INTERNATIONAL TERRORISM: THREATS AND RESPONSES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1710

COMPREHENSIVE ANTITERRORISM ACT OF 1995

APRIL 6, JUNE 12 AND 13, 1995

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CONTENTS

HEARINGS DATES

OPENING STATEMENT

TEXT OF BILL

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARINGS

APPENDIXES

INTERNATIONAL TERRORISM: THREATS AND RESPONSES

THURSDAY, APRIL 6, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, Carlos J. Moorhead, F. James Sensenbrenner, Jr., Bill McCollum, George W. Gekas, Howard Coble, Steven Schiff, Ed Bryant of Tennessee, Bob Inglis, Martin R. Hoke, John Conyers, Jr., Barney Frank, Charles E. Schumer, Howard L. Berman, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, José E. Serrano, Zoe Lofgren, and Sheila Jackson Lee.

Also present: Alan F. Coffey, Jr., general counsel/staff director; Patrick B. Murray, counsel; and Tom Diaz, minority counsel.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. Pursuant to notice, I call this full committee hearing on International Terrorism: Threats and Responses to order.

I expect this hearing to educate members of this committee and the general public about the need, both immediate and long term, for adequate and reasonable responses to the scourge of international terrorism. We have three panels of witnesses that will present testimony to the committee today.

Members will, of course, be given an opportunity to make opening statements, which I hope will be blessedly brief. Your full statements will be submitted in the record in their entirety. So I ask the Members to bear that in mind.

It's my desire to conclude this hearing early this afternoon, and I suspect with an important bill on the floor today that concerns our committee, as well as other legislation, we may be interrupted several times for votes.

International terrorism affects all Americans, both at home and abroad. It threatens our safety, and our national sovereignty. It restricts our prized freedom of travel, reduces our security, but it also stifles our natural inclination to trust others. Nothing could be more destructive of our domestic tranquillity. Innocents are annihilated, families are destroyed by terrorist acts. Etched forever in our collective memory are the passengers of Pan Am Flight 103, violently murdered over Lockerbie, Scotland, by a bomb blast believed sponsored by the Libyan Government; the innumerable victims of strife in Northern Ireland, who have lived a full generation with

almost daily portions of death, destruction, and terror handed to them by terrorists on both sides of that struggle for peace; the kidnapping, torture, and hanging of Marine Colonel Rich Higgins by the Hezbollah, and the victims of the World Trade Center bombing, including the six who died in the blast, the thousands that were injured, and the 50,000 citizens evacuated in that terror-filled event—to name just a few.

The recent poisoning by a Japanese terrorist cult with anti-American animosities of the subway commuters in Tokyo, 11 of whom have died, the thousands who have been critically sickened by nerve gas, underscores our own vulnerability to similar terrorist acts. The murder of two American consulate employees in Karachi, Pakistan, reminds us that Americans are frequent targets for terrorism, aggression, and violence due to longstanding historical, political, religious, and ideological distrust.

The administration claims that fighting international terrorism is among its top priorities. However, it has continually sought to downgrade the Office of Counterterrorism at the State Department, which is responsible for spearheading international efforts to combat terrorism, from the rank of ambassador at large to a lower level bureaucratic post. Despite that ambivalence, this country must be prepared to respond effectively and immediately. International terrorism not only threatens our citizens' lives and health, it threatens our country's vital economic interests. With each passing day, our economic life becomes more intertwined with international markets and supply sources. With the advance of computer technology, we can be literally seconds away from total catastrophe in our financial markets.

The administration's proposal has been one response to this terrorist threat, which is real and continues daily. I'll expect we'll learn today there may be other ways, other methods, other approaches, to this extremely serious problem and its consequences. I also suspect there will be provisions in H.R. 896 that meet with approval from Members on both sides of the aisle. Many have criticized portions of H.R. 896. Those criticisms concern serious constitutional issues relating to due process, free speech and association, and cherished fourth amendment freedoms.

Our purpose is to develop legislation that provides the United States with the necessary capabilities to combat the evil of terrorism now and in the future, but in a constitutional manner. We want to ensure that whatever legislation ultimately results, it's constitutional, it's practical, and it's effective. We should be asking: is H.R. 896 sufficient to meet our needs? Can more be done? What future risks can be anticipated? Have they been adequately addressed? Is U.S. policy cognizable, coherent, and current?

We need to determine which tools are necessary to help law enforcement and the intelligence community prevent terrorism and protect our citizenry from its awful harms. We need to find the delicate balance between protecting constitutional rights and protecting our national security. The questions before us, then, are what needs to be done and how do we accomplish that task.

I'm pleased to yield to the ranking minority member, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I am here in an almost state of shock. This is the most outrageous act outside of the Contract of America that I have ever witnessed here in the Judiciary Committee. I am stunned that we would be trampling on our constitutional rights in the manner that we are. I am very disappointed in the people who claim to be the authors of this measure, and I just want to tell you what I'll be looking at.

Are we going to allow the Government to deport aliens convicted of no crime based on secret information? That's almost like a question out of a novel. Are we going to grant the President the power to freeze the assets and bar contributions to unpopular organizations unilaterally? Are we going to make deportable aliens who contribute to the legal, nonviolent, even charitable activities of organizations or governments unpopular with the United States? Are we going to subject people to lengthy prison sentences and fines for doing the same unless they meet impossibly onerous licensing requirements? Are we going to expand Federal wiretap authority, permit FBI investigations with evidence of criminal acts, and are we going to allow secret information into trials—in the course of trials?

Mr. Chairman and members of this committee, this is still the United States of America. We owe it to our citizens to be more responsible than this, and then to have outside of these doors metal detectors that you have to go through to get in—the people have been coming in the Judiciary room 2141, for 30 years, and this morning you have to pass through a detector to determine whether anybody is going to blow up the Judiciary Committee room this morning because we're having a terrorism hearing. This is a calculated, phony activity that I resent very much.

I said I wasn't going to say anything detrimental about this act, but this is so disparaging to what the Judiciary Committee stands for that I am disgraced by the fact that we're bringing up a bill with so many complete violations of the Constitution all the way through it—all the way through it, and we are now talking about counterterrorism as one of the big problems confronting America in the face of some anecdotal evidence that we have.

It's my belief that there isn't any more problem than there's ever been and that there's plenty of good law controlling it, that all we have to do is use it, that the law is already in existence.

And I thank the chairman for allowing me to make this expression of disapproval.

Mr. HYDE. I thank the gentleman.

Mr. McCollum.

Mr. MCCOLLUM. Thank you very much, Mr. Chairman.

Let me begin by thanking you for calling this hearing today and demonstrating so clearly your commitment to make the struggle against terrorism a top priority of this committee.

As you know, I've long been involved in this area and have served as chairman of the House Republican Task Force on Terrorism for the past several years. My experience as chairman of the terrorism task force has convinced me that we simply must place more effort in fighting this type of crime and fighting terrorism, period.

In 1993, the last year for which we published data, there were 427 international terrorist attacks. That number represents an increase of more than 50 incidents over prior years. Of the 427 attacks in 1993, 27 percent of those attacks were aimed at Americans. Unfortunately, we have long thought terrorism to be a crime directed at citizens of other countries; it is now increasingly apparent that it is a crime directed against Americans, not only Americans abroad, but Americans here at home.

In the last few years, incidents of both domestic and international terrorism carried out in the United States have increased. The events of 1993 brought home to all Americans the urgency of the problem. In that year we learned of the failed Iraqi plot to kill former President Bush in Kuwait. In the United States a conspiracy was discovered to bomb the United Nations building where the FBI's New York field office is located along with the Lincoln and Holland Tunnels. And, of course, 1993 was the year when the World Trade Center was bombed, where 6 Americans were killed, 1,000 persons injured, and over half a billion dollars in damages resulted.

Mr. Chairman, while incidents of international terrorism in the United States still appear to be few in number, any act of terrorism occurring in this country is simply not acceptable. Likewise, we cannot allow America to be used as a staging ground for those who seek to commit terrorist acts against persons in other countries. It's up to us to ensure that our laws give our Federal law enforcement officials sufficient powers to investigate and prevent terrorist activities here in the United States regardless of whether they're directed at persons and property in the United States or persons and property abroad. We must also ensure that our laws severely punish all who engage in terrorist activities.

It seems to me that it is appropriate for this committee to examine the existing laws in both of these areas. Given the national and global nature of terrorism, it also seems appropriate to review the jurisdiction of our Federal courts to ensure that they're authorized to try as Federal crimes all acts of terrorism regardless of whether those acts are carried out here in the United States or planned and put into motion against American citizens and property abroad.

I look forward to hearing from the witnesses who are scheduled to testify before us today as to the scope of the problem, the existing laws that deal with these crimes, and their recommendations of ways that Congress can act to further combat these crimes. I'm particularly pleased that Director Freeh is here today, as the FBI serves as the lead agency responsible for combating terrorism in the United States, having received this mandate in 1982.

Finally, Mr. Chairman, I note the President has transmitted to Congress a bill to combat terrorism which was developed with the input of several executive branch agencies and the FBI, in particular. While the specific details of that bill appear to be beyond the scope of today's hearing, I'd like to acknowledge the hard work of those involved in drafting that bill and, in particular, the work of Director Freeh and the FBI agents who have been on the front lines fighting this type of crime. Their experience will be invaluable to us in drafting the appropriate legislation to combat terrorism more extensively.

Mr. Chairman, as you know, I fully expect the subcommittee I chair, the Subcommittee on Crime, to begin work on the details of this issue very soon. And, Judge Freeh, in that effort I look forward to working with you and other executive branch officials to put this together and make sure the product we produce is one that will combat terrorism effectively and in the right way.

Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman from Florida.

The Chair recognizes the distinguished gentleman from New York, who is the chief sponsor of H.R. 896, Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

And let me first say I appreciate the promptness at which you have moved to hold this important hearing on the counterterrorism bill I have sponsored. Terrorism is a problem that's always with us, but it's usually invisible; that is, it's invisible until it strikes. And by its nature, when terrorism strikes, it strikes with stealth. It strikes with surprise and it strikes most often against the innocent. Then all of us are shocked. We are dismayed and we are disgusted by the attacks that are usually cowardly and bloody.

Who among us can forget the agony of the survivors of those who lost their lives in Pan Am 103 bombing over Lockerbie, Scotland? I went to some of the wakes, because three people in my district were killed by that, and suffered a little bit with the families who lost loved ones in a mindless act. Or the shock of my entire city of New York when the World Trade Center was bombed? Or the grim resolve of the Marines who had to dig their comrades out after the Marines barracks were destroyed in Lebanon?

The emotions we felt then are, indeed, the very goal of the terrorist because terrorism is intended to frighten ordinary citizens and intimidate government officials. Its goal is to paralyze the legitimate machinery of government and substitute the blackmail of the gun and the bomb for democratic discourse. Fortunately, the United States has been relatively free—and I emphasize relatively free in light of the World Trade Center bombing—of acts of terrorism on our own soil, but we cannot be complacent. The Trade Center bombing may have signaled a new era. We cannot simply sit by and meet that era unprepared. We would all regret it if we didn't do everything we could legitimately and constitutionally and terrorism began to rear its ugly head with more frequency.

The potential shape of the new era of terrorism is chilling. I daresay it's even frightening. The nerve gas attack on the Tokyo subway demonstrated to any rational thinker unthinkable potentials for disaster in every city in the United States and, indeed, the world. I'm satisfied from my study of the technologies and techniques of terrorism are at hand—not tomorrow, but today—that can create unprecedented world winds of death and destruction. The level of terroristic violence has escalated until now we see hundreds of lives taken in a single event. In a new era of terrorism we could see thousands perish at a stroke.

Now I'm also conscious of the fact—and my record speaks clearly to the fact—that what distinguished our society most is that it's a free society. We cannot, we must not simply lash out blindly at the thought of potential terrorism. We must be careful to protect the

fundamental freedoms that terrorists seek to destroy or we'd engage ourselves in empiric victory.

The bill before us is aimed at providing Federal law enforcement officials with the tools they need to stop the initiation of terrorist acts abroad from U.S. soil and to prevent the commission of terrorist acts within the United States inspired and supported from abroad. I know how hard the various aspects of the administration, the various departments of the administration have worked on this bill, and I believe that the administration has struck a careful, rational balance between preserving our fundamental rights and protecting ourselves from the violent intentions of international terrorists. I know, for instance, that this Justice Department and the Attorney General have been very mindful of civil liberties, and I doubt they would introduce any legislation—I believe they would not introduce any legislation—that threatened those liberties.

I'm aware, of course, that some of the more ardent civil libertarians have already said that they strongly oppose this bill, and I understand their concerns. We may well hear today some suggestions for improving this bill. I welcome them. I think this is a good, sound bill, but, of course, I'm not wedded to every jot and tiddle in it. I'm willing to endorse any suggestions that truly improve the bill without gutting its very important and very vital purpose.

But, in conclusion, Mr. Chairman, we must be mindful of five points as we evaluate suggestions for changing this bill, and we must look at these points and examine them because they're often forgotten in the debate.

First, noncitizens do not—and, in my judgment, should not—have the same rights as citizens. A balance must always be struck in a society between the rights of society and the rights of individuals, but in the case of noncitizens I believe the rights of society have a greater weight than in cases with citizens.

Second, we must remember that the deportation proceedings are civil proceedings, not criminal trials. We need not, and should not, impose on them the same burdens that we impose on criminal trials. In fact, the ability to immigrate to the United States is a privilege, not a right. Every year we deny millions of people throughout the world that privilege, and by saying that some people should be deported, we are not dealing with criminal acts.

Third, the procedures of this bill for dealing with highly-sensitive, classified information in those civil—civil, civil—deportation proceedings are modeled after existing procedures that have been going on for years in criminal trials. The record of those proceedings, which are used in criminal trials against U.S. citizen defendants, are free of abuse in trials involving Americans that spy, in other types of criminal trials. Of course, there's a need to keep confidential and classified information confidence and yet at the same time give the defendant due process.

Again, this is not a new area. This is not some new ground that has been broken. Just look at how we handle cases against even American citizens who have been tried for spying this way. I have not heard much of an outcry that there has been any abuse over the decades that we have used those.

Fourth, even if we enacted every single change in our immigration laws included in this bill, the United States would still—still—

be one of, if not the most liberal countries in the world in its treatment of immigrants and aliens within its borders. For example, in Canada, hardly a bastion of reactionary conservatism, aliens can be deported on the simple signature of two Cabinet ministers. That's a far cry from what is being proposed here.

And, finally, I would ask those who very sincerely oppose this bill, what solutions do you offer? What proposals do you have for this country to meet its new responsibilities to protect its citizens from the scourge of terrorism in a world that is rapidly changing and becoming more deadly by the day?

Mr. Chairman, I've come to this hearing to listen, to learn. There is a lot of debate that has to go on, but I want to thank you for your leadership on this important issue. It is one that this committee and the Congress should be able to work with on a truly bipartisan basis.

Mr. HYDE. I thank the gentleman.

Is there anyone else who has a burning desire? I recognize the gentleman from California.

Mr. MOORHEAD. Mr. Chairman, I want to congratulate you for holding these hearings. My statement will not be long because I'm anxious to hear the testimony of Mrs. Higgins and the other witnesses that we have before us today, but I think it's clear to most of us that the nature and the scope of terrorist activities, both in the United States and abroad, have become so great that it's a danger to not only individuals, but to hundreds, and even thousands, of people. That bombing of the Trade Center in New York, if it had been at a slightly different time of day, could truly have cost thousands of lives. It's up to our Government to protect the lives and the property of our citizens, and it's very important with an issue such as this, where terrorist activities have been increasing, that we protect our people and we do whatever is necessary to make our society safe.

Mr. HYDE. I thank the gentleman.

Any other statements? The gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, I will simply thank you for the opportunity to have an informational hearing on legislation that is proposed and simply acknowledge that I will remain openminded on I think a very important issue. Even in Texas, we've had the impact of the Pan Am 103 incident with a constituent in my community, and as well I think we face a regular concern to both balance the needs of protecting our citizens and as well insuring the privileges of the Constitution to them as well. So I thank you very much for this hearing.

Mr. HYDE. I thank the gentlelady.

By unanimous consent, all opening statements will be made a part of the record.

And I recognize the gentleman from Pennsylvania.

Mr. GEKAS. I thank the Chair.

I simply want to add my words of welcome to those who will be testifying here today. The World Trade Center series of acts and the following trials were a tremendous signal to the citizenry of our country that we are not invulnerable to massive acts of terrorism. Yet, I feel that the swift action that was taken by the authorities that were in charge, both locally, State, and Federal, also dem-

onstrated to the world that we will not tolerate this kind of action and that our system of justice will move in to remedy the situation in a quick pace.

It is that kind of result that I've seen in the—that we have seen in the World Trade Center that gives me hope that what the witnesses will be testifying here today will auger even a fresher approach to prevention security measures and a system of justice that will lead to the defense of American citizens if something dreadful like that should happen again.

I yield back the balance of my time.

Mr. HYDE. I thank the gentleman.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I'll be very brief.

I want to thank you for holding these hearings. This is a very complicated issue and it will give us time in full committee and in subcommittee to appropriately consider the idea.

I just wanted to remind everyone that when we make laws like this we have to remember that innocent people, as well as guilty people, will be tried by the same process. And when you review whether a process is appropriate or not, you ought not just focus on how guilty people will flow through the system, but also how people that happen to be innocent will flow through the same system. And I hope we'll view the legislation from that light.

Thank you very much, Mr. Chairman.

Mr. HYDE. I thank the gentleman.

It's my pleasure to welcome our first witness——

Mr. NADLER. Mr. Chairman.

Mr. HYDE. I hear Mr. Nadler.

Mr. NADLER. May I have an opening statement, please?

Mr. HYDE. All—would you please make it brief, sir?

Mr. NADLER. I will try.

Mr. HYDE. I've admonished everybody else—without success.

[Laughter.]

Mr. HYDE. The gentleman from New York.

Mr. NADLER. Thank you, Mr. Chairman.

I would like to begin by commending Chairman Hyde for bringing this important topic to a full committee hearing today, and by commending Mr. Schumer and the administration for their initiative in drafting legislation to address the very serious problem of terrorism.

As a Member of Congress representing the area of the World Trade Center and many of the workers who were trapped and brutally murdered inside as a result of a terrorist act, the gravity of the terrorist threat hits home quite literally. I know we will hear today from witnesses who will try to convince the members of this committee that there is no terrorism problem. On behalf of my neighbors in New York who have been bombed, or who have been machinegunned on the Brooklyn Bridge, I can tell you that terrorism is a problem on the streets of America, as well as abroad, and we have an affirmative obligation to deal with it.

The introduction of the Omnibus Counterterrorism Act is an important step toward developing a national policy to deal with terrorism. This bill contains some important and overdue measures toward that end. Most significantly, the bill corrects some signifi-

cant gaps in existing Federal law by placing, for the first time, an antiterrorism statute on the books.

This piece of legislation, however, also contains several disturbing provisions, some of which, though enacted for the best and perhaps most noble of purposes, we may live to profoundly regret. I am concerned that under this legislation, for example, groups could be labeled as terrorists in an unreviewable Presidential action and then be banned, expelled, or charged. It also opens the possibility of secret proceedings in which the accused would not even be aware of the charges or the evidence against him. These provisions would seem to do violence to our historic commitment to liberty.

I am hopeful that during these hearings we can examine what impact these provisions may have and what steps we can take to stop terrorism without doing violence to our liberties. While stopping terrorism must be our foremost concern, I believe it is essential that we do not violate our historic commitment to liberty, to due process, and to the rule of law in an effort to thwart terrorism. I believe these goals are not inconsistent, and I hope we can explore today how we can fight terrorism without resorting to un-American practices.

What makes the United States great and distinguishes us from most nations of the world is our commitment to civil rights, civil liberties and to due process of law. We must be extraordinarily careful to ensure that we retain that commitment to liberty in crafting our response to terrorism. The founders of this Nation took that care in drafting the Constitution and the Bill of Rights. We must exercise that same care today.

Again, I commend Chairman Hyde and Representative Schumer for the steps they have taken and for their commitment to developing a serious national response to the very serious problem of terrorism. I look forward to working with them and with the other members of the committee in developing an effective and serious response to the problem of terrorism that does not do violence to our liberties and our traditions.

Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman.

It's my pleasure to welcome our first witness for this hearing. She is Mrs. Robin L. Higgins, a lieutenant colonel with the U.S. Marine Corps. She is, unfortunately, much better known as the widow of U.S. Marine Corps Col. William R. "Rich" Higgins who was abducted, tortured, and hanged in the Middle East in 1988 by a radical Islamic terrorist organization. Mrs. Higgins is here to put a human face on the ravages of terrorism, and to give a voice to its victims. This is necessary so we never forget what we have lost and so during the course of debate and policy discussions that will follow that we remember that there are real people who suffer tragically from the cowardice of terrorist activities.

Mrs. Higgins. Welcome.

STATEMENT OF LT. COL. ROBIN L. HIGGINS, U.S. MARINE CORPS, WIDOW OF COL. WILLIAM R. HIGGINS, U.S. MARINE CORPS

Mrs. HIGGINS. Thank you, Mr. Chairman and members of the committee, for inviting me here to speak today. I would like to em-

phasize that I am here today not as a Marine Corps officer or as a representative of the Department of Defense, and what I say here is my personal opinion only.

I also thank you for having this hearing. Many people think terrorism is dead or that Americans are no longer targeted. Please don't believe that, and don't believe it can't happen here.

As an example, supporters of radical organizations responsible for bombing innocent civilians in Israel and Algeria, determined to undermine the courageous Middle East peace process, have offices in Dallas and San Diego, and they send their fundraising bulletins throughout the United States through the Internet.

I'm not here to tell you how the Omnibus Counterterrorism Act of 1995 will or will not address the scourge of terrorism directed against our citizens or our interests. You will have several expert witnesses follow me to speak about that. I am here to frame the issue that you are about to study by putting a personal face on it.

Seven years ago, in 1988, I was serving in the Pentagon and my husband, William R. Higgins, known as Rich, a Marine colonel, was on an overseas assignment with the United Nations in the Middle East. One morning in February he was taken by terrorists in Lebanon, and my life was changed forever. I am one person; Rich was one victim, but there have been others; there will be others. The threat is real and it is terrible.

On February 17, 1988, I was in a 9 o'clock meeting in the Pentagon. My boss, the newly-assigned Assistant Secretary for Public Affairs, answered a hotline call from the State Department at 9:20. When he turned to the assembled group and said a Marine lieutenant colonel working with the United Nations in Lebanon has just been kidnapped, I knew it was Rich.

Two days after Rich was taken, the Organization of the Oppressed on Earth released a photo of his U.N. ID card saying he was the main CIA agent in Lebanon. Three days after that, they released a videotape in which he was forced to say it was the Reagan administration and Israel which was causing his captivity.

In April, they released a ghoulish, grainy picture saying he would be put on trial as a spy. In December, he had been found guilty and was going to be sentenced to death for being an Israeli spy. Then for a year and a half, wild speculation daily, and sometimes hourly, in the world media about the length and condition of his captivity. Until a gruesome picture of him hanging appeared in newspapers and on TV screens around the world in July 1989, I had no idea if he was dead or alive.

Two and a half years later, December 23, 1991, almost 4 years after he was taken, on my birthday, what would have been our 14th wedding anniversary, a body bag was dumped on a Beirut street. On the coldest day I ever remember, we buried what remained of him in beautiful Quantico National Cemetery near the Marine base where we met in Virginia.

Rich was with the United Nations Truce Supervision Organization, UNTSO, the first U.N. peacekeeping operation in the Middle East. UNTSO is a relatively small operation, to which we have been providing American service members since its inception in 1948. The mission and the threat had changed over the 40 years before Rich was there, but the command and control arrangements

had not, and my sense is that the United States has shown little interest in getting involved in the U.N. arrangements. The observers were unarmed.

In the 1980's, southern Lebanon was a hazardous assignment for the UNTSO observers. They had often been caught in the crossfire, injured, robbed, held for short times, and in January 1988 an Australian captain was killed by a roadside bomb. Shortly after that, Rich was taken.

Immediately, there seemed to be a power struggle. The U.N. had no idea what to do and turned to the United States. It was the U.N.'s contention that he was not taken because he was U.N., but because he was an American. The United States, on the other hand, had several American citizens already lost in the bowels of Lebanon, and State Department decisionmakers felt that the U.N. connection represented the best possibility to get him out. There were diplomatic pouches and demarches going back and forth and lots of public posturing. Was it the U.N. or the United States that was ultimately responsible? And what could the civilized international community do that wouldn't appear to give legitimacy to the terrorists?

At my beckoning, the U.N. Security Council passed Resolution 618, condemning the kidnapping and urging all member states to use their influence in any way possible to secure Colonel Higgins' immediate release. I foolishly thought this would give the member nations clout to put pressure on the nations which clearly had influence in the area. It didn't and they wouldn't.

There was speechifying going on in this body and in the Senate, and several of your colleagues wrote letters and offered support, but no letters reached their mark and no amount of support brought Rich home.

It is my contention that there was a degree of paralysis in the United States as far as what to do about the hostages. Having just gone through the Iran-Contra affair, the prevailing notion was: just ignore them and the problem. I couldn't convince either the U.N. Secretary General or the State Department that Colonel Higgins was different than the other American hostages, that there was a much greater urgency to his release, that he was in greater danger.

Please don't take anything I say to diminish the importance of the lives of any Americans in trouble or being held against their will in a foreign land. Their agony, and that of their family, is no less immense than mine. But Rich Higgins was not a hostage. A hostage is a civilian caught in the line of fire and held for some sick political or financial reason. Servicemen are held because they represent to those who would harm us all the perceived weaknesses of democracy. When servicemen or women are captured, they behave as prisoners of war, not hostages. They live day by day by the code of conduct which says, "I am an American fighting for the Armed Forces which guard my country and our way of life. I will never forget that I am an American fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in God and in the United States of America."

Because Rich was always a hostage and never a prisoner, there were never any demands of international rules of treatment, no

Red Cross visits, no insistence on medical care or humane treatment. Because neither the United States nor the U.N. wanted to give legitimacy to the terrorists, insisting that neither Lebanon nor Syria had anything to do with it, they put no special pressures or demands, placed no sanctions on them or anyone else. The State Department, not the Defense Department, had the lead. That meant diplomacy, not military might. There was no retribution, no retaliation, no rescue.

I can tell you I had a battalion of Marines who were ready and willing to get Rich, but they weren't called and they didn't go. That had to do with the perceived political sensitivities of civilians being held at the same time, but let's not ever forget we owe a special debt to those who go into harm's way because of their unique bond to this country. Servicemen and women wear the uniform of this country and leave their families behind to fight for this country because they believe that this country will come after them when they fall. I believe we broke this pledge to Rich.

An additional and insidious phenomenon I had to fight was the blame-the-victim syndrome. There were unnamed State and Defense Department officials and reporters who were sure that it was something Rich did which got him captured. They called him a "cowboy" and labeled him "reckless." They implied that he was placed there by his former boss, Caspar Weinberger, and they compared him with Bill Buckley, thereby painting him with the same CIA brush that the terrorists used.

To date, I don't know what really happened, since I have never seen an investigation by either the United States or the United Nations. What I believe is this: Rich was taken and killed by members of the Hezbollah, a radical group primarily acting in Lebanon, with the backing of Iran and Syria. He was probably killed much earlier than the July 1989 hanging picture and probably not killed by hanging. That's it. I don't know why Rich was taken. I don't know who held him or where, and I don't know why, when, or how he was killed.

I'm told that his case is still open, and I fully expect—but I fully expect it's on a back burner, if, indeed, it's on the stove at all. My sense is that our laws and policies and redtape have so bound those who would go after these criminals that it's simply not worth the effort, but I can tell you this: if retaliation and retribution is not sure and swift, if we don't track terrorists relentlessly and publicly, this will happen again, happen soon, and happen often. It will happen in the Middle East, in Africa, and in Europe, and it will happen in Washington, in Chicago, and Detroit.

In conclusion, these are some of my recommendations:

One, we must acknowledge whenever we commit American service members outside our shores they will be subject to those who would harm them, whether in combat or in terrorist acts. They are Americans, and whether they are armed with multiple rocket launchers, rubber bullets, or blue berets, nothing will disguise the fact that they are Americans.

No. 2, do not put American troops under U.N. command. Our military men and women join our Armed Forces to fight and defend our country, our people, our flag, not the United Nations.

Three, only by publicly pursuing, relentlessly tracking down, and bringing to justice those who commit terrorist acts will we begin to deter them. To forget the kidnapping, torture, and murder of Rich Higgins is to encourage history to repeat itself.

Four, our laws must allow us to consider the conditions and the treatment of victims while they are still alive. By ignoring the terrorists, we also ignore the victim.

Five, the $2 million reward program now run by the State Department is an excellent program which I support. It needs to have your full attention and funding.

Members of the committee, this is my story. Thank you for listening to it. I speak today because, I must admit, I have a personal agenda: to find out how and when Rich died, to identify his murderers and bring them to justice, and to ensure his memory remains alive, so that what I perceive to be the mistakes of the past don't repeat themselves. Thank you, Mr. Chairman.

[The prepared statement of Mrs. Higgins follows:]

PREPARED STATEMENT OF LT. COL. ROBIN L. HIGGINS, U.S. MARINE CORPS, WIDOW OF COL. WILLIAM R. HIGGINS, U.S. MARINE CORPS

INTRODUCTION

Thank you, Mr. Chairman and members of the committee, for inviting me here today. I would like to emphasize that I am here today, not as a Marine Corps officer or as a representative of the Department of Defense, and what I say here is my personal opinion only.

I also thank you for having this hearing. Many people think terrorism is dead, or that Americans are no longer targeted. Please don't believe that is true.

Don't believe it can't happen here: as an example, supporters of radical organizations responsible for bombing innocent civilians in Israel and Algeria, determined to undermine the courageous Middle East peace process, have offices in Texas and San Diego; and they send their fund raising bulletins throughout the United States over the internet.

Seven years ago—in 1988—I was serving in the Pentagon, and my husband, William R. Higgins, known as Rich, a Marine colonel, was on an overseas assignment with the United Nations in the Middle East. One morning in February, he was taken by terrorists in Lebanon, and my life was changed forever.

I am not here to tell you how the Omnibus Counterterrorism Act of 1995 will or will not adequately address the scourge of terrorism directed against our citizens or our interests. You will have several expert witnesses to follow me to speak about that.

I am here to frame the issue you are about to study. I am one person; my husband was one victim. But there have been others; there will be others. The threat is real—and it is terrible.

CHRONOLOGY

Rich was taken on February 17th, 1988. I was in a 9 a.m. meeting in the Pentagon. My boss, the newly assigned Assistant Secretary for Public Affairs, answered a hot-line call from the State Department at 9:20. When he turned to the assembled group and said, "A Marine lieutenant colonel with the UN in Lebanon has just been kidnapped," I knew right away it was Rich.

Two days after Rich was taken, the "Organization of the Oppressed on Earth" released a photo of his UN ID card saying he was the "main CIA agent in southern Lebanon."

Three days after that, they released a videotape in which he was forced to say it was the Reagan Administration and Israel which was causing his captivity.

In April, they released a picture saying he would be put on trial as a spy.

In December, they said he had been found guilty and sentenced to death for being an Israeli spy.

Then—for a year and a half—wild speculation daily and sometimes hourly in the world media about the length and condition of his captivity.

Until a gruesome picture of him hanging appeared in newspapers and tv screens around the world—July 1989—I had no idea if he was dead or alive.

Two and a half years later—December 23, 1991—almost 4 years after he was taken on my birthday, what would have been our 14th wedding anniversary, a body bag was dumped on a Beirut street. On the coldest day I ever remember, we buried what remained of him in beautiful Quantico National cemetery, near the Marine base where we met, in Virginia.

UNTSO Background

Rich was with United Nations Truce Supervision Organization (UNTSO), the first UN peacekeeping operation in the Middle East. UNTSO is a relatively small operation to which the U.S. has been providing American service members since its inception in 1948.

The mission and the threat had changed over the 40 years before Rich was there, but American servicemen remained in the area, acting as go-betweens for the hostile parties and as the means by which isolated incidents could be contained and prevented from escalating into major conflicts. Generally, they were to observe and report security violations in the security zone, e.g., Israeli overflights, incursions by ground troops, terrorist activities.

As far as I can tell, the command and control arrangements had not changed very much since they were first established in the late 40's, and my sense is that the U.S. has shown little interest in getting involved in what is truly a UN-led and controlled military mission.

The parties to the conflict are required to co-operate with the observers and to ensure their safety and freedom of movement. Something called the "Convention on the Privileges and Immunities of the United Nations" is to be the law of the land and should protect the observers. The observers are unarmed.

In the 1980's southern Lebanon was a hazardous assignment for the UNTSO observers. They had often been caught in cross-fire—injured, robbed, held for short times—and one died as a result of a road-side bomb explosion in January 1988. While the various parties and groups had generally continued to respect the international status of the unarmed observers, some of them had been threatened on account of their nationality. Shortly after the Australian captain was killed in January, Rich was taken.

What Went Wrong

WHO'S RESPONSIBLE: U.S. OR UN?

Immediately, there seemed to be a power struggle. The UN had no idea what to do and turned to the U.S.; it was the UN's contention that he was taken not because he was UN, but because he was an American. The U.S. already had several American citizens lost in the bowels of Lebanon, and State Department decisionmakers felt the UN connection represented the best possibility to get him out.

There were diplomatic pouches and demarches going back and forth, and lots of public posturing. Was it the UN or the U.S. who was ultimately responsible? And what could the civilized international community do that wouldn't appear to give legitimacy to terrorists?

At my beckoning, the UN Security Council passed Resolution 618, condemning the kidnapping and exhorting all member states to use their influence in any way possible to secure Colonel Higgins' immediate release. I foolishly thought this would give the member nations clout to put pressure on the nations which clearly had influence in the area. It didn't; they wouldn't.

There was speechifying going on in this body and in the Senate and several of your colleagues wrote letters and offered support. But no letters reached their mark; no amount of support brought Rich home.

It is my contention that there was a degree of paralysis in the U.S. as far as what to do about hostages. Having just gone through the Iran-Contra affair, the prevailing notion was: just ignore them and the problem. I could not convince either the UN Secretary General or the State Department that Colonel Higgins was different than the other American hostages, that there was a much greater urgency to his release, that he was in greater danger.

HOSTAGE VS. POW?

Please do not take anything I say to diminish the importance of the lives of any Americans in trouble and being held against their will in a foreign land. Their agony and that of their families is no less immense than mine.

But Rich Higgins was not a "hostage." A "hostage" is a civilian caught in the line of fire, and held for some sick political or financial reason.

Servicemen are held because they represent to those who would harm us, all the perceived weaknesses of democracy.

When servicemen or women are captured they behave as prisoners of war, not hostages. They live day by day by the code of conduct which says: "I am an American, fighting in the Armed Forces which guard my country and our way of life. I am prepared to give my life in their defense. . . . I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America."

Because Rich was always a "hostage" and never a "prisoner," there were never any demands of international rules of treatment, no Red Cross visits, no insistence on medical care or humane treatment. Because neither the U.S. nor the UN wanted to give "legitimacy" to the terrorists, insisting that neither the state of Lebanon or Syria had anything to do with it, they put no special pressures or demands, placed no sanctions on them or anyone else.

The State Department, not the Defense Department, had the lead. That meant diplomacy, not military might. There was no retribution, no retaliation, no rescue. I can tell you I had a battalion of Marines who were ready and willing to get Rich, but they weren't called, and didn't go.

That had to do with the perceived political sensitivities of civilians being held at the same time, but let's not ever forget we owe a special debt to those who go into harm's way because of their unique bond to this country.

Servicemen and women wear the uniform of this country and leave their families behind to fight for this country because they believe this country will come after them when they fall. I believe we broke this pledge to Rich.

BLAME THE VICTIM

The most insidious phenomenon I had to fight was the "blame the victim" syndrome. There were "unnamed" State and Defense Department officials and reporters who were sure that it was something Rich did which got him captured. They called him a "cowboy" and labeled him reckless; they implied he was placed there by his former boss, Caspar Weinberger; they compared him with Bill Buckley, thereby painting him with the same CIA brush the terrorists used.

WHAT REALLY HAPPENED

To date, I don't know what really happened, since I have never seen an investigation; I'm not aware of whether one was done—either by the U.S. or the UN.

What I believe is this: Rich was taken and killed by members of Hezbollah, a radical group primarily acting in Lebanon, with the backing of Iran and Syria. He was probably killed much earlier than the July 1989 hanging picture, and was probably not killed by hanging.

That's it.

I don't know why Rich was taken; I don't know who held him or where; and I don't know why, when or how he was killed. I'm told that his case is still open, but I fully expect it is on a back burner if, indeed, it is on the stove at all. My sense is that our laws and policies and red-tape have so bound those who would go after these criminals, that it's not worth the effort.

But I can tell you this: If retaliation and retribution is not sure and swift, if we don't track terrorists relentlessly and publicly—this will happen again, happen soon, and happen often. It will happen in the Mideast, in Africa, and in Europe—and it will happen in Washington, in Chicago, and in Detroit.

MY RECOMMENDATIONS

1. We must acknowledge whenever we commit American service members outside our shores, they will be subject to those who would harm them, whether in combat or terrorist acts. They are Americans, and whether they are armed with multiple rocket launchers, rubber bullets, or blue berets, nothing will disguise the fact they are Americans.

2. We do not attach American troops to UN command and control. Our military men and women join our armed forces to fight and defend our country, our people, our flag, not the United Nations.

3. Only by publicly pursuing, relentlessly tracking down, and bringing to justice those who commit terrorist acts will we begin to deter them. To forget the kidnapping, torture, and murder of Rich Higgins is to encourage history to repeat itself.

4. Our laws must allow us to consider the conditions and treatment of the victims while they are still alive. By ignoring the terrorists, we also ignore the victim.

5. The two million dollar reward program now being run in the State Department is an excellent program which I support. It needs to have your full attention and funding.

CONCLUSION

This is my story. I hope I have given you some food for thought as you debate this issue. I speak because I must admit I have a personal agenda:

1) to find out when and how Rich died;

2) to identify his murderers and bring them to justice; and

3) to ensure his memory remains alive so [what I perceive to be] the mistakes of the past do not repeat themselves.

Thank you.

Mr. HYDE. Thank you, Mrs. Higgins, for your courage and your sacrifice. Heroism takes many forms, and Rich's and yours are sobering and inspiring.

Are there any questions of the gentlelady? The gentleman from Pennsylvania.

Mr. GEKAS. I thank the Chair.

Your reference to the necessity for swift retaliation is one with which many of us agree, evidenced, of course, by President Reagan and the Libya incident, where he ordered a strike in retaliation for acts of terrorism at that time. Have you ever been given a rationale for no retaliation having been taken following the kidnapping, or at least the report of the death at least, of your husband, from the State Department or the Pentagon? Have you ever been given any rationale for the lack of retaliation or efforts to retaliate it?

Mrs. HIGGINS. I've never been given any official explanation. I only feel and believe what I've read in the press and what I've heard from other people unofficially, and it's my contention that to retaliate may have put the other American civilian hostages at greater risk.

Mr. GEKAS. Was there any hint that because this was a U.N. mission that there was less feeling of authority to attempt retaliation or that it would be withdrawing from under the umbrella of the U.N. to unilaterally try to retaliate? Was there any hint of that by U.S. authorities?

Mrs. HIGGINS. At that point I didn't receive any information or believe that that was the case because I think the U.N., by that time, had pretty much extracted itself from that responsibility or putting him under the umbrella of being United Nations.

Mr. GEKAS. That's all the questions I have.

Mr. HYDE. I thank the gentleman.

The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, just very briefly, as you just said, heroism does, indeed, take many paths and many forms, and I think we have a heroine before us today. Like the chairman, I thank you, Mrs. Higgins, for being here.

I don't know of any area that's any more fragile or delicate than when it comes to dealing with terrorism, but I want to reiterate for emphasis' sake, Mrs. Higgins, what you said. You said—and I think I am precisely quoting you; if not, I know I am correctly paraphrasing—in effect, when we ignore the terrorist, we inevitably ignore the victim. And I think that's what we're going to have

to try to overcome as we go about, hopefully, trying to find a solution to this very difficult enigma that faces us, Mr. Chairman.

And I thank you.

Mr. HYDE. I thank the gentleman.

Mr. Bryant from Tennessee.

Mr. BRYANT from Tennessee. Thank you, Mr. Chairman. I, too, will be brief.

Ms. Higgins, are you still active duty?

Mrs. HIGGINS. Yes, sir, I am.

Mr. BRYANT from Tennessee. OK. Well, I'll refer to you as "Colonel Higgins" then.

As an experienced career soldier, I very much appreciated your perspective and recommendation as pertain to American soldiers being under the command of the U.N. I was fortunate enough to also serve in the military, and since I've arrived at Congress, I was the freshman sponsor of the National Security Revitalization Act, which had as a key provision of that bill, which has now passed the House, that limitation of American soldiers being served—serving under U.N. commanders. And, again, I very much appreciate your affirmation of that as a career soldier, and I want to thank you for your heroism, also.

Thank you.

Mr. HYDE. I thank the gentleman.

The gentlelady from Texas.

Ms. JACKSON LEE. Colonel, let me, likewise, add my appreciation for your being here and tell you how disheartened I am to listen to even the sense that not even the minimal was offered to your husband as a member of the U.S. military with respect to Red Cross visits and other types of inquiries that might have assisted in his condition.

My question to you—and I'm not asking you to comment on the legislation that we are presently reviewing, but I am asking whether you could give maybe the single comment that you would make that might have distinguished or might have allowed, if you will, him to be distinguished from the civilian hostages, of course, that we hold in great respect, but for him to have been able to receive just the basics that you had indicated that were not coming to him. What would have been a factor? Would it have been a determination by the State Department, by the military, by the White House? Would it have been the U.N.? What would be the salient factor that might have changed at least the facts while he was alive?

Mrs. HIGGINS. I think, had any one of those agencies that you mentioned become convinced that he, in fact, should be afforded those international rights, then any one of those agencies, I think, could have fought, and perhaps convinced the others, and figured out a way that this could possibly happen. I think the fact that I could never convince any of those agencies contributed to the fact that it just wasn't on anyone's mind.

Ms. JACKSON LEE. When, obviously, you faced your personal tragedy and you said you're still asking for—you're raising questions and asking for answers. Was there not any response when the finality of his life came to the light as to what the procedures were or why actions were not taken by any of the groups that I've just mentioned to you?

Mrs. HIGGINS. Nothing has officially come to light to me as an explanation.

Ms. JACKSON LEE. And nothing about their procedures and why they acted or did not act during that time period?

Mrs. HIGGINS. No, ma'am.

Ms. JACKSON LEE. Thank you very much.

Mr. HYDE. Well, it's clear that there was a lot of buck-passing. Once a Marine, always a Marine. I should have thought someone in the Marine Corps would have not forgotten and would have pressed and pressed and pressed. Passing the buck—he's a U.N. functionary; he's a U.S. military—divided responsibility, it's a sad story. Maybe we've learned something from this and maybe it can't happen again. Let's hope so.

Your contribution has been really substantial, and we thank you, and God bless you. Thank you.

Mrs. HIGGINS. Thank you.

Mr. HYDE. The second panel will come forward. We're pleased to have with us today four members of the Clinton administration who will educate this committee on the threats of terrorism from their specific perspectives and to address various provisions of the administration's proposal which was introduced by Congressman Schumer, H.R. 896.

In the order of their testimony, let me introduce, on my right, Acting Director William O. Studeman, Admiral and Acting Director of the Central Intelligence Agency. Next to Admiral Studeman is Deputy Attorney General Jamie S. Gorelick, U.S. Department of Justice. And next to Ms. Gorelick is the Director of the Federal Bureau of Investigation, Louis J. Freeh. And next to Mr. Freeh is Ambassador Philip Wilcox, Coordinator of the Counterterrorism Section, U.S. Department of State.

We are most grateful to have such a distinguished panel here, and we welcome you, and ask Admiral Studeman to commence. And we will go through the panel, and then if you'll be patient, we'll try to formulate some questions. Thank you.

Admiral Studeman.

STATEMENT OF WILLIAM O. STUDEMAN, ACTING DIRECTOR, CENTRAL INTELLIGENCE AGENCY

Mr. STUDEMAN. It's a real pleasure for me to appear before you today to support the Omnibus Counterterrorism Act of 1995. The intelligence community supports this bill as a significant step forward in the fight against international terrorism. This legislation is needed to give our Nation's law enforcement agencies, which we work with so closely, the proper tools to carry out this fight.

I've been asked to provide an overview of the international terrorist threat, and I'm happy to do so from a foreign perspective; I understand that Director Freeh will address it from the domestic side. Some topics may relate to ongoing criminal investigations or prosecutions. Then I would have to defer to my colleagues, Deputy Attorney General Gorelick and Director Freeh. Some aspects of this topic, and some of your questions as well, may touch upon very sensitive information that cannot be discussed in this open session. I would be pleased to address any such issues in executive session or in written answers to the committee.

Mr. Chairman, we have seen a most disturbing change in the nature of the terrorist threat over the recent past, and this change will make the world an increasingly dangerous place for Americans. In general, international terrorists today are focusing less on hostage-taking and hijackings and more on the indiscriminate slaughter of innocent men, women, and children. Although the number of international terrorist incidents has decreased over the past 10 years, the trend is toward a higher lethality, particularly in the number of civilian casualties, more extensive property damage, and increasingly devastating effects on economies. We recorded 321 international terrorist incidents during 1994, down from 431 recorded in 1993. However, beginning in 1993, the number of casualties has risen dramatically.

For instance, the World Trade Center bombing in 1993 resulted in six deaths and a thousand injured. The 1994 bombing of a Jewish cultural center in Buenos Aires left nearly 100 people dead and over 250 people wounded. The recent gassing of the Tokyo subway killed 11 people and, injured over 5,500, as the chairman has already stated. These incidents have also resulted in substantial property damage. The pace of terrorist incidents during the first 3 months of this year has increased significantly, due primarily to a spate of firebombings by Kurdish separatists of Turkish targets in Europe and the Tokyo attack.

The preferred targets of terrorist attacks continue to be "soft" targets, such as business and tourist sites and facilities. With their limited security precautions, these targets are easier to attack than government buildings or military installations. Attacks on foreign interests, particularly tourist targets which are the prime sources of foreign exchange, effectively hamper national and regional economies. U.S. interests and citizens continue to be the favorite targets of terrorists, as we were reminded by the murder of two Americans last month in Karachi, Pakistan. Attacks against American citizens and interests over the past 5 years account for about 40 percent of the total terrorist incidents.

Particularly disturbing is the terrorist use of chemical weapons, possibly the nerve gas sarin, in the attack in the Tokyo subway. We hope that it does not herald the dawn of a new era long feared by counterterrorist experts: the increasing use of weapons of mass destruction against urban populations.

The consequences of a terrorist incident involving weapons of mass destruction can be enormous, including massive casualties, widespread contamination, major stresses on rescue and response resources, as well as I might say on law enforcement resources, and serious economic dislocation. Unfortunately, we believe that we will witness more of this type of attack. Production of biological and chemical agents is relatively easy because the ingredients and manufacturing instructions are readily available. Also, the possibility of "copycat" attacks increases with media exposure of major incidents and with prolonged investigations by civil authorities.

Equally frightening, but less likely, is the use of nuclear materials or devices in a terrorist attack. The most serious threat of nuclear terrorism is the use of materials or devices diverted from stockpiles of the former Soviet Union. Continuing economic destitution, deteriorating living conditions and morale within the military,

and the rise of organized crime could undermine the stockpile's security, making thefts of warheads or subcomponents possible. Warheads in transit by rail between military facilities or to assembly and disassembly facilities could also be vulnerable to direct attack and theft.

Small portable devices, even with severely degraded yields, could still be several times more powerful than the Hiroshima bomb and powerful enough to bring down a target like the World Trade Center. Even with no nuclear yield, such a device could cause significant radiological dispersion, contaminating the area of an attack and threatening survivors and rescue personnel.

Adding to the threat of indiscriminate attacks are ethnic and separatist movements produced by savage regional and ethnic conflicts around the world. These groups are becoming more of a threat to U.S. facilities and interests abroad. The Kurdistan Workers Party, or PKK, heads the list of such groups because the group has made international terrorism a key weapon in its fight for an independent homeland in the Kurdish-inhabited part of southeast Turkey. The PKK has been especially active in Europe, and we fear that its tactics may become a model for other ethnic or separatist movements being spawned in the former Yugoslavia and Soviet Union. Bosnia and the Central Asian region offer potentially fertile ground for some of the Middle Eastern groups to operate or seek recruits, and American involvement in humanitarian and peacekeeping missions in the region increases the potential threat to U.S. interests and citizens. Financial and logistics support for Muslims in these regions could come from some of the radical Islamic groups and their state sponsors.

State sponsors of terrorism include Iran, Syria, Libya, Iraq, North Korea, Cuba, and Sudan. Of these, Iran is the most active instigator of terrorism, especially against dissidents or enemies in the region. These outlaw states consider terrorism a legitimate instrument of statecraft. Recently, they have become more adept at concealing their own activities. Additionally, they are getting better at hiding their support for their surrogates, which includes providing safe havens, funds, training, weapons, and other assistance.

The greatest terrorist threats to the United States today come from extremist groups who claim, however falsely, to act on behalf of a religion, especially Islam. Some of these groups fit the traditional terrorist mold. These include the Lebanese Hezbollah, the Palestinian group Hamas, and the Algerian Armed Islamic Group. They remain extremely dangerous. Although these groups comprise a small minority in the Islamic world, they have used Islam as a guise to offer alienated segments of the population an alternative to secular governments in the Middle East, North Africa, and South Asia. Some of these groups also pose a threat to the Arab-Israeli peace process.

In addition, a new Islamic extremist threat is on the rise. These groups, often ad hoc, are even more dangerous in some ways than the traditional groups because they do not have a well-established organizational identify and they tend to decentralize and compartment their activities. They are also capable of producing and using more sophisticated conventional weapons, as well as chemical and biological agents. They are less constrained by state sponsors or

other benefactors than are the traditional groups. These new groups appear to be disinclined to negotiate, but, instead, seek to take revenge on the United States and Western countries by inflicting heavy civilian casualties. The World Trade Center bombers are prime examples of this new breed of radical, transnational, Islamic terrorist.

Both the traditional Islamic terrorists and the new breed have filled their ranks with militants who trained in the Afghan war, where they learned the value of violence in defeating a major power. They are well funded. Some have developed sophisticated international networks that allow them great freedom of movement and opportunity to strike, including in the United States. They also are attracting a more qualified cadre with greater technical skills. Several groups have established footholds within ethnic or resident alien communities here in the United States. These communities offer terrorists financial support and a source for new recruits.

All these characteristics shield these groups from effective counterterrorism operations by government security forces. This makes it even more critical that the United States obtain the close and continual cooperation of other countries. One of the best ways to ensure this cooperation is to protect the information that these countries share with us about terrorists. Foreign governments simply will not confide in us if we cannot keep their secrets.

One goal of section 201 of the bill is to provide a mechanism to do just that by protecting classified information in special removal hearings for alien terrorists. The objective is to permit the court to consider classified information as evidence without risking the compromise of sensitive intelligence sources and methods or foreign government-provided information. The intelligence community strongly supports this objective.

In addition to requiring the cooperation of foreign governments, the war against terrorism requires close and continual cooperation within the U.S. Government. A prime example is the DCI's (Director of Central Intelligence's) Counterterroist Center. Since its inception in 1986, the CTC has been responsible for anticipating and preempting terrorist operations and for penetrating, disrupting, and destroying terrorist groups that target the interests of the United States and its allies. The high degree of cooperation with law enforcement agencies is evident in the staffing of the CTC. In addition to CIA, nine other agencies are represented: FBI; Secret Service; Bureau of Alcohol, Tobacco and Firearms; Immigration and Naturalization Service; the National Security Agency; the Department of State Diplomatic Security; Federal Aviation Administration; the Naval Criminal Investigative Service, and the Department of Energy. Detailees from these various agencies sit side by side, share information, and tackle joint problems. This close cooperation has permitted the two communities to learn from each other to the ultimate benefit of the security of the Nation.

Counterterrorist work, by necessity, must be done out of the glare of publicity. We must protect those who would provide us with vital information and protect methods critical to us, if we are to continue to keep Americans out of harm's way. There are several cases, however, that can be mentioned here today that demonstrate

the excellent results of the close cooperation between law enforcement and the intelligence community.

One such example is the attempted assassination of former President Bush in Kuwait. The CIA used its substantial analytic capability, its ability to collect foreign intelligence, and its technical analysis of forensic evidence, in cooperation with the FBI and the Department of Justice, to establish that the assassination attempt was ordered by Saddam Hussein's regime.

The intelligence community has also contributed to the FBI's arrest of Umar Mohammed Ali Rezaq, allegedly responsible for hijacking and murder in November 1985. He's charged with shooting three Americans, killing one and leaving another with permanent brain damage. On the World Trade Center bombing, CIA worked closely with the FBI and local law enforcement officials on the foreign side of the investigations. Finally, the intelligence community and law enforcement are working together to bring Mir Aimal Kansi to justice. He is accused of brutally murdering two CIA employees and wounding three others outside our headquarters in 1993.

In closing, international terrorism remains one of the deadliest and most persistent global threats to U.S. security. The motives, perpetrators, and methods of terrorist groups are evolving in ways that complicate analysis, collection, and counteraction, and require the ability to shift resources flexibly and quickly. The rise of the new breed of terrorist who is interested in inflicting mass death and destruction does not bode well for the future security of American interests. These groups can strike at any time, anywhere, spurred by seemingly unrelated events for which they judge the United States to be blameworthy. They have a widening global reach and a high degree of technical proficiency with more sophisticated weapons and tactics.

The intelligence community plays an important role in supporting law enforcement efforts to prevent attacks on American lives and property and to apprehend those who commit these heinous crimes. This bill strengthens law enforcement's ability to combat terrorism and at the same time takes steps to protect sensitive intelligence information. We, therefore, believe it is worthy of your support.

Thank you, sir.

[The prepared statement of Mr. Studeman follows:]

PREPARED STATEMENT OF WILLIAM O. STUDEMAN, ACTING DIRECTOR, CENTRAL INTELLIGENCE AGENCY

Good morning Mr. Chairman and Members of the Committee. It is a pleasure to appear before you today in support of the Omnibus Counterterrorism Act of 1995. The Intelligence Community supports this bill as a significant step forward in the fight against international terrorism. This legislation is needed to give our nation's law enforcement agencies, with which we work so closely, the proper tools to carry out this fight.

I have been asked to provide an overview of the international terrorist threat. I am happy to do so from the foreign perspective and I understand that Director Freeh will address it from the domestic side. Some topics may relate to ongoing criminal investigations or prosecutions, and I would have to defer to my colleagues Deputy Attorney General Gorelick and Director Freeh. Some aspects of this topic, and some of your questions as well, may touch upon very sensitive information that cannot be discussed in this open session. I would be pleased to address any such issues in executive session or in written answers to the Committee.

Mr. Chairman, we have seen a most disturbing change in the nature of the terrorist threat over the recent past, and this change will make the world an increasingly dangerous place for Americans. In general, international terrorists today are focusing less on hostage-taking and hijackings and more on the indiscriminate slaughter of innocent men, women, and children. Although the number of international terrorist incidents has decreased over the past 10 years, the trend is toward a higher number of civilian casualties, more extensive property damage, and increasingly devastating effects on economies. We recorded 321 international terrorist incidents during 1994, down from the 431 recorded in 1993. However, beginning in 1993, the number of casualties has risen significantly.

For instance, the World Trade Center bombing in 1993 resulted in six deaths and over 1,000 injured. The 1994 bombing of a Jewish cultural center in Buenos Aires left nearly 100 people dead and over 250 wounded. The recent gassing of the Tokyo subway killed 10 people and injured over 5,500 others. These incidents have also resulted in substantial property damage. The pace of terrorist incidents during the first three months of this year has increased significantly due primarily to a spate of firebombings by Kurdish separatists of Turkish targets in Europe and the Tokyo attack.

The preferred targets of terrorist attacks continue to be "soft" targets, such as business and tourist sites and facilities. With their limited security precautions, these targets are easier to attack than government buildings or military installations. Attacks on foreign interests, particularly tourist targets that are prime sources of foreign exchange, effectively hamper national and regional economies. U.S. interests and citizens continue to be favorite targets of terrorists, as we were reminded by the murder of two Americans last month in Karachi, Pakistan. Attacks against American citizens and interests over the past five years account for about 40 percent of the total number of terrorist incidents.

Particularly disturbing is the terrorist use of a chemical weapon, possibly the nerve gas sarin, in the attack on the Tokyo subway. We hope that it does not herald the dawn of a new era long feared by counterterrorist experts: the use of weapons of mass destruction against urban populations.

The consequences of a terrorist incident involving a weapon of mass destruction can be enormous, including massive casualties, widespread contamination, and serious economic dislocation. Unfortunately, we believe that we will witness more of this type of attacks. Production of biological and chemical agents is relatively easy because the ingredients and manufacturing instructions are readily available. Also, the possibility of "copycat" attacks increases with media exposure of major incidents and with prolonged investigations by civil authorities.

Equally frightening, but less likely, is the use of nuclear materials or devices in a terrorist attack. The most serious threat of nuclear terrorism is use of materials or devices diverted from the Russian stockpile. Continued economic destitution, deteriorating living conditions and morale within the military, and the rise of organized crime could undermine the stockpile's security, making thefts of warheads or subcomponents possible. Warheads in transit by rail between military facilities or to assembly and disassembly facilities could also be vulnerable to direct attack or theft.

Small, portable devices, even with severely degraded yields, could still be several times more powerful than the Hiroshima bomb and powerful enough to bring down a target like the World Trade Center. Even with no nuclear yield, such a device could cause significant radiological dispersion, contaminating the area of an attack and threatening survivors and rescue personnel.

Adding to the threat of indiscriminate attacks are ethnic and separatist movements produced by savage regional and ethnic conflicts around the world. These groups are becoming more of a threat to U.S. facilities and interests abroad. The Kurdistan Workers Party, or PKK, heads the list of such groups because the group has made international terrorism a key weapon in its fight for an independent homeland in Kurdish-inhabited southeastern Turkey. The PKK has been especially active in Europe, and we fear that its tactics may become a model for other ethnic and separatist movements being spawned in the former Yugoslavia and Soviet Union. Bosnia and the Central Asian region offer potentially fertile ground for some of the Middle Eastern groups to operate or seek recruits, and American involvement in humanitarian or peacekeeping missions in the region increases the potential threat to U.S. interests and citizens. Financial and logistic support for Muslims in these regions could come from some of the radical Islamic groups and their state sponsors.

State sponsors of terrorism include Iran, Syria, Libya, Iraq, North Korea, Cuba, and Sudan. Of these, Iran is the most active instigator of terrorism, especially against dissidents or enemies in the region. These outlaw states consider terrorism

a legitimate instrument of state craft. Recently, they have become more adept at concealing their own activities. Additionally, they are getting better at hiding their support for their surrogates, which includes providing safe haven, funds, training, weapons, and other assistance.

The greatest terrorist threats to U.S. interests today come from extremist groups who claim—however falsely—to act on behalf of a religion, especially Islam. Some of these groups fit the traditional terrorist mold. These include the Lebanese Hezbollah, the Palestinian group Hamas, and the Algerian Armed Islamic Group. They remain extremely dangerous. Although these groups comprise a small minority in the Islamic world, they have used Islam as a guise to offer alienated segments of the population an alternative to secular governments in the Middle East, North Africa, and South Asia. Some of these groups also pose a threat to the Arab-Israeli peace process.

In addition, a new Islamic extremist threat is on the rise. These groups—often ad hoc—are even more dangerous in some ways than the traditional groups because they do not have a well-established organizational identity and they tend to decentralize and compartment their activities. They also are capable of producing and using more sophisticated conventional weapons as well as chemical and biological agents. They are less restrained by state sponsors or other benefactors than are the traditional groups. These new groups appear to be disinclined to negotiate, but instead seek to take revenge on the United States and Western countries by inflicting heavy civilian casualties. The World Trade Center bombers are prime examples of this new breed of radical, transnational, Islamic terrorist.

Both the traditional Islamic terrorists and the new breed have filled their ranks with militants who trained in the Afghan war, where they learned the value of violence in defeating a major power. They are well funded. Some have developed sophisticated international networks that allow them great freedom of movement and opportunity to strike, including in the United States. They also are attracting a more qualified cadre with greater technical skills. Several groups have established footholds within ethnic or resident alien communities here in the United States. These communities offer terrorists financial support and a source for new recruits.

All these characteristics shield these groups from effective counterterrorism operations by government security forces. This makes it even more crucial that the United States obtain the close and continual cooperation of other countries. One of the best ways to ensure this cooperation is to protect the information that these countries share with us about terrorists. Foreign governments simply will not confide in us if we can not keep their secrets.

One goal of section 201 of the bill is to provide a mechanism to do just that by protecting classified information in special removal hearings for alien terrorists. The objective is to permit the court to consider classified information as evidence without risking the compromise of sensitive intelligence sources and methods or foreign government information. The Intelligence Community strongly supports this objective.

In addition to requiring the cooperation of foreign governments, the war against terrorism requires close and continual cooperation within the United States Government. A prime example is the Counterterrorist Center (CTC). Since its inception in 1986, CTC has been responsible for anticipating and preempting terrorist operations and for penetrating, disrupting, and destroying terrorist groups that target the interests of the United States and its allies. The high degree of cooperation with law enforcement agencies is evident from the staffing of CTC. In addition to CIA, nine other agencies are represented: FBI; Secret Service; Bureau of Alcohol, Tobacco and Firearms; Immigration and Naturalization Service; National Security Agency; Department of State Diplomatic Security; Federal Aviation Administration; Naval Criminal Investigative Service; and Department of Energy. Detailees from these various agencies sit side by side, share information, and tackle joint problems. This close cooperation has permitted the two communities to learn from each other to the ultimate benefit of the security of the nation.

Counterterrorist work by necessity must be done out of the glare of publicity if we are to protect those who would provide us with vital information and to protect methods critical to us if we are to continue to keep Americans out of harm's way. There are several cases, however, that can be mentioned here today that demonstrate the excellent results of the close cooperation between law enforcement and the Intelligence Community.

One such example is the attempted assassination of former President Bush in Kuwait. CIA used its substantial analytic capability, its ability to collect foreign intelligence, and its technical analysis of forensic evidence, in cooperation with the FBI and the Department of Justice, to establish that the assassination attempt was ordered by Saddam Hussein's regime.

The Intelligence Community also contributed to the FBI's arrest of Umar Mohammed Ali Rezaq, allegedly responsible for hijacking and murder in November 1985. He is charged with shooting three Americans, killing one and leaving another with permanent brain damage. On the World Trade Center bombing, CIA worked closely with the FBI and local law enforcement officials on the foreign side of the investigations. Finally, the Intelligence Community and law enforcement are working together to bring Mir Aimal Kansi to justice. He is accused of brutally murdering two CIA employees and wounding three others outside our Headquarters in 1993.

In closing, international terrorism remains one of the deadliest and most persistent global threats to U.S. security. The motives, perpetrators, and methods of terrorist groups are evolving in ways that complicate analysis, collection, and counteraction and require the ability to shift resources flexibly and quickly. The rise of the new breed of terrorist who is interested in inflicting mass death and destruction does not bode well for the future security of American interests. These groups can strike at any time, anywhere, spurred by seemingly unrelated events for which they judge the United States to be blameworthy. They have a widening global reach and a high degree of technical proficiency with more sophisticated weapons and tactics. The Intelligence Community plays an important role in supporting law enforcement efforts to prevent attacks on American lives and property and to apprehend those who commit these heinous crimes. This bill strengthens law enforcement's ability to combat terrorism and at the same time takes steps to protect sensitive intelligence information. We, therefore, believe it is worthy of your support.

Thank you.

Mr. HYDE. Thank you, Admiral.

The next witness will be Deputy Attorney General Jamie Gorelick. Ms. Gorelick.

STATEMENT OF JAMIE S. GORELICK, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Ms. GORELICK. Thank you. Thank you, Mr. Chairman and members of the committee. It's our privilege to appear before you regarding H.R. 896, the Omnibus Counterterrorism Act of 1995.

As Admiral Studeman has just said, and as I think you will hear from all of us here today, the protection of this Nation and its people against the threat of terrorism, both at home and abroad, is of paramount importance to all of us. The proposed legislation before you is an effort to strengthen our ability to deter terrorist acts and to punish those who engage in terrorism.

The bombing of Pan Am Flight 103 demonstrates the magnitude of human suffering that can result from even a single terrorist incident, and as weapons of mass destruction become more accessible, the catastrophic potential of terrorist acts becomes more apparent. The recent nerve gas attack in the subway system in Tokyo was a grim warning of that potential here in the United States.

Americans are unquestionably the targets of choice of terrorists. From 1990 to 1994, approximately 40 percent of reported international terrorist acts worldwide were directed against U.S. interests, and during the past decade, as you know, Americans have been killed, injured, brutalized by bombings, hijackings, and hostage-takings.

In the past 2 years, Americans have been the target of a number of extraordinarily deadly terrorist plots, both here and abroad. Fortunately, most of those plots were prevented or failed to achieve the consequences intended by their perpetrators. And here I think our vigilance has paid off, but had the intentions of those terrorists been fulfilled, tens of thousands of Americans would have been injured or killed.

The continuing nature of this deadly threat to U.S. interests and to our people is exhibited by the March 8, 1995, murders of two American civilian employees assigned to the consulate in Karachi, Pakistan. We cannot wait for more terrorist tragedies like those I have discussed before seeking legislation to enhance our ability to address the terrorist threat.

As we have developed and refined the legislative package that is before this committee today, we have been keenly aware of our responsibility to ensure that constitutional rights are fully protected. We believe that the proposed legislation fully comports with our Nation's traditional respect for civil liberties, and we are committed to working with this committee to ensure that the legislation is both tough and fair.

During the past 20 years, the Congress has enacted a number of very important antiterrorism statutes. Most of those statutes addressed acts of terrorism undertaken against U.S. people or interests overseas, and we aggressively enforce those statutes. We do not forget the heinous acts of terrorists or the human suffering of their victims. We have long memories. The long-term nature of our commitment is exemplified by the arrest of Umar Ali Rezaq in July 1993 on charges relating to an aircraft hijacking in the Mediterranean in 1985.

Our investigations have led to the conviction of terrorists involved in attacks on Americans overseas. For example, Mohammed Hamadei was convicted and given a life sentence in Germany for the 1985 hijacking of TWA 847 and the murder of Navy diver Robert Stethem. Although Germany declined to extradite Hamadei to the United States, it utilized evidence developed during our investigation in its prosecution. And, similarly, after denying a U.S. extradition request, Greece utilized evidence from the U.S. investigation in its successful prosecution of Mohammed Rashid for the 1982 bombing of a Pan Am flight in Asia which resulted in the death of a passenger. Fawaz Yunis, the leader of a hijacking in the Middle East of a flight with Americans onboard, was lured into international waters in the Mediterranean Sea, where he was arrested by the FBI and brought to the United States for trial. Yunis was convicted and is serving a 30-year sentence.

But, in contrast to the substantial legislation relating to overseas acts of terrorism directed against U.S. interests, there has been little focus on legislation addressing acts of international terrorism in the United States. The bombing of the World Trade Center reminds us that we are not free from the threat of terrorism in our own borders. Swift and effective investigative work led to the prompt arrest and subsequent successful prosecution of four defendants. In August 1993, 15 defendants were indicted in Federal court in Manhattan on charges which included conspiracy to levy a war of urban terrorism against the United States by bombing the World Trade Center and planning to bomb several other targets, including a Federal office building, United Nations headquarters, the Lincoln and Holland Tunnels, the George Washington Bridge. The trial of that case is ongoing.

The proposed Omnibus Counterterrorism Act takes important steps to address acts of terrorism within the United States. While the bill contains provisions which enhance our ability to address

extraterritorial terrorist acts, its primary emphasis is on international terrorism aimed at targets here or utilizing the United States as a base for support of terrorism activities. Section 101 would provide a more certain and comprehensive basis for the Federal Government to respond to international terrorist acts occurring here. It would allow us to incorporate an applicable State statute violated by the terrorist if one of nine jurisdictional bases can be established. The provision would be utilized only with the personal approval of the Attorney General or the Deputy, based on a finding that the offense was of an international terrorist nature.

This provision should significantly enhance our ability to respond to international terrorism. State enforcement entities often cannot effectively address criminal activity with international aspects, and there is a need for a more effective basis to address activities within the United States that support terrorist activities in foreign countries, and that is the focus of sections 102 and 301.

Section 102 would, in essence, make it a crime for a person in the United States to be a part of a conspiracy to commit a terrorist act overseas. It would provide prosecutive jurisdiction over not only U.S.-based conspirators, but also their confederates overseas.

Section 301 would authorize the Government to regulate or prohibit any person or organization within the United States from raising or providing funds for use by a foreign organization which the President has declared to be engaged in terrorist activities. That declaration would be based on a finding that the organization engages in terrorist activities which threaten the national security, foreign policy, or economy of the United States.

The fundraising prohibitions of section 301 would apply, notwithstanding the fact that a terrorist organization might also engage in legitimate charitable activities, but a licensing mechanism would permit contributions to such activities where there would be appropriate safeguards to ensure that the money would not be used to carry out terrorist acts.

H.R. 896 would create a mechanism that would allow prompt deportation proceedings for suspected alien terrorists while providing reasonable protection for pertinent national security information. Under this provision, such proceedings could be handled by U.S. district court judges if the Government can establish that adherence to normal INS deportation proceedings would pose a threat to national security. The judges would be authorized to invoke procedures such as those—such as the use of summaries in place of classified information, designed to safeguard national security equities while protecting the rights of the alien. The proceedings would be open to the public. The alien would be represented by counsel, and the Government would bear the burden of proof.

In all, H.R. 896 contains a total of 20 legislative proposals, among its other provisions or proposals, that would improve our ability to respond to the threat of nuclear terrorism, and would require that plastic explosives be manufactured with a detection agent embedded therein. With the chairman's consent, given the length of this proposal, I will submit for the record a summary of each proposed item of legislation with my formal statement.

Mr. Chairman, I want to thank you for this prompt hearing on this bill. The Department of Justice is prepared to work with the

committee and with its staff to address any areas of concern, and I would urge this committee to move expeditiously toward enactment.

Thank you very much.

[The prepared statement of Ms. Gorelick follows:]

PREPARED STATEMENT OF JAMIE S. GORELICK, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Committee, it is a privilege to appear before you regarding the proposed "Omnibus Counterterrorism Act of 1995."

The protection of this nation and its people against the threat of terrorism, both at home and abroad, is of paramount importance to all of us. The proposed legislation is a comprehensive effort to strengthen the ability of the United States to deter terrorist acts and to punish those who engage in terrorism.

Acts of terrorism defy rational explanation, and their harm cannot be measured by counting the number of terrorist acts. Terrorist acts occur within the United States very infrequently and the number of overseas terrorist attacks against U.S. interests is not great, in part because of our extraordinary efforts at prevention. When, as in the bombing of Pan Am Flight 103, terrorists do succeed, the magnitude of the human suffering is incalculable. Society as a whole pays a high price, as the population as a whole fears similar incidents.

Moreover, as weapons of mass destruction become more accessible, the catastrophic potential of terrorist acts becomes more apparent. The recent nerve gas attack in the subway system in Tokyo was a grim warning of that potential. Similarly, earlier this year, two defendants were convicted in federal court in Minnesota of possessing ricin, a deadly biological agent, with intent to use it as a weapon. According to experts, a gram of pure ricin could kill 3,600 people.

Americans are unquestionably the target of choice of terrorists. From 1990 through 1994, approximately 40% of the reported international terrorist acts worldwide were directed against U.S. interests. During the past decade Americans have been killed, injured, or brutalized by bombings, hijackings, and hostage takings.

In the past two years, Americans have been the target of a number of extraordinarily deadly terrorist plots, both at home and abroad. Fortunately, most of those plots were either prevented or failed to achieve the consequences intended by their perpetrators. However, had the intentions of those terrorists been fulfilled, tens of thousands of Americans would have been injured or killed.

The continuing nature of this deadly threat to U.S. interests and people is reflected in the March 8, 1995, murders of two American civilian employees assigned to the U.S. consulate in Karachi, Pakistan. The United States cannot await additional terrorist tragedies—such as the Karachi murders, the World Trade Center bombing, and the bombing of Pan Am Flight 103—before seeking legislation to enhance its ability to address the terrorist threat.

We must take all reasonable steps to prevent and punish terrorist activity directed at U.S. interests. The proposed Omnibus Counterterrorism Act of 1995 is a comprehensive effort to fulfill that responsibility.

We are keenly aware of our responsibility to ensure that constitutional rights are fully protected. We believe that the proposed legislation fully comports with our nation's traditional respect for civil liberties. Nevertheless, we are committed to working with this Committee to examine any concerns and to ensure that the legislation is both tough and fair.

During the past 20 years, Congress has enacted a number of very important terrorism statutes. Most of those statutes address acts of terrorism undertaken against U.S. people or interests overseas. The Department of Justice aggressively enforces those statutes.

We investigate fully all incidents of international terrorism that affect U.S. interests and over which we have jurisdiction. When sufficient evidence is developed, the case is indicted and a concerted effort is made to obtain custody of the defendants for trial, even though they usually reside outside the United States. The Department is committed to pursuing such apprehension efforts for as long as is necessary to obtain custody. We will not forget the heinous acts of terrorists or the human suffering of their victims. The long-term nature of our commitment is exemplified by the arrest of Umar Ali Rezaq in July 1993 on charges relating to a deadly hijacking which occurred in the Mediterranean area in November 1985.

Examples of prosecutions that have been pursued as a result of United States enforcement efforts under existing terrorism statutes include the following:

Mohammed Ali Hamadei was indicted in the District of Columbia for the June 1985 hijacking of TWA 847 and the murder of Navy diver Robert Stethem. Hamadei was arrested in Germany in 1987, but the U.S. extradition request was denied. Thereafter, U.S. investigators and prosecutors worked with their German counterparts to facilitate Hamadei's prosecution in Germany on hijacking and murder charges. He was convicted and is currently serving a life sentence.

Fawaz Yunis was indicted in the District of Columbia for a June 1985 hijacking of a Royal Jordanian Airlines flight which had two American passengers on board. In September 1987, he was lured into international waters of the Mediterranean Sea, where he was arrested by the FBI and returned to the United States. He was convicted in federal court in March 1989 and is currently serving a 30-year prison sentence.

Mohammed Rashid was indicted in the District of Columbia for an August 1982 bombing of a Pan Am flight en route from Tokyo to Honolulu, resulting in the death of one passenger. Rashid was arrested in Athens in June 1988. Greece denied the U.S. extradition request but agreed to prosecute Rashid. Thereafter, federal investigators and prosecutors worked closely with their Greek counterparts to make available the evidence which supported the U.S. case. Rashid was subsequently convicted and is presently serving a 15-year prison sentence in Greece.

Umar Ali Rezaq is currently pending trial in federal court in the District of Columbia on an indictment which charges that he hijacked an Egypt Air flight in 1985, during which he allegedly murdered two passengers, an American and an Israeli.

Other indictments are pending based on terrorist acts directed against U.S. interests and persons overseas. One of those indictments charges two Libyan defendants, as officers and operatives of a Libyan intelligence agency, with having carried out the bombing of Pan Am Flight 103.

The bombing of the World Trade Center in 1993 was a grim reminder that the United States is not free from the threat of terrorism within its own borders. Swift and effective investigative work led to the prompt arrest and subsequent successful prosecution of four defendants, all of whom are now serving multiple life sentences. Recently, a fifth defendant charged in the World Trade Center indictment was arrested overseas and returned to New York, where he is currently pending trial.

In August 1993, fifteen defendants were indicted in federal court in Manhattan on charges which included conspiracy to levy a war of urban terrorism against the United States by bombing the World Trade Center and planning to bomb several other targets, including a federal office building, United Nations Headquarters, the Lincoln and Holland Tunnels, and the George Washington Bridge. The trial of that case is presently ongoing.

In contrast to the substantial legislation relating to overseas acts of terrorism directed against U.S. interests, there has been little focus on legislation addressing acts of international terrorism in the United States. The proposed Omnibus Counterterrorism Act of 1995 reverses that trend. While the bill would enhance our ability to address extraterritorial terrorist acts, its primary emphasis is on international terrorism aimed at targets within the United States or utilizing the U.S. as a base for monetary or strategic support.

In transmitting this legislation to Congress, the Administration provided a detailed section-by-section analysis explaining the intended scope and effect of each of the bill's 20 provisions. Additionally, I am submitting, as an attachment to this statement, a summary of those 20 provisions. Accordingly, I will limit my remarks to some of the bill's key provisions.

TITLE I—SUBSTANTIVE CRIMINAL LAW ENHANCEMENTS

SECTION 101—ACTS OF TERRORISM TRANSCENDING NATIONAL BOUNDARIES

Section 101(a), which would create Section 2332b in Title 18 of the United States Code, provides a more certain and comprehensive basis for the federal government to respond to international terrorist acts within the United States. While most international terrorist violations which might occur within the United States can be reached under some existing federal statute, the coverage is fragmented, the applicable statutes may be insufficient to capture the gravamen of the offense, and their penalties may not be proportionate to the conduct involved.

Section 101 would allow the government to incorporate any applicable state statute violated by the terrorists, so long as one of nine jurisdictional bases can be established. The provision would be utilized only with the personal approval of the

Attorney General or Deputy Attorney General, based on a finding that the offense was of an international terrorist nature.

The proposed provision is patterned after existing federal statutes which have been upheld by the courts and which have been applied without controversy. For example, Subsection 2332b(b)(1)(A), which incorporates state laws relating to murder, kidnapping, maiming, and serious assaults, is drawn directly from 18 U.S.C. § 1959, violent crimes in aid of racketeering activity. Similarly, the nine proposed jurisdictional bases provided in the proposed legislation are drawn from existing statutes.

State enforcement entities often cannot address effectively criminal activity that has international aspects. This legislation will permit federal enforcement in an area in which the federal government has both expertise and responsibility.

Additionally, the legislation would allow the Attorney General to request assistance from other agencies, including the military. The type of assistance that would typically be sought from the military—*e.g.*, logistical support—is not precluded by the Posse Comitatus Act, as it applies only to military enforcement activity that "regulates, forbids, or compels," *Bissonette* v. *Haig*, 776 F.2d 1384, 1390 (1985), *aff'd*, 485 U.S. 264 (1988), and does not prohibit the military from providing assistance to civilian law enforcement. *See,. e.g., United States* v. *Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988). However, if the military aid needed is of a type covered by Posse Comitatus, the Act authorizes such assistance and such authorizations are not unusual. *See. e.g.*, 10 U.S.C. §§ 331–334. Indeed, provisions identical to that contained in Subsection 2332b(f) already exist in other federal statutes, *see, e.g.*, 18 U.S.C. §§ 351(g), 1116(d), and 1751(i), and have presented no problems.

Subsection lot(e) would also enhance the investigative capability of law enforcement agents by permitting a wiretap on one phone number to be transferred to another when the individual tapped changes phones. The government would still have to obtain a court order, supported by probable cause, to engage in the wiretap. However, where the probable cause relates to a violation of Section 2332b, the proposal would permit the court's order to include provision for the use of a "roving" wiretap. This provision is critical because, in the context of violations of Section 101, the consequences of delay imposed by reapplications whenever a target changes phones could be catastrophic. This provision does not raise constitutional concerns, as the Fourth Amendment "protects people, not places," *i.e.*, the target of the surveillance and not a particular telephone instrument. *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

Subsection lot(d) provides a rebuttable presumption in favor of pretrial detention for persons charged with violating the statute. Federal law currently contains the identical rebuttable presumption of pretrial detention for certain serious narcotics and firearms violations. 18 U.S.C. § 3142(e). This provision has been sustained in the courts. *See, e.g., United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1986).

Although the maximum penalties prescribed in Section 2332b are significant, the actual level of sentence would be left to the discretion of the court in applying the Sentencing Guidelines. However, any term of imprisonment imposed under Section 2332b would have to be consecutive to other prison sentences. In this regard, the provision is consistent with that contained in 18 U.S.C. § 924(c)(1), which applies to persons who commit certain federal crimes of violence or narcotics offenses while armed.

SECTION 102—CONSPIRACY TO HARM PEOPLE OR PROPERTY OVERSEAS

Current federal law provides very limited jurisdiction over conspiracies undertaken within the United States to injure the property of a foreign government overseas. 18 U.S.C. § 956. Section 102 would amend that statute to make it a crime for any person within the United States to be a part of a conspiracy to commit a terrorist act overseas. The amended statute would apply to conspiracies to murder, kidnap, or maim, as well as conspiracies to injure or destroy any public structure, utility, or conveyance, or any religious, educational, or cultural property. The proposal would provide prosecutive jurisdiction over not only U.S.-based conspirators but also over their confederates overseas.

Section 102 is designed to complement the proposals in Section 101, concerning terrorist acts within the United States transcending national boundaries, and Section 301, prohibiting terrorist fundraising. We need an effective basis to reach conspiracies undertaken in part within the United States for the purpose of carrying out terrorist acts in foreign countries.

SECTION 103—CLARIFICATION AND EXTENSION OF CRIMINAL JURISDICTION OVER CERTAIN TERRORISM OFFENSES OVERSEAS

Since 1974, extraterritorial jurisdiction in terrorist statutes has been enacted piecemeal. The statutes contain jurisdictional bases; some statutes make their prohibited terrorist activity a federal offense only if the offender is later found in the United States. The Constitution and principles of international law permit jurisdiction when the victim or perpetrator is a national of the United States. Indeed, some existing extraterritorial statutes already include that jurisdictional base, *e.g.*, hostage taking (18 U.S.C. § 1203).

Section 103 amends terrorism statutes which are deficient in this regard to provide jurisdiction wherever the victim or perpetrator is a national of the United States. The amendment would relate to the following statutes: 18 U.S.C. § 32(b) (aircraft sabotage); 18 U.S.C. § 37(b) (violence at international airports); 18 U.S.C. §§ 112, 878, 1116, and 1201 (crimes against internationally protected persons); 18 U.S.C. § 178 (biological weapons); and 49 U.S.C. 46502(b) (aircraft piracy outside the special aircraft jurisdiction of the United States).

Although this section is highly technical, it is of substantial practical importance. If jurisdiction does not vest until the offender is found in the United States, the government is not in a position to obtain an indictment. This places in doubt the government's ability to stop the running of the statute of limitations applicable to non-capital terrorist offenses. More importantly, the United States is not in a position to pursue an extradition request because there is no clear basis for obtaining the judicial process to support such a request.

TITLE II—IMMIGRATION LAW IMPROVEMENTS

Current procedures in the Immigration and Nationality Act (INA) are inadequate to permit the government to deport aliens who have engaged in terrorism activity. The first case filed seeking deportation on the ground of terrorism activity has now marked its fourth anniversary and the trial portion of the proceeding has not yet concluded. Further, there is currently no effective basis for protecting critical national security information from disclosure in the course of such proceedings as there is in criminal proceedings.

SECTION 201—ALIEN TERRORIST REMOVAL PROCEDURES

Section 201 would create a mechanism for protecting national security information during deportation proceedings which are based on an alien's involvement in terrorism. Under the legislation, such cases could be handled by U.S. district court judges, if the government can establish that adherence to normal INS deportation procedures would pose a risk to national security. Judges would be authorized to invoke procedures such as the use of summaries in place of classified information to safeguard national security equities while protecting the rights of the alien.

All evidence except that bearing a national security classification would be fully available to the alien. The alien would be provided a summary of classified information of sufficient specificity to permit him to prepare his defense. The only exception would be in the extraordinary circumstance that the court finds that the provision of a summary or the continues presence of the alien in the United States "would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person." The government's burden of proof would be by clear and convincing evidence.

In criminal cases, the Classified Information Procedures Act (CIPA) has long provided for the protection of classified information through the use of a variety of procedures, including summaries. Their use has been upheld in criminal cases, where a defendant—alien or citizen—has his liberty or even his life at stake.

Section 201 provides that the exclusionary rule is inapplicable to deportation cases, a provision that codifies existing law. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984).

The proposed procedures protect constitutional rights. Deportation proceedings undertaken pursuant to Section 201 would be presided over by an independent, Article III judge; the alien would be represented by counsel, at the government's expense if necessary; the proceedings would be open to the public; the burden of proof would be on the government; and a judgment of deportation would be appealable to the United States Court of Appeals.

When there is substantial risk of serious damage to national security, reasonable curtailment of otherwise available procedures is justified. *Haig* v. *Agee*, 453 U.S. 280, 309–10 (1981). In related contexts, the Supreme Court has stressed that the requirements of due process do not make the Constitution a "suicide pact." The

Court has also extended substantial deference to the procedures considered appropriate by Congress in the immigration and deportation context, in recognition of the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature." *Landon* v. *Plasencia,* 459 U.S. 21, 34 (1982). The procedures afforded alien terrorists under section 201 of the bill are fully in keeping with the constitutional standards established in this sensitive area.

SECTION 202—CHANGES TO THE IMMIGRATION AND NATIONALITY ACT TO FACILITATE REMOVAL OF ALIEN TERRORISTS

Section 202 amends the Immigration and Nationality Act to facilitate the handling of alien terrorists in traditional immigration proceedings, *i.e.,* in instances where the government does not seek to invoke the special procedures contained in Section 201. One of the central aspects of this proposal is to provide that during immigration proceedings undertaken against non-immigrants (*i.e.,* non-resident aliens such as persons who have surreptitiously entered the U.S. or overstayed their visas), the alien would have no right of access to any classified information. Subsection 202(d). This provision would not apply to resident aliens.

Section 202 also makes limited modifications to the existing INA definition of terrorist activities. These changes serve to clarify that aliens who are officials or spokespersons of terrorist organizations or who provide material support to organizations engaged in terrorism activity are deportable.

SECTION 203—ACCESS TO CERTAIN CONFIDENTIAL INS FILES THROUGH COURT ORDER

Section 203 provides law enforcement a limited basis to obtain access to certain immigration files. Under current law, INS files relating to legalization and special agricultural worker status are not available to law enforcement. The proposed legislation would permit an application to a federal court for an order authorizing disclosure of information in such files in the course of an investigation into serious criminal activity occurring subsequent to the legalization or special agricultural proceeding.

The norm in criminal law is that, based on a proper showing, all records are available as needed to carry out criminal investigations. The two statutes which would be amended in the proposed legislation are a deviation from that norm. The law enforcement access which would be permitted relating to those records is both narrow and subject to judicial scrutiny, as the proposed provision would authorize access only through court order.

TITLE III—CONTROLS OVER TERRORIST FUNDRAISING

Section 301 authorizes the government to regulate or prohibit any person or organization within the United States from raising or providing funds for use by any foreign organization which the President has declared to be engaged in terrorist activities. Such declaration would be based on a Presidential finding that the organization (1) engages in terrorist activity as defined in the Immigration and Nationality Act, and (2) its terrorist activities threaten the national security, foreign policy, or economy of the United States.

For purposes of a criminal prosecution, the President's designation of a terrorist organization would be conclusive. This simply means that a person may not disregard a designation and thereafter challenge it when detected and prosecuted. However, whatever right, if any, may exist under the Constitution or current statutory principles to affirmatively challenge a Presidential designation would continue to exist.

Although the fundraising prohibition would apply notwithstanding the fact that the terrorist group may also engage in legitimate activities, Section 301 provides a licensing mechanism to address contributions to such activities. Foreign terrorist groups that wish to receive money solicited in the United States for other purposes can establish safeguards to ensure that money will not be used to carry out terrorist acts.

The proposal is not aimed at suppressing speech but rather at curtailing the terrorist acts of the designated groups. Even if one were to assume, for sake of discussion, that the fundraising prohibition might have an incidental effect on speech, it would still be sustainable under the Supreme Court's analysis in *United States* v. *O'Brien,* 391 U.S. 367, 376–77 (1968), based on the importance of the governmental interest involved. *See. e.g., Haig* v. *Agee,* 453 U.S. 280, 307 (1981) ("[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.").

This does not punish mere membership in an organization without regard to whether the member had any intent to further the organization's illegal aims. *See. e.g., Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). Rather, Section 301 prohibits only the act of raising funds on behalf of, or providing funds to, a designated terrorist organization without first obtaining a license.

Section 301 would effectively serve to fulfill three salutary objectives. Most importantly, it would limit the funds available for terrorist purposes. Further, it would benefit potential American contributors by alerting them to those groups which may misuse their contributions for terrorist purposes. Finally, it would give foreign groups an incentive to eliminate their terrorist elements in order to ensure the continued availability of U.S. funds to pursue their legitimate activities.

TITLE IV—CONVENTION ON THE MARKING OF PLASTIC EXPLOSIVES

Sections 401–407 implement the Convention on the Marking of Plastic Explosives for Purposes of Detection. That Convention is an international response to the terrorist bombings of Pan Am Flight 103 in December 1988 and UTA Flight 772 in September 1989, which would improve the detectability of plastic explosives so that terrorist disasters can be avoided.

Starting one year following the effective date of the statute, this provision would require the insertion of a detection agent during the manufacture of such explosives. It would be unlawful to manufacture any plastic explosive without a detection agent or to receive, possess, or transfer any plastic explosive that does not contain such an agent.

TITLE V—NUCLEAR MATERIALS

Section 501 expands the scope and jurisdictional bases under 18 U.S.C. §831, which prohibits certain transactions involving nuclear materials. It would modify current law to deal with the risk stemming from the destruction of certain nuclear weapons that were once in the arsenal of the former Soviet Union and the lessening of security controls over peaceful nuclear materials in the former Soviet Union.

Among its provisions, Section 501 expands existing law to include nuclear byproduct materials. These materials, which are less than weapons grade, are nevertheless dangerous to human life or the environment, especially if utilized together with other explosives. The Section would also expand the jurisdictional bases to reach situations in which a United States national is the victim of an offense or in which a United States corporation is the victim or perpetrator of an offense. Finally, the legislation would cover those situations in which a threat to do some form of prohibited activity is directed at the United States Government.

TITLE VI—PROCEDURAL AND TECHNICAL CORRECTIONS AND IMPROVEMENTS

This title contains ten relatively technical, but highly important, provisions that would facilitate investigations and prosecutions of terrorist crimes. Included are provisions that would add terrorism offenses to the Racketeer Influenced Corrupt Organizations (RICO) and Money Laundering statutes; add terrorism offenses to the list of statutes which are subject to court authorized electronic surveillance; increase the penalties for conspiracies to commit certain terrorist offenses; and enhance the existing weapons of mass destruction statute by, *e.g.,* covering threatened uses of such weapons against the United States or U.S. nationals.

One provision of Title VI merits specific explanation so as to avoid misunderstanding concerning the Administration's intentions. Section 601 would delete an investigative restriction contained within the recently-enacted statute addressing material assistance to overseas terrorists. That restriction provides that an investigation may be initiated or continued only when the facts indicate that the target "knowingly or intentionally engages, has engaged, or is about to engage" in a violation.

That provision has proved to be unworkable. The threshold requirement can rarely, if ever, be met because the existence of knowledge and intent usually can be established only through investigation. Indeed, in the words of a commonly-utilized federal jury instruction, "the intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind." *Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice Instructions,* § 17.07 (1992).

This restriction on investigative activity is also unnecessary. Attorney General Guidelines, which have been in existence for more than 15 years, appropriately limit the FBI's initiation of criminal investigations.

TITLE VII—ANTITERRORISM ASSISTANCE

Sections 701–702 amend existing law relating to the State Department's Antiterrorism Assistance Program to enhance the ability of the United States to provide instruction overseas to officials of other governments to assist them in addressing the problem of terrorism.

CONCLUSION

In conclusion, I want to thank the Chairman for this prompt hearing. The Department of Justice is prepared to work with the Committee and its staff to address any areas of concern. I urge the Committee to move expeditiously toward enactment of this essential legislation.

The following is a summary of the legislative proposals contained in the attached draft bill.

TITLE I -- SUBSTANTIVE CRIMINAL LAW ENHANCEMENTS

Section 101 - Acts of Terrorism Transcending National Boundaries

Section 101 provides a more certain and comprehensive basis for the Federal Government to respond to future acts of international terrorism carried out within the United States. It would create a new federal crime relating to acts of international terrorism which involve any of the following types of conduct: murder, kidnapping, maiming, assault resulting in serious bodily injury, assault with a dangerous weapon, or destroying or damaging any structure, conveyance, or other real or personal property within the United States. The new statute would allow the government to incorporate for purposes of a federal prosecution any applicable federal or state criminal statute violated by the terrorist act, so long as the prosecutor can establish any one of a variety of jurisdictional bases delineated in the legislation. The jurisdictional bases have been drawn from existing federal criminal statutes and, therefore, do not represent a significant broadening of established concepts of federal jurisdiction.

Section 101 would also amend existing law relating to pretrial detention to provide, for persons charged with this offense, a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of the community and the appearance of the defendant. This would serve to facilitate detention, pending trial, of persons charged with violations of this anti-terrorism statute. Similarly, it amends the federal electronic surveillance statute to facilitate the use of court-authorized roving electronic surveillance against persons suspected of having violated the new statute. Finally, it amends a statute of limitations provision, enacted in September 1994, which created a longer, eight year, statute of limitations for non-capital violations of certain designated terrorism statutes. The amendment would include this new anti-terrorism offense among those covered by the eight year statute of limitations provision and would clarify the language of that provision to ensure that it is not construed as applying to terrorism offenses which are subject to a capital offense penalty. The latter category of offenses is not subject to any statute of limitations.

Section 102 - Conspiracy to Harm People or Property Overseas

Section 102 is designed to complement the proposals in section 101, concerning terrorist acts within the United States transcending national boundaries, and section 301, prohibiting terrorist fund raising. Just as it appears appropriate to provide a better basis for addressing crimes carried out within the United States by international terrorists, so also United States authorities should have an effective basis to reach conspiracies undertaken in part within the United States for the purpose of carrying out terrorist acts in foreign countries. Further, it would be anomalous to prohibit fund raising in the United States in support of overseas terrorism but not to address actual conspiracies undertaken within the United States to commit acts of terrorism overseas. The revised statute is contained within the existing provisions of Chapter 45 of Title 18, relating to foreign relations, thereby rendering it inapplicable to appropriately sanctioned actions of the federal government.

Section 103 - Clarification and Extension of Criminal Jurisdiction Over Certain Terrorism Offenses Overseas

Extraterritorial jurisdiction in terrorism statutes has been enacted piecemeal from 1974 to the present. As a result, the statutes contain a variety of different jurisdictional bases. Some statutes make their prohibited terrorist activity a federal offense only if the offender is later found in the United States. There is no reason under either the Constitution or principles of international law why that jurisdiction cannot include situations in which the victim or perpetrator is a national of the United States. Indeed, some existing extraterritorial statutes already include that jurisdictional base, e.g., hostage taking (18 U.S.C. § 1203).

Section 103 amends terrorism statutes which are deficient in this regard to provide jurisdiction wherever the victim or perpetrator is a national of the United States. The amendment would relate to the following statutes: 18 U.S.C. § 32(b) (aircraft sabotage); 18 U.S.C. § 37(b) (violence at international airports); 18 U.S.C. §§ 112, 878, 1116, and 1201 (crimes against internationally protected persons); 18 U.S.C. § 178 (biological weapons); and 49 U.S.C. 46502(b) (aircraft piracy outside the special aircraft jurisdiction of the United States).

Although this section is highly technical, it is of substantial strategic importance. If jurisdiction does not vest until the offender is found in the United States, the government is not in a position to obtain an indictment. This places in doubt the government's ability to stop the running of the statute of limitations applicable to non-capital terrorism offenses. More importantly, the United States is not in the position to

pursue an extradition request because no clear basis exists for obtaining the judicial process to support such a request.

TITLE II -- IMMIGRATION LAW IMPROVEMENTS

Section 201 - Alien Terrorist Removal Procedures

Section 201 embodies a comprehensive plan to create a special court made up of five United States district court judges appointed by the Chief Justice of the United States. That court would be available to handle deportation actions relating to any alien who "has engaged, is engaged, or at any time after entry engages in any terrorist activity," as defined by the Immigration and Nationality Act, if the government can establish that adherence to normal INS deportation procedures would pose a risk to national security. In cases handled before the special court, the assigned judge would have broad latitude to protect classified information and the government could appeal adverse decisions concerning the handling of national security information to the United States Court of Appeals for the District of Columbia Circuit.

Section 202 - Changes to the Immigration and Nationality Act to Facilitate Removal of Alien Terrorists

Section 202 amends the Immigration and Nationality Act to facilitate the handling of alien terrorists in traditional immigration proceedings, i.e., in instances where the government does not seek to invoke the special procedures contained in section 201. The central aspect of this proposal is to provide that during immigration proceedings undertaken against non-immigrants (i.e., non-resident aliens such as persons who have surreptitiously entered the U.S. or overstayed their visas), the alien would have no right of access to any classified information. The provisions of section 202 would not be applicable to resident aliens.

Section 203 - Access to Certain Confidential INS Files Through Court Order

Certain INS files are not available to law enforcement in the course of a criminal investigation without the consent of the alien. For example, files relating to the legalization of aliens who were previously in an illegal status are not available to law enforcement. The proposed legislation would authorize the issuance of a federal court order granting criminal investigators access to such files where a showing can be made that the activity under investigation poses an immediate risk to life or to national security or would be prosecutable as an aggravated felony. This would serve to resolve a problem which has arisen

during two major terrorism investigations conducted in the past two years.

TITLE III -- CONTROLS OVER TERRORIST FUND RAISING

Section 301 - Terrorist Fund Raising Prohibited

Section 301 authorizes the government to regulate or prohibit any person or organization within the United States from raising or providing funds for use by any foreign organization which the President has declared to be engaged in terrorist activities. Such declaration would be based on a Presidential finding that the organization (1) engages in terrorist activity as defined in the Immigration and Nationality Act, and (2) its terrorist activities threaten the national security, foreign policy, or economy of the United States.

The legislation provides a licensing mechanism pursuant to which funds can be provided to a designated organization based on a showing that the money will be used exclusively for religious, charitable, literary, or educational purposes. It includes both administrative and judicial enforcement procedures, as well as a Classified Information Procedures Act (CIPA) type provision applicable to civil litigation undertaken by the government under both this statute and the International Emergency Economic Powers Act (IEEPA).

TITLE IV -- CONVENTION ON THE MARKING OF PLASTIC EXPLOSIVES

Sections 401-407 - Implementing Legislation to the Plastic Explosives Convention

Title IV implements the Convention on the Marking of Plastic Explosives for Purposes of Detection. The Convention is an international response, in the aftermath of the terrorist bombings of Pan Am Flight 103 in December 1988 and UTA Flight 772 in September 1989, to improve the detectability of plastic explosives so that terrorist disasters can be avoided.

TITLE V -- NUCLEAR MATERIALS

Section 501 - Expansion of Nuclear Materials Prohibition

Section 501 expands the scope and jurisdictional bases under 18 U.S.C. § 831 (prohibited transactions involving nuclear materials). It would modify current law to deal with the risk stemming from the destruction of certain nuclear weapons that were once in the arsenal of the former Soviet Union and the

lessening of security controls over peaceful nuclear materials in the former Soviet Union.

Among other things, the section is expanded to include nuclear byproduct materials. These materials, which are less than weapons grade, are nevertheless dangerous to human life and/or the environment, especially if placed with other explosives to create a "dirty bomb." It would also expand the jurisdictional bases to reach situations where a United States national is the victim of an offense and where a United States corporation is the victim or perpetrator of an offense. The legislation would cover those situations where a threat to do some form of prohibited activity is directed at the United States Government.

TITLE VI -- PROCEDURAL AND TECHNICAL CORRECTIONS AND IMPROVEMENTS

Section 601 - Correction to Material Support Provision

Section 601 deletes subsection (c) of the material support statute enacted as part of the 1994 Crime Bill. That subsection imposes an unprecedented and impractical burden on law enforcement concerning the initiation and continuation of investigations under this statute. Specifically, subsection (c) provides that the government may not initiate or continue an investigation under this statute unless the existing facts reasonably indicate that the target knowingly and intentionally has engaged, is engaged, or will engage in a violation of federal criminal law.

The section deletes subsection (c) retroactive to September 13, 1994, the date that the 1994 Crime Bill was signed into law. Since the provision is procedural in nature, its retroactive deletion does not pose a constitutional problem. The section therefore precludes a defendant from availing himself of subsection (c) in the event that the conduct charged in a subsequent indictment arose between September 13, 1994, and the enactment of section 601.

Section 102, it should be noted, broadens the scope of the material support statute by incorporating, as one of the predicate offenses, the proposed statute relating to conspiracies within the United States to commit terrorist acts abroad.

Section 602 - Expansion of Weapons of Mass Destruction Statute

The current weapons of mass destruction statute was enacted as part of the 1994 Crime Bill. Section 602 extends its coverage to instances in which there is a threatened use of a weapon of mass destruction against a national of the United States or against any property owned, leased, or used by the United States.

Section 603 - Addition of Terrorist Offenses to the RICO Statute

The basic extraterritorial terrorism offenses are not included as predicate offenses in the Racketeer Influenced and Corrupt Organizations (RICO) statute. Yet, when an organization commits a series of terrorist acts, a RICO theory of prosecution may be the optimal means of proceeding. Accordingly, this proposed legislation would add extraterritorial terrorism offenses as predicate offenses for a RICO prosecution.

Section 604 - Addition of Terrorist Offenses to the Money Laundering Statute

Terrorist acts are often carried out on the basis of relatively little funding. For example, the investigation of the World Trade Center bombing suggests that the cost of constructing and placing the bomb was minimal. However, some terrorist groups engage in substantial raising and manipulation of funds. Accordingly, section 604 makes terrorist offenses predicates under the money laundering statute.

Section 605 - Authorization for Interception of Communications in Certain Terrorist Related Offenses

Although the bulk of the existing terrorism offenses focus on acts of international terrorism conducted outside the United States, there is an increasing indication that many foreign terrorists have ties within the United States. Section 605 augments the ability of law enforcement to respond effectively if, in the course of a criminal terrorism investigation, it is learned that wire or oral communications are taking place in whole or in part within the United States relating to such activity.

Section 606 - Clarification of Maritime Violence Jurisdiction

In considering legislation proposals which were incorporated into the 1994 Crime Bill, Congress made clarifications to the jurisdictional provisions of the Violence Against Maritime Fixed Platforms legislation and the Violence at International Airports legislation. However, no equivalent change was made to the Maritime Violence legislation. Section 606 accomplishes that change, thereby clarifying the jurisdictional scope of that statute.

Section 607 - Expansion of Federal Jurisdiction over Bomb Threats

The current federal statute relating to bomb threats covers only those threats communicated through use of the mail, telephone, telegraph, or other instrument of commerce. 18 U.S.C. § 844(e). Yet, federal authorities often respond to bomb threats, however communicated, where the commission of the

threatened bombing would impact on a particularly significant aspect of federal jurisdiction. Where federal jurisdiction would exist in the event the bombing is carried out, there is no legal impediment to providing federal jurisdiction over a threat to commit such a bombing. Accordingly, section 607 extends federal jurisdiction to cover all threats pertaining to bombings of property owned, leased, or used by the United States (18 U.S.C. § 844(f)) and buildings, vehicles, or property used in interstate or foreign commerce or in activities affecting such commerce (18 U.S.C. § 844(i)).

Section 608 - Increased Penalty for Explosives Conspiracies

Section 608 amends the existing federal criminal statute relating to explosives violations to provide that conspiracies to commit such violations shall be subject to the same penalty, other than the death penalty, which is prescribed for the explosives violation which is the object of the conspiracy.

Section 609 - Amendment to Include Assaults, Kidnappings, Murders, and Threats Against Former Federal Officials on Account of the Performance of Official Duties

It is currently a federal offense to threaten or engage in violent conduct against certain federal officials while such officials are engaged in the performance of official duties or on account of their performance of such duties. There is not, however, presently a provision which makes it a crime to make threats or engage in violence against former federal officials. Federal investigators, prosecutors, and judges who are involved in terrorism cases are often the subject of death threats. The danger posed to the safety of such officials does not necessarily abate when they leave government service. Accordingly, section 609 amends 18 U.S.C. § 115 to make it a federal offense to assault, kidnap, murder, or threaten a former federal official where such conduct is motivated by the official's prior performance of official duties.

Section 610 - Addition of Conspiracy to Terrorism Offenses

Section 610 adds "conspiracy" to several offenses likely to be committed by terrorists. In the absence of a conspiracy provision as part of the statute defining the substantive offense, the only penalty for a conspiracy which does not result in a completed offense is the five year penalty under the general conspiracy statute, 18 U.S.C. § 371. This is often an insufficient penalty. Section 610 increases the available penalties to those prescribed for the substantive offense.

TITLE VII - ANTITERRORISM ASSISTANCE

Section 701-702 - Antiterrorism Assistance Amendments

Title VII makes certain amendments to the Department of State's Antiterrorism Assistance (ATA) program by permitting more courses to be taught overseas and allowing instructors to teach overseas for up to 180 days. It also permits some personnel expenses for administering the ATA program to be met through the actual foreign aid appropriation.

Mr. HYDE. Thank you, Ms. Gorelick.
Director Freeh.

STATEMENT OF LOUIS J. FREEH, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. FREEH. Thank you, Mr. Chairman. Good morning, and it's a pleasure, as always, to be before this very distinguished committee.

Terrorism, as we have heard this morning in different institutional as well as personal perspectives, has no boundaries. We merely need to look at the news of the last couple of months, which I need not recount, for various instances of terrorism around the world, and certainly a trend which increasingly threatens the people as well as the institutions of this great country.

We're deeply concerned about terrorism in the United States. The face and the hand of terrorism are changing dramatically as we enter the last half of the last decade before the 21st century. Consequently, the hands of the FBI and counterterrorism must be given new tools and resources to combat a changing and more dangerous phenomena.

In April 1982, by Executive order, the FBI was first given the lead responsibility for combating terrorism inside the United States. The mission is fairly simple, but complex to perform.

First, and most important, to prevent acts of terrorism before they occur.

Second, when they do occur, to mount an immediate, overwhelming, and persistent investigative and prosecutive effort.

Terrorism is best prevented by acquiring, through legal means, intelligence information which serves to prevent violent attacks before they occur and to protect U.S. citizens as well as people around the world. Intelligence, to be used in that endeavor, must be timely, reliable, and amenable to taking action regarding its contents and threat.

When terrorism does strike, our mission is to mount whatever it takes to solve the crime and apprehend the individuals responsible for those acts. The swift and effective investigation of terrorism acts and the persistent efforts to track down fugitives sends a powerful message to terrorists that can, and does in my view, deter activity in particular venues, including here in the United States.

We all grimly recall the bombing of the Pan Am Flight 103. On November 14, 1991, the Department of Justice obtained indictments against the two Libyan intelligence operatives now charged as responsible for that bombing. Their names are Fhimah and Megrahi. On March 23, the Attorney General added these names to the FBI's 10 most wanted fugitives program. On the same day, the State Department offered up to $4 million in reward money for information leading to their arrest. These steps, as taken by the Attorney General and the President, serve to send the unmistakable message that crime such as this, no matter how new or old, will receive our continuous and persistent efforts to solve.

The potential terrorist threat to the U.S. national security, of course, depends on many factors. They include: developments in foreign policy by other nations around the world; an increase in state support of terrorism, which we see from key countries, and changes occurring in the world order. The most prominent inter-

national terrorist threat has been the emergence of international extremist groups that use crime and violence to further their political, social, and economic objectives. These groups operate in a decentralized fashion, unlike many state-sponsored groups, which tend to be more structured and hierarchical. The members move between different groups, factions, leaders, and objectives, based on evolving international or local conditions. Americans in any country are vulnerable.

We do not, by any means, identify or even single out any particular group. We note in passing, for instance, that there are thousands of decent Arab-Americans within the United States, millions of Arabs around the world, decent and law-abiding. Nothing in these remarks or from any of the witnesses you'll hear today identifies any particular group as opposed to another.

As you may know, the first FBI arrest for violation of the Biological Weapons Anti-Terrorism Act of 1989, a fairly new statute, occurred in Minneapolis on August 4, 1994. Two men associated with a domestic terrorism group called the Patriots Council had manufactured ricin, a highly toxic substance which they were planning to use against law enforcement personnel. The two men were convicted on February 28 of this year. Ricin is a highly effective neurotoxin synthesized from castor beans. Sophisticated technology is not required, neither was it required for the sarin used in Japan, nor for the urea nitrate used in the World Trade Center. Many of these deadly components can and are commercially available in grocery and department stores.

This Congress has played a vital role in countering terrorism by providing the FBI with legal tools we utilize in fulfilling our counterterrorism responsibilities. In 1968, for example, Congress passed legislation giving law enforcement court-authorized wiretap authority. It has become a vital and crucial technique in our fight against terrorism.

Last year Congress passed legislation to ensure continuing access to criminal and terrorist conversations in the face of the incredible advance of telecommunications technology known as digital telephony. Had Congress not done so, we would have lost the ability to access criminal and terrorist conversations pursuant to court order. All that remains now is the issue of funding, and we're confident that the administration will soon prepare legislation implementing the funding for this vital provision.

An even more difficult problem with respect to counterterrorism fighting has to do with encryption. Powerful drug cartels, as well as terrorist organizations, are aware of the hiding and concealing power of strong encryption, and are making headway to develop that technology to defeat counterterrorism investigations. This will be an increasing technology problem which we know the Congress is eager to take up.

To look again at past actions with respect to our jurisdiction, the Comprehensive Crime Control Act of 1984 and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 gave the FBI significant extraterritorial jurisdiction with respect to the fight against terrorism. As the Deputy Attorney General noted, we have paid more attention to our extraterritorial jurisdiction than to the tools needed to fight terrorism here within the United States.

One other method by which we advance counterterrorism investigations is the presence of FBI "legats" around the world, 23 now in place in various embassies, with the ability to work with police authorities in those countries to prevent, as well as to detect, terrorism activity aimed at the United States and its people.

The FBI's mission to prevent and investigate acts of terrorism is impeded now, in my view, by two significant obstacles. One, there is no Federal law against acts of terrorism committed in the United States. Two, current immigration laws and procedures are not effective in addressing alien terrorists when they are discovered here in the United States.

We need additional tools to assist the law enforcement fight against terrorism. We need to improve current immigration law to stop terrorists from entering the country, and I'm proud that the Attorney General has taken strong leadership in this important regard. We need to prohibit terrorist fundraising, the lifeblood of any terrorist organization. We need to fully implement regulations which mandate the addition of detection agents into all plastic explosives either manufactured in or imported into the United States.

More needs to be done. For example, on April 24, the Attorney General will dedicate a law enforcement training academy in Budapest. One of the critical aspects of this training is its counterterrorism implications. In all of the countries that will take advantage of this academy we have seen, since May 1994, 39 major, separate incidents of nuclear material being smuggled and transacted around Central and Eastern Europe. Adding up all of the different 39 incidents, surely enough enriched weapons grade material is available to construct a nuclear weapon.

The current scope of Federal criminal law does not reach some very possible and truly frightening activity which could be the basis of a terrorist organization's campaign to effect the operation of this Government and the safety and confidence of the American people. Let me give you just one hypothetical example.

Suppose for a moment that a terrorist organization in this country put up posters in any city or town threatening to kill or injure non-Federal officials, leaders of private interest groups, and/or members of the general public. The FBI would be hard-pressed at this current time to articulate a legal basis for conducting an investigation into that activity.

Taking it to the second step beyond that, if—acting within a single state where those posters were put up on poles—the terrorist organization entered into a campaign of assassination, killing non-Federal officials, leaders of private interest groups, and members of the general public, this activity, in my view, could easily fall completely outside our criminal jurisdiction. Perhaps more frighteningly, if a terrorist organization, acting within a single state, constructed bombs or incendiary devices with ingredients that had not crossed State lines and proceeded to bomb or burn non-Government-owned buildings, abandoned buildings, or many private residences, the FBI would not now have the authority to investigate.

These examples are merely illustrative of the serious gaps in the Federal criminal laws which can be used to combat terrorism. We need more tools to meet the challenges of terrorism, particularly into the 21st century.

Let me give you another specific example with respect to the difficulty which the law now provides when it comes to acting against alien terrorists who are here in the United States. We'll call this the "Y" case. In November 1989, "Y" and his wife received a U.S. entry visa, J–1 and J–2, exchange visitor and spouse provisions, to pursue their education here in the United States. "Y" began attending classes at a major university and continues to do so to this present date. Investigation indicates that during the entire time that "Y" has resided in the United States he has been an active member of an internationally-known terrorist organization with knowledge and participation in its terrorism activities. "Y" has been involved in the organization as a leader in financial transactions, communications among other major leaders, and in administration of the group. "Y" played a major role in the organization. Because "Y" has not violated any of the requirements of his visa status, he cannot be deported by normal circumstances. The FBI cannot provide any of the classified information obtained which would show knowledge and participation in terrorist activity. We could not provide any of that classified information to support deportation because there is no capacity to control its disclosure to either "Y" or the public at large, thereby causing potential irreparable harm to the national security. This immigration problem is not a hypothetical. It is a factual case example.

In conclusion, let me just say that the terrorism threat is everpresent. I want to compliment the chairman and the committee for holding this hearing. I think it is a discussion that needs to continue with great vigor and great speed, because the trends that we see around the world and in the United States are, indeed, frightening, and we want to ensure that the men and women who are out there putting their lives on the line with respect to fighting terrorism have the tools to protect the people that we're sworn to take care of.

Thank you very much.

[The prepared statement of Mr. Freeh follows:]

PREPARED STATEMENT OF LOUIS J. FREEH, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Good morning, Mr. Chairman and members of the committee. I am pleased to have this opportunity to discuss the current threat of terrorism to the United States and its citizens, and to describe the FBI's role in combatting terrorism.

This is a virtually-important matter. The threat from terrorism is very real, as grim statistics show.

Terrorism knows no boundaries. March 20, 1995: A poison gas attack occurred in the subway system of Tokyo, killing 11 and injuring thousands, including two Americans. March 8, 1995: Two Americans were murdered in a hail of gunfire on the streets of Karachi. February 26, 1993: Six people were killed and over 1,000 injured when a twelve hundred pound bomb ripped through the World Trade Center in New York City.

Terrorism has become a deadly menace that seems able to strike nearly anywhere in the world—at any time.

I am deeply concerned about terrorism in the United States. The face and the hand of terrorism are changing dramatically as we enter the last half of the last decade before the 21st century. Consequently, the hands of the FBI and counterterrorism must be given new tools and resources to fight its serpent-like presence around the world. There is no higher priority in the FBI than counterterrorism.

At the same time, these tools must be used carefully, and must preserve the individual liberties and constitutional rights that are so essential in our democracy.

THE FBI'S COUNTERTERRORISM PROGRAM

As you are aware, the U.S. government fights terrorism in a number of ways, such as: through diplomacy; through economic sanctions; through covert operations; through military intervention; and through law enforcement action.

The FBI's role in the government's counterterrorism effort is law enforcement.

In April 1982, by executive order, the FBI was given the lead responsibility for combatting terrorism inside the United States. At the same time, the Department of State was given the lead for coordinating the U.S. counterterrorism effort abroad. The FBI's mission is simple: First, and most important, to prevent terrorist acts before they occur; and second, should an act of terrorism occur, to mount an immediate and overwhelming investigative response.

Terrorism is best prevented by acquiring, through legal means, intelligence information relating to groups and individuals whose violent intentions threaten U.S. citizens or interests.

Once acquired, intelligence must be carefully analyzed, rapidly disseminated, and effectively used to prevent acts of terrorism before they occur. To be useful, however, that intelligence, must be timely, reliable and amenable to taking action regarding its contents.

But another issue looms on the horizon that ultimately could be devastating to law enforcement's ability to prevent terrorism. Last year—with the tremendous support of the President, the Attorney General, and Congress—digital telephony legislation was enacted that ensures the government's continuing ability to wiretap with court approval. Now the issue of encryption is upon us. Unless it is resolved soon, terrorists' conversations over the telephone and other communication devices will become indecipherable by law enforcement. As much as any issue, this jeopardizes the public safety and national security of this country. I will talk about this important prevention matter later in my statement.

When terrorism does strike, our mission is to mount whatever it takes to solve the crime and apprehend the individual terrorists or terrorist groups. The swift and effective investigation of terrorist acts, culminating in arrests, convictions, and incarcerations, sends a powerful message to terrorists that can help deter future acts of terrorism. It must always be clear that we will pursue terrorists worldwide to bring them to justice for acts of terrorism against the united states and our people—regardless of where the acts occur. This is precisely why the FBI needs legal attaches overseas in critical embassies as a first line of defense, extraterritorial jurisdiction to fight crime and protect Americans, and police contacts and networks abroad to stop crime from entering America.

As an example, we all grimly recall the bombing of Pan Am Flight 103 in 1988. On November 14, 1991, the Department of Justice obtained indictments against the two Libyan intelligence operatives now charged as responsible for the bombing. Their names are Lamen Khalifa Fhimah and Abdel Basset Ali Al-Megrahi.

Since the bombing, the United Nations has imposed economic sanctions in an attempt to force Libyan Leader Colonel Khadafi to end his sponsorship of terrorism, to accept responsibility for the Pan Am 103 bombing, and to extradite Fhimah and Megrahi to either the United States or the United Kingdom to stand trial.

On March 23, 1995, Fhimah and Megrahi were added to the FBI's ten most wanted fugitives program. On the same day, the State Department offered up to four million dollars in reward money for information leading to their arrests. Such steps can bring results.

For example, accused World Trade Center Bomber Ramzi Ahmed Yousef also was placed on the top ten list and was added to the reward program on July 23, 1993. He was apprehended in Islamabad, Pakistan, on February 7, 1995. The drug enforcement administration, the U.S. Department of State, and other agencies provided valuable assistance in this arrest. Through the top ten program, we put a face on terrorism. It was a factor in his apprehension.

Once a terrorist act occurs, we can never let up until justice is done. To do otherwise only invites more attacks. The face of terrorism is dynamic. Today, acts of terrorism generally are more spectacular, are aimed at causing larger numbers of casualties, and raise higher levels of fear among civilian populations than in the past. Much of what we are seeing today is the result of the many changes around the world which have brought unrest, armed conflict, and political instability. In this climate, there is a great potential for our nation and its citizens to be attacked by violent acts of terrorism.

ASSESSMENT OF THE THREAT

Mr. Chairman, you have expressed a keen interest in the FBI's current assessment of the terrorist threat. The World Trade Center bombing did not unleash addi-

tional acts of terrorism in the United States. But it serves as a constant reminder that the United States is not impervious to terrorism within our borders.

The potential terrorist threat to U.S. national security depends on a number of factors. They include developments in foreign policy by other nations around the world, an increase in state support of terrorism, and changes occurring in the world order. World events can have a significant impact on the terrorist threat inside the United States. Individuals associated with extremist causes and extremist beliefs may decide to engage in terrorist activities. In recent years, we have not witnessed significant state-sponsored terrorist activity in this country. But this could change if countries which sponsor terrorism decide to include terrorism within U.S. borders on their agendas.

The most prominent international terrorist threat has been the emergence of international extremist groups that use crime and violence to further their political, social, and economic objectives.

The FBI believes that this type of international terrorism poses a significant threat to U.S. national security and the security of the American people.

These groups operate in a decentralized fashion, unlike many state-sponsored groups, which tend to be more structured. The members move between different groups, factions, leaders, and objectives based on evolving international or local conditions. Americans in any country are vulnerable.

Ongoing traditional threats and our contingency planning against any acts of nuclear, chemical, or biological terrorism promise a full workload for the FBI for the foreseeable future.

As you may know, the first FBI arrest for violation of the Biological Weapons Anti-Terrorism Act of 1989 occurred in Minneapolis on August 4, 1994. Two men associated with a domestic terrorist group called the Patriots Council had manufactured ricin, a highly-toxic substance, which they were planning to use against law enforcement personnel. The two men were convicted on February 28. Ricin is a highly effective neurotoxin synthesized from castor beans. Sophisticated technology is not required. Neither was it required for the sarin used in Japan, nor for the urea nitrate used in the World Trade Center. Many of these deadly components are commercially available.

Investigative Tools—More Are Needed

Despite threats and deeds, the United States has been effective in making this country a hostile environment for terrorists. The U.S. Congress has played a vital role in countering terrorism by providing the FBI with legal tools we utilize in fulfilling our counterterrorism responsibilities. In 1968, Congress passed legislation giving law enforcement the court-authorized wiretap. It has become a technique crucial to the fight not only against terrorism, but also against drugs, kidnapping and sophisticated white collar crime.

Last year, after careful deliberation, Congress passed legislation to ensure continuing access to criminal conversations in the face of the incredible advance of telecommunications technology known as digital telephony. Had Congress not done so, we would have lost the ability to access criminal conversations pursuant to court order. All that remains on the access issue is funding consistent with the authorization to ensure carrier compliance. I have been advised that the administration will soon be sending legislation to address this funding issue. Of course, this funding is critical to the implementation of the legislation. We're confident it will happen. Too many people worked too hard—including thousands of state and local police chiefs, who do the majority of court-authorized wiretaps in the United States.

However, an even more difficult problem with court-authorized wiretaps looms: powerful encryption that is becoming more commonplace. Drug cartels are already buying sophisticated communications equipment. Unless the issue of encryption is resolved soon, criminal conversations over the telephone and other communications devices will become indecipherable by law enforcement.

As much as any issue, this jeopardizes the public safety and national security of this country. Terrorists, drug cartels, and kidnappers will use telephones and other communications media with impunity knowing that their conversations are immune from our most valued investigative technique.

This is an extremely difficult issue. We are working hard to address adequately the important law enforcement, national security, commercial, and privacy concerns associated with this matter. As we proceed with solving this issue, we will be consulting closely with Congress.

To look again at past actions, Congress enacted the Comprehensive Crime Control Act of 1984 and the Omnibus Diplomatic Security and Anti-Terrorism Act passed in 1986. They resulted in significant expansion of FBI jurisdiction by enabling the

FBI to investigate certain terrorist acts abroad. This has resulted in the FBI investigating 205 terrorist incidents conducted against U.S. targets overseas thus far.

While these laws allow the United States to assert jurisdiction outside of our borders, I strongly emphasize that host country approval and coordination with the U.S. Department of State are prerequisites and essential to the successful application of this jurisdiction. I want to underscore that the FBI's special agents, who work as legal attaches overseas, are overt, declared officers, and that their activities are supported 100 percent and with the knowledge of the ambassador and the host country. These statutes have provided the FBI with a legal mechanism to investigate and, when warranted, seek the prosecution of terrorists who attack Americans and U.S. interests abroad. Thus far, our extraterritorial investigations have had considerable success. We have obtained indictments against individuals who have committed terrorist acts, such as the two Libyan nationals I mentioned earlier. Several other terrorists have been arrested and tried abroad.

This is why the FBI is in Karachi, and that is why we are offering support, as needed, to the Romanian authorities in their investigation of the crash of a Romanian airliner on March 31, 1995, which killed 59 passengers and crew, including three Americans.

The small FBI presence overseas represents a critical first line of defense. Currently, the FBI has 23 legal attaches overseas—FBI agents working hand-in-hand with law enforcement officials from the host nations to address the growing, joint problems of terrorism and other international crimes. Because terrorism takes many forms—bombings, the theft of nuclear material, murders of Americans abroad, and, as we saw two weeks ago, a chemical attack in Japan—the FBI needs more legal attaches in other nations.

The Uranium-235 and the plutonium seizures by the German BKA, the Ukrainians, and the Czech police were all done by police, not intelligence agencies. That's why the FBI needs to be there working with them.

It took nearly 36 hours before FBI agents reached the crime scene in Karachi, Pakistan, last month: that is simply unacceptable. The overseas agents are so important that we have developed plans to station them in many more countries worldwide—and we have found these countries eager to join in the common battle against terrorism.

The FBI's mission to prevent and investigate acts of terrorism is impeded by two significant obstacles: 1) there is no federal law against acts of terrorism committed in the united states; and 2) current immigration laws and procedures are not effective in addressing alien terrorists when they are discovered.

So, we need more weapons to assist U.S. law enforcement in the fight against terrorism. We need to improve current immigration law, to stop terrorists from entering the country. Attorney General Reno has provided strong leadership in this area.

The United States is a generous place where fundraising for humanitarian purposes is always welcome. It also can be a significant source of cash for funding the violence of terrorism. When it is the latter, we need to prohibit terrorist fundraising—the life-blood of a terrorist organization.

We need to fully implement regulations which mandate the addition of detection agents into all plastic explosives either manufactured in or imported into the United States. This will allow us to more quickly identify explosives and the terrorists who use them.

More needs to be done: for example, on April 24, the Attorney General will open the International Law Enforcement Academy in Budapest. Spearheaded by the FBI and with the full support and help of Hungary and many other countries, police officers from all over Eastern and Central Europe will be trained overtly in effective police methods under the rule of law. It will help them—and it will help the United States, too. If we are to be effective in fighting international crime, crimes like drug trafficking and terrorism, we must have a worldwide presence to push the perimeter of defense and prevention as far back from the United States as possible. We must have worldwide cooperation with other countries—cop-to-cop bridges. In Budapest, we'll be working closely with the Department of State, the Department of Treasury, the International Association of Chiefs of Police, and the governments of many other countries.

We need to combat more forcefully the threat of nuclear contamination and proliferation which may result from illegal possession and use of radioactive materials. Law enforcement around the world has been confronted with literally dozens of instances of illegal trafficking of nuclear material. Some of it has been weapons grade. The potential harm is incalculable. In December, 1994, alone, there were two substantial seizures of nuclear material. On the fourteenth of December, Czech authorities seized 2.72 kilograms of highly-enriched Uranium-235. They arrested three individuals, including a nuclear engineer who had been trained in the former Soviet

Union. The very next day, Lithuanian authorities made two arrests and confiscated eight kilograms of uranium, which had been stolen from a nuclear plant.

As I stressed earlier, we need many new tools that will assist the FBI and other law enforcement agencies in our cooperative mission of preventing acts of terrorism before they occur and bringing the perpetrators of terrorist violence to the bar of justice.

Disturbingly, the current scope of federal criminal law does not reach some very possible and truly frightening activity which could be the basis of a terrorist organization's campaign to affect the operation of the government of the United States and the safety and confidence of the American public.

For example, if, acting within a single state, a terrorist organization entered into a campaign of assassination, killing non-Federal officials, leaders of private interest groups and members of the general public, this activity could easily fall entirely outside of Federal criminal jurisdiction.

Similarly, if a terrorist organization put up posters threatening to kill or injure non-Federal officials, leaders of private interest groups and/or members of the general public, the FBI would be hard pressed to articulate a legal basis for its investigation of this activity.

Perhaps most frighteningly, if a terrorist organization acting within a single state constructed bombs or incendiary devices with ingredients that have not crossed state lines and proceeded to bomb or burn non-government owned abandoned buildings, or many private residences, the FBI could not investigate.

These examples are merely illustrative of the serious gaps in the Federal criminal laws which can be used to combat terrorism. The FBI needs more tools to meet the challenges of terrorism.

Let me give you specific case examples of one of our concerns. It involves alien abuse of our immigration system.

This example is what I'll call the "Y" case:

In November of 1989, Y and his wife received a U.S. entry visa (J–1 and J–2, exchange visitor and spouse) to pursue education in the United States. Y began attending classes at a major university and continues to do so to the present date.

Investigation indicates that during the entire time that Y has resided in the U.S., Y has been an active member of an internationally known terrorist organization. Y has been involved in the organization as a leader in financial transactions, communications among other major leaders, and in administration of the group. Y played a major role in the organization.

Because Y has not violated any of the requirements of his visa status, Y cannot be deported by normal procedures. The FBI cannot provide any of the classified information obtained in its investigation of Y to support deportation because there is no capacity to control its disclosure to either Y or the public at large, thereby causing irreparable harm to the national security.

This immigration problem directly ties into the World Trade Center bombing.

As you can see from the example, the problem is real and cannot be ignored. Over the years, we have adapted to various forms of terrorism and dealt with them in an informed and confident manner. Continued success will be accomplished through cooperative efforts with our counterparts in the U.S. intelligence and law enforcement communities and friendly foreign services. Finally, and perhaps most importantly, as always, the FBI relies heavily on the cooperation and support of the American public to fulfill our mission.

Conclusion

In conclusion, let me emphasize that the terrorist threat is ever-present and constantly evolving. Its current evolution in the United States represents the most serious threat from international terrorism we have ever faced. In some ways, it presents a far more dangerous challenge than the cold war era.

The goal of the FBI is to counter this threat with the limited resources we have available. The United States won the cold war against a formidable adversary. We also can win our many battles with terrorists. We need deep resolve.

Through continuing efforts placed on developing effective intelligence and plain hard work, we will strive to continue to detect and prevent terrorist acts from occurring within the United States. We cannot accomplish this alone. It is through the continued cooperation of U.S. Government agencies, local and state authorities, and of course, the American public, that we can be prepared to meet aggressive activity on the part of terrorists and stop it before it happens. We are faced with challenges to the security of our nation but I am confident that the FBI and the U.S. law enforcement community can meet this challenge—if we have the full support of the congress.

Mr. HYDE. Thank you, Director Freeh.
Ambassador Wilcox.

STATEMENT OF PHILIP C. WILCOX, JR., COORDINATOR, COUNTERTERRORISM SECTION, DEPARTMENT OF STATE

Mr. WILCOX. Mr. Chairman and members of the committee, thank you very much for the opportunity to testify today and for the early attention that you're giving to this important bill.

I want to emphasize that countering terrorism is among the most important of the foreign policy priorities of President Clinton's administration, and we have, therefore, worked very closely with the Department of Justice in the drafting of this legislation, which meets a very important need.

My colleagues have surveyed the current terrorist threat in some detail. I fully subscribe to their analyses, but I would like to reinforce several points about the constantly changing and significant dangers that terrorism poses to the United States and to our foreign policy interests abroad.

Others have stressed that terrorism has disproportionately targeted American citizens abroad. This is all too true. The bombing of Pan American 103, the taking of hostages in Lebanon, the murder of Colonel Higgins, the killing of our Foreign Service colleagues in Karachi recently, and the recently discovered plot to bomb American airliners in Asia, which the Philippine police uncovered, are a reminder that this danger is present today as it has been in the past.

We also are more conscious today that terrorism can strike us here at home and that we need to be ever more vigilant and aggressive in countering the threat here in the United States. It is also a fact that in recent years terrorists are seeking out softer, unprotected civilian targets. As our Government and others have moved to provide security for official installations, terrorists are increasingly attacking unprotected civilians.

Terrorists are also moving to inflict greater casualties because of the fear and disruption they hope to inflict. And while the number of international incidents has declined in recent years—the fact is that terrorists are increasingly striking at mass targets, and casualties are increasing. The World Trade Center bombing, the bombing of the AMIA Jewish culture center in Buenos Aires, the previous bombing of the Israeli Embassy there, and the Tokyo gas incidents are reminders of this new trend.

The Tokyo incident also raises the specter of the use of weapons of mass destruction by terrorists and the growing linkage between terrorism and modern technology. Terrorists are not only increasingly sophisticated in weaponry and explosives, but today they're using computers, cellular telephones, and code language to plan their crimes. Our complex information, medical, financial, and transportation infrastructures, which all of us rely on, are increasingly vulnerable to disruption by terrorists.

There are other reasons why terrorists have become more dangerous and elusive. Religion, and the emotions it arouses, is being increasingly exploited and abused by terrorists. The Tokyo incident also raises the potential that cult groups, like the one suspected of the Tokyo subway attack, whose followers are seized with strange

pathologies, may use terrorism to work their—to pursue their objectives. This pathological phenomenon is an even more difficult one for us to study, diagnose, and guard against.

Moreover, whereas in the past state-sponsored terrorism predominated, today we see a new phenomenon of groups which are not associated with states or traditional organizations who are capable of major acts of terrorism. These are difficult groups to penetrate and to counter, and they represent a new challenge to counterterrorism.

The material and psychic costs which terrorism inflicts on the security and well-being of Americans is very high, but I must add that the danger it poses to our foreign policy interests abroad are equally high. I point out, for example, the severe challenge that terrorists have made to the Middle East peace process. We think this is a rear-guard action and that it will fail, but we do not underestimate the damage that it has done.

For all of these reasons, Mr. Chairman, we need to use all available U.S. resources in an aggressive and dynamic effort to reduce the threat of terrorism. This legislation helps to reinforce our policy in many ways. I'd like to comment on a few aspects of the bill.

First of all, in addition to our diplomatic efforts to work with other governments against the threat of terrorism and the military capability which we have developed and which stands ready for use, if necessary, the United States has relied increasingly on expanding the rule of law as a major tenet in our counterterrorism policy. Terrorists are criminals regardless of what cause they espouse. It is essential that the United States and other nations oppose them with the full weight of the law.

Fortunately, many other governments around the world, with the exception of a few who continue to sponsor terrorism, are viewing terrorism today unambiguously as a particularly heinous form of crime which is beyond the pale of civilized behavior. Governments today are far less willing than they were a decade ago to condone terrorism or to regard it as excusable behavior because of the political cause the terrorists espoused—or perhaps in the hope that they would buy protection against terrorism.

Today, more and more governments have accepted the premise which we have long followed: that terrorism is a crime, that there should be no compromises made with terrorism, no political concessions, and no payment of ransom. This bill helps to reinforce this major tenet of American policy by expanding and clarifying Federal jurisdiction over terrorist offenses and conspiracies and using U.S. law in other ways to strengthen our efforts.

I'd like to mention, in particular, title 3, the fundraising section. It's especially important and has provoked a good deal of public discussion. Reducing the flow of funds from American sources to terrorists abroad is a major U.S. policy goal. For many years we have imposed sanctions against states for their support of terrorist activities. Backed by a series of congressional laws, these sanctions have reinforced our diplomatic efforts, against state sponsors. But we still need ways to go after funding from private sources to terrorist groups, especially those who do not rely on state sponsors and who often use front groups or charitable organizations as a channel for funding.

Section 301 of this bill provides the legal framework we need to deal with this problem. I can assure you that the designation of terrorist organizations which the President would make under this section would be done very scrupulously and after very careful consultation among the executive branch.

I also want to stress that this section would not prohibit donations to legitimate charitable organizations abroad, of whom there are many. We simply do not accept the argument made by some that groups which engage in terrorist activities should be immune from actions to halt their fundraising if they also collect funds for charitable purposes. Just as we sanction governments for supporting terrorism, we cannot allow groups to raise funds in this country, some of which will be used for terrorist activities, just because those groups may also carry out charitable works.

By strengthening our laws against financial support from private American sources to terrorist groups, we will give new impetus to diplomatic efforts which we have been making for some time to discourage similar fundraising in other countries. The majority of funds, indeed, come from other countries. But we will provide an example to other nations to strengthen their laws, as we hope to strengthen ours in this effort, if this section is adopted.

Mr. Chairman, since terrorists operate in the shadows and they are increasingly sophisticated in concealing their activities, secret intelligence is the life blood of our counterterrorism effort. We and our friends abroad, with whom we share intelligence extensively, rely heavily on protected sources of information to alert us to potential terrorist attacks, to deter against them, and to arrest and convict terrorists. This is why the Department of State strongly supports the proposals in section 201 of this bill concerning the protection of intelligence information when it is necessary to use that information in the deportation of terrorist aliens. This procedure would enable U.S. authorities to protect sensitive intelligence sources and methods, both foreign and domestic, when, as is frequently the case, this intelligence is needed as a basis for a deportation proceeding. The sources would be protected by allowing the information to be summarized after the judge had an opportunity to review the raw intelligence. This proposed judicial review would protect against possible abuse.

I'd also like to commend to the committee title 4 of the bill which would provide the implementing statute for adoption of the convention on plastic explosives.

I might point out to the committee that this is 1 of 11 international treaties and conventions addressing various acts of international terrorism which are in force or coming into force. In contrast, in 1985, there were only five such treaties. The rapid growth of such international treaties and conventions is a positive sign of the willingness of governments around the world to use international law as a weapon against terrorism.

Finally, Mr. Chairman, title 8 of this bill expands the authority of the Department of State in carrying out our program of antiterrorism training. Today, we are limited in the number of courses we can offer abroad and in the duration of those courses. This legislation would give us greater flexibility and enable us to

use the resources of this excellent program, which the Congress has generously supported, more economically.

Mr. Chairman, I'd also like to stress that, as a reflection of the high priority which Secretary Christopher and this administration place on terrorism, I report directly to the Secretary of State, and my office has direct access to the Secretary of State and to his colleagues. There is no plan to alter that structure. We have an aggressive and very successful interagency apparatus with our fellow agencies, and this legislation will strengthen the efforts we are making. We urge its speedy approval.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Wilcox follows:]

PREPARED STATEMENT OF PHILIP C. WILCOX, JR., COORDINATOR, COUNTERTERRORISM SECTION, DEPARTMENT OF STATE

Mr. Chairman, thank you for the opportunity to testify today on behalf of the Administration's Omnibus Counterterrorism Act of 1995, H.R. 896. I will comment on some aspects of international terrorism today and the importance of this legislation in support of U.S. efforts to reduce this threat. The State Department has worked closely with the Department of Justice in the development of this bill.

Terrorism has threatened American interests for decades, but the methods and targets of terrorists are constantly changing and there are significant new dangers. We must therefore continually develop new ways to respond to this menace. This bill meets that need.

Mr. Chairman, combatting international terrorism is a major priority of the Clinton Administration. Our citizens and installations abroad have been disproportionately targeted for many years. The number of terrorist incidents against Americans abroad has declined recently, but the killing of two U.S. officials in Karachi on March 8 and the plot to bomb U.S. airliners in Asia which was discovered and thwarted by the Philippines police in January remind us that this danger remains.

While the overall incidence of international terrorist acts has also declined—there were 321 recorded in 1994, compared to 665 in the peak year of 1987—these statistics are not a reliable index of the threat. The bombing of the World Trade Center in 1993 and the related conspiracy now being tried in New York brought home the reality that Americans are exposed to terrorism here, as well as abroad. Indeed, terrorists have expanded their global reach, and today all nations and continents are vulnerable. Moreover, as governments have improved security for their officials and installations, terrorists are striking more frequently at soft, unprotected civilian targets.

Terrorists also appear to be aiming at mass civilian casualties to increase the fear and disruption they hope to inflict and this far overshadows the decline in nonlethal incidents. The bombing of the World Trade Center in 1993, the attack on the Amia Jewish cultural center in Buenos Aires in 1994, and the chemical attack in Tokyo last month are recent examples. The Tokyo incident was a warning of another new danger—that terrorists in search of mass casualties are willing to use weapons of mass destruction to work their evil.

Modern technology and terrorism are linked by other ways as well. Terrorists are not only increasingly sophisticated in weaponry and explosives, they are using computers, cellular telephones, and code language to plan their crimes. Also, our complex information, transportation, medical and financial infrastructures are increasingly vulnerable to disruption by terrorists.

There are other reasons why terrorists have become more dangerous and elusive. Religion and the emotions it arouses are being exploited increasingly by terrorists today, especially Islamic extremists. Terrorism instigated by cult groups, such as the Japanese organization suspected in the Tokyo gas attacks, is a pathological phenomenon which is even more difficult to anticipate, diagnose and guard against. Also, whereas terrorism sponsored by states and well established groups were the main threat in the past, some of the most dangerous terrorists today, such as the World Trade Center bombers, appear to operate in small cells without state-sponsors or well-established networks. They are therefore more difficult targets to penetrate and counter. These trends and factors indicate that international terrorism today is an increasingly complex and dangerous threat.

The material and psychic cost which terrorism inflicts on the security and well-being of Americans is high. And the danger it poses to our friends abroad and to

our vital foreign policy interests, for example, the success of the Middle East peace process, must not be underestimated.

Mr. Chairman, for all these reasons, we need to use all available U.S. resources in a dynamic and vigilant effort to keep terrorists on the defensive and reduce the threat they pose. This legislation helps reinforce our counterterrorism policy in many ways. I would like to comment, specifically, on several aspects of the bill.

First, this bill supports a major tenet of U.S. policy, strengthening the rule of law as a weapon in the fight against terrorism. Terrorists are criminals, regardless of what cause they espouse, and it is essential that the U.S. and other nations oppose them with the full weight of the law. Fortunately, governments around the world, with the exception of a few who continue to support terrorism, increasingly view terrorism as a particularly heinous form of crime which is beyond the pale of civilized behavior. This contrasts with the former tendency to condone terrorism or to deal leniently with terrorists, out of sympathy for their political cause, or in the hope that they would buy protection against terrorism. Today, more and more governments have accepted a basic premise of U.S. counterterrorism policy: to refuse terrorist blackmail in the form of political concessions or ransom.

Sections 101, 102 and 103 of this bill will strengthen our policy of using law enforcement to combat terrorism by expanding and clarifying Federal jurisdiction over terrorist offenses and conspiracies. This would help us move more quickly in requesting a foreign government to hold suspects for possible rendition to the U.S.

Title III, the fundraising section, is also especially important, since it strengthens our legal means to deny funds from American sources to terrorist groups. This is a major U.S. policy goal. For many years, we have imposed economic sanctions against states which support and sponsor repeated acts of international terrorism. Backed by a series of laws enacted by Congress, these sanctions have reinforced our diplomatic efforts against state sponsors. But we still need better ways to block private funding for terrorist groups, especially those who do not rely on state sponsorship and who often use front groups and charitable organizations as channels for funding.

Section 301 of the bill provides the legal framework we need to deal with the problem. This section authorizes the President to make a determination that a terrorist group's activities threatens the national security, foreign policy or economy of the United States. I can assure you, Mr. Chairman, that such determinations will be made carefully, using a thorough process of interagency review.

I also would like to emphasize that actions under section 301 will not prohibit donations to legitimate charitable organizations abroad. We do not accept the argument made by some that groups which engage in terrorist activities should be immune from actions to halt their fundraising if they also collect funds for charitable purposes. Just as we sanction governments for supporting international terrorism, irrespective of their other policies and activities, we cannot allow groups that raise funds in this country, some of which will be used for terrorist activities, just because these groups may also support charitable works.

There are many, legitimate, non-terrorist, charitable groups in the middle east and elsewhere to which Americans can contribute without being concerned that some of their funds may be directed to terrorist activities. Moreover, section 301 contains a licensing provision to allow contributions to designated groups if they can establish that none of their funds are being used for terrorist activities.

By strengthening our laws against financial support for terrorism from U.S. sources, this legislation will give new impetus to our diplomatic efforts to persuade other governments to curb terrorist fundraising. This is important, since we believe the majority of private funds for terrorism come from other countries.

Protecting Intelligence

Mr. Chairman, since terrorists operate in the shadows, and are increasingly sophisticated in concealing their activities, secret intelligence is the lifeblood of our counterterrorism effort. We and our friends abroad, with whom we share intelligence extensively, rely heavily on protected sources of information to alert us to potential terrorist attacks and to arrest and convict terrorists.

For this reason, the Department of State strongly supports the efforts in section 201 of this bill regarding the protection of intelligence information when necessary in deportation of terrorist aliens. This procedure would enable U.S. authorities to protect vital and sensitive intelligence sources and methods, both foreign and domestic, when, as is frequently the case, such intelligence is a basis for a deportation proceeding. Sources would be protected by allowing the use of summaries of infor-

mation rather than the raw intelligence, and the proposed review by judges would protect against possible abuse.

Mr. Chairman, I also want to stress the Department of State's interest in title IV of the bill, the implementing legislation for the "convention on the marking of plastic explosives for purposes of detection." This convention requires nations which manufacture plastic explosives to oblige manufacturers to include a chemical agent that can be detected by existing machine technology or specially trained dogs.

It is encouraging that this convention is one of ten such treaties and conventions now in force, or coming into force, which strengthen international cooperation against various terrorist activities. This is double the number of such treaties in 1985. The expansion of international law in this way is a positive sign that the majority of states share our view that the rule of law is a principal bulwark against terrorism.

Finally, Mr. Chairman, I want to highlight title VII of the bill, which would strengthen an important tool in our counterterrorism arsenal, the Department of State's anti-terrorism assistance program. The ATA program, which has received strong support from the Congress, has trained over 18,000 officials in 50 countries in the last decade. Section 702 would allow us to teach all our ATA courses in recipient countries if this is more effective and cost efficient. Current law limits to seven the courses that can be offered overseas.

Mr. Chairman, the Department of State believes this legislation meets a need to strengthen our counterterrorism effort in many ways. It is an important adjunct to our diplomatic efforts, and we urge its speedy approval.

Mr. HYDE. Well, thank you, Ambassador. I have several questions, and I will try to move expeditiously.

Ambassador, the administration, as you have just said, ranks international terrorism as a top priority. We're told that that priority is reflected in this bill. Yet, in the last Congress the very same administration tried to eliminate your high-level office and bury terrorism under narcotics and crime in a low-level bureaucratic post. Has that unwise organizational plan now been scrapped or will it be revitalized within the next 2 years?

Mr. WILCOX. Mr. Chairman, the Department has no intention to change the existing structure of an independent office of the Coordinator of Counterterrorism reporting directly to the Department of State.

Mr. HYDE. Good.

Director Freeh, has the Office of Intelligence Policy and Review overruled your request to surveil certain terrorist targets?

Mr. FREEH. No, sir.

Mr. HYDE. That has not happened?

Mr. FREEH. Unless you could be more specific, I don't—I don't know that I could answer, but, no, as far as I know, it's not.

Mr. HYDE. All right. I don't—I don't think it's appropriate to be more specific, but that was something that I had heard that concerned me. If you say it didn't happen——

Mr. FREEH. No, we have recently, the Attorney General and the Deputy and myself, discussed some changes, clarifying our mutual interpretation of the Attorney General's guidelines with respect to investigating terrorism cases to ensure that we're not missing anything. But, other than that, I don't really have any complaints about it.

Mr. HYDE. Good.

Ms. Gorelick, is the Justice Department attending to the problem of aliens who defraud the political asylum system?

Ms. GORELICK. Yes, sir. We have a very aggressive program to attack that problem. As you know, we inherited an enormous backlog of asylum cases, and there is a large number of people trying

to manufacture documents and to defraud our asylum process, and we have an aggressive system to attack that.

Mr. HYDE. At some future time and at your convenience, if you could perhaps communicate with us as to how the dimensions of that problem and how you are coping with it because, frankly, that's a very weak link and we're concerned that that's how people get into the country who ought not to. So we'd appreciate more details. I won't burden you with that now.

Ms. GORELICK. We'd be happy to supply that. This is a problem that began to escalate at the end of the Bush administration and that we have tried to address, and we will provide you some briefing materials on that.

Mr. HYDE. And even if you have some suggestions on changing the law, that would be helpful——

Ms. GORELICK. Certainly.

Mr. HYDE [continuing]. If such exists.

[The information follows:]

The problem of asylum fraud has two aspects. First, persons use fraudulent documentation to board airplanes to gain access to the United States where they make claims for asylum. Second, persons already in the United States file insincere or fabricated asylum applications in order to secure permission to remain and work in the United States until their applications are adjudicated.

The Immigration and Naturalization Service (INS) has substantially reduced the first problem through an aggressive campaign combining the benefits of the Carrier Consultant Program with increased detention space. The Carrier Consultant Program reduces the arrival of improperly documented passengers at United States ports-of-entry by detailing immigration inspectors to overseas airports to train government officials and transportation industry employees who are in a position to screen persons with fraudulent documents before they embark on airplanes for the United States. At the request of the airlines, the INS officers also directly screen questionable documents.

The problem of mala fide arrivals who sought asylum was particularly acute at the John F. Kennedy International Airport in New York. While these arrivals have been reduced by the overseas deterrence efforts, INS also has increased from 100 to 300 beds the detention space available to hold such persons. During the first six months of fiscal year 1993, 3964 aliens arrived at JFK International claiming asylum. By comparison only 1317 asylum seekers arrived in the first six months of fiscal year 1995.

We have vigorously investigated preparers of spurious asylum claims for nearly two years. Several of these investigations have already resulted in criminal indictments and convictions of preparers in Los Angeles, San Francisco, New York, and Arlington, Virginia. Widespread publicity of the arrest of fraudulent asylum preparers in the Spanish-language media in Los Angeles in 1994 resulted in a marked decrease in asylum applications. The INS also intends to pursue civil document fraud charges against those individuals who knowingly prepare false asylum applications.

The number of asylum applications overall has been falling steadily since January 1995, when we implemented new asylum regulations. One reform provided by these regulations was disassociating the filing of asylum applications from the receipt of employment authorization. Asylum applicants are not eligible to apply for employment authorization until 150 days have elapsed from the date of asylum filing or an asylum officer or immigration judge has granted them asylum. This has discouraged individuals from filing frivolous claims and reduced the attraction for corrupt notarios and immigration arrangers to file asylum applications with fraudulent information. The new regulations have also streamlined the process, so INS is current with its interviews of new applicants and is beginning to adjudicate the backlog of applications. The prospect of being promptly placed in deportation proceedings if one is not granted asylum by an asylum officer is a further deterrent to the filing of insincere or fraudulent claims.

These reforms have significantly reduced the potential for abuse of the asylum process. These improvements pose a new challenge for INS, however, because of the increase in the number of deportation orders for persons whose asylum claims are denied and finally adjudicated. The INS lacks both the detention space to hold and the funds necessary to remove persons with outstanding final deportation orders. To

repair this weak link, the Administration has requested a $178 million increase in the INS's budget for detention and removal of deportable aliens. These additional funds are essential to eliminating the potential for terrorists to abuse the asylum process.

Mr. HYDE. What about those aliens who overstay their student visas? We understand and have seen a memo from the Director of the FBI, dated September 26, 1994, having to do with some improvements in the student visa abuses, and we wonder if anything has come about as a result of the Director's memo.

Ms. GORELICK. We have an interagency—internal to the Justice Department—an interagency task force looking at the entire issue of the relationship between what the FBI can do and what the Immigration and Naturalization Service can do with respect to problems of illegal aliens, and particularly in the area of terrorism. And the Director has been quite helpful in participating in that.

The detention and deportation part of the Immigration and Naturalization Service budget has for decades been essentially flat and not adequate to the task of deporting people who overstay their visas. In the 1996 immigration budget, as you know, we have asked for a significant increase in the funding for the Immigration and Naturalization Service for deportation facilities and personnel, designed, in particular, to address the problem that you note.

Mr. HYDE. Thank you.

Lastly, just a general comment, I was distressed by Mrs. Higgins' testimony: passing the buck, not finding anybody to assume the point on getting her husband back, and I don't doubt what she said is true, but, again, there's always the remote possibility that other things intervened; I don't know what they are, but I think all of you and all of us, with your help, ought to wonder what in the world went wrong and what we can do to prevent that from happening, where we can go to say somebody's responsible for coordinating an effort to recover this person as best we can and punish people who do that sort of thing. I have a feeling Israel would do it that way, and I'm embarrassed that we didn't do it that way. I know considerations from the State Department are more diplomatic. They have a lawyer's point of view, and I understand; I'm a lawyer; everything's negotiable. But nobody seemed to negotiate to get Colonel Higgins back, and the military would want to go in and bomb them back to the Stone Age, but somebody's got to—somebody should have done something, and nothing was done, apparently—apparently. So that's kind of an embarrassment.

Did you want to say something? I'm not fingering you to say anything, but you're welcome to, if you will.

Mr. WILCOX. Mr. Chairman, there is no more important objective of this administration, and I believe past administrations, in protecting the lives of Americans abroad and in bringing those who do violence against Americans to justice. This remains our policy. There have been some 27 acts of violence and terrorism against American citizens in Lebanon and many others around the world which remain unresolved. We're absolutely committed to keeping these cases open and to pursuing them aggressively, doing everything we can to bring those criminals to justice.

At the time of the loss of Colonel Higgins, we did aggressively try to obtain help and to bring pressure to bear through bilateral

U.N. channels and to ask other governments to intervene. We failed, and that deeply saddens me, but we have not abandoned the effort with respect to Colonel Higgins or all of those other American victims of terrorism.

Mr. HYDE. Thank you.

We have a vote, but Mr. Conyers has some questions he would like to ask prior to our recessing for the vote. Mr. Conyers.

Mr. CONYERS. Thank you.

To the representative from the Attorney General's Office, Ms. Gorelick, you described in your testimony the prosecution of the World Trade Center bombing, a prosecution which I applaud, and it proceeded swiftly under existing Federal and State law. What did we learn from that case that tells us that our Federal and State criminal laws are deficient in prosecuting terrorism now? In other words, is there a need for this legislation?

Ms. GORELICK. Let me say that we have looked at a number of cases and found that we either have no jurisdiction or questionable jurisdiction, and that is what brings us to propose this legislation. I'd like Director Freeh to address, to the extent that he is able to, the examples of cases that we have had that we feel are specifically addressed by this legislation.

Mr. HYDE. If I could intervene, we do have a vote on, and the questions that Mr. Conyers has to ask are not easily answered, nor briefly answered, and I don't want to curtail the fullness of your response. On the other hand, we are in a position where we have a bill on the floor we have to deal with, and let me ask you—and this is an imposition—if we recessed until 1:30, could you eat lunch and come back? I know what a burden that is. I don't know any other way to do it.

Ms. GORELICK. Mr. Chairman, you're the chairman; this is our oversight committee, and we'll be here.

[Laughter.]

Mr. HYDE. Oh, that's wonderful. Some of you are nodding more enthusiastically than others, but that's great.

Mr. SCHUMER. Can we wish them enjoyment of their luncheon?

Mr. HYDE. The committee will stand—if the gentleman approves——

Mr. CONYERS. That's absolutely fine with me.

Mr. HYDE. The committee will stand in recess until 1:30. Thank you.

[Whereupon, at 12 noon, the committee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

Mr. HYDE. The committee will come to order.

The good news is that I only needed one Member to have a quorum for a hearing, and, luckily and happily, that gentleman has arrived.

I want to take this opportunity to thank you for the considerable imposition of keeping you around for that extra hour and a half, but we had important legislation and we were not responsible for its scheduling. These hearings have been scheduled some time in advance. So trying to juggle those two balls in the air resulted in a serious imposition on you, and we're really grateful for your pa-

tience, and I can't say I pledge it never to happen again, but if we have anything to say about it, it won't happen again. Thank you.

Mr. Conyers was in the process of questioning Ms. Gorelick.

Mr. CONYERS. Thank you, Mr. Chairman. I, too, appreciate our witnesses' cooperation in helping in this very complex and very important legislation.

My question to our representative from the Department of Justice was to inquire, what is the problem and why is there a need for this legislation when under the measures that currently exist we've been able to prosecute pretty effectively? And so it seems to me that we've learned a lot from the prosecutions that have flowed from terrorist activities, both in the Federal and State criminal laws, and it hasn't—there hasn't been a case made today in terms of why additional legislation is needed. Can you respond to that, please?

Ms. GORELICK. Yes, sir. Let me try to make that case based upon the very example that you chose, which is the World Trade Center bombing. In general, the purpose of the legislation that we propose is to focus on the real harm here. When someone blows up or tries to blow up the World Trade Center, what we are seeing is not simply a State crime. We are seeing a crime in which there are important Federal interests, and it is not unlike the situation that this Nation faced with regard to racketeering. The underlying crimes that are attacked in the racketeering statute are State crimes. The Federal harm is in the purpose of that criminal activity—in that case, racketeering; in this case, terrorism. If you do not attach a Federal interest to this, you are really left to the serendipity of individual State laws or to the serendipity of the availability of a Federal nexus on some other basis.

So, in this case, it was the serendipity that the Secret Service had an office in the World Trade Center that allowed us to begin an investigation and not have to defer to State authorities. It was the serendipity that an interstate port authority actually owned the World Trade Center that allowed us to have the predicate for the indictment. Now I would doubt that those who planned that bombing knew or understood the difference between a building owned by a port authority and a building owned by a private owner, where we might not have had jurisdiction.

Similarly, it was the serendipity of a purchase of some of the tools used for that terrorist act in a jurisdiction outside of the one where the act occurred. So there was evidence of interstate commerce——

Mr. CONYERS. Excuse me. Is all of this serendipity like a fortuitous circumstance?

Ms. GORELICK. Serendipity means that it could just have well not have happened that way.

Mr. CONYERS. OK. Then, in other words, it was merely accidental that things worked out so that there was prosecution because of the location of our office?

Ms. GORELICK. What I'm saying is one can easily foresee a circumstance where either there would be confusion at the outset, much more than there was here, about whether the Federal Government could investigate or where there could be a situation where we would not be able to prosecute where we should be able

to prosecute, in my view, and certainly consistent with the Constitution.

Mr. CONYERS. Well, can we stay in touch about this? I haven't begun my research yet, but serendipity is a sort of nonlegal way of—I've never seen this much law created as a result of prosecutions that we agree worked very effectively, but you say that it may not have worked. We're up to 108 pages—111, to be sure. And we're treading on the Constitution here. If everybody that's assured me that the Constitution is not being harmed in this measure is going to stay with us, I think we're going to show, be able to show, that we've got some very serious problems in that way. I want to tell you that serendipity doesn't make me feel that we ought to move forward here just in case we don't have the kind of fortuitous circumstances that you've referred to.

I think that our Federal and State criminal laws are not deficient in prosecuting terrorism and I think that we ought to be very careful in terms of how much more law we add because of a concern of specific incidents. Now I'm as horrified as anybody else about the terrorist possibilities that are occurring, but at the same time we're bringing forward some proposals that have never existed in American law before. In other words, we're saying that there is a new problem here that we've got to get on top of in advance of anything else happening because so far we've done everything pretty well.

Now let's look for a moment at the evidence problem. When it comes to trying spies under the Classified Information Procedures Act, defendants have rights to summaries of evidence, even if they may be classified, if they're going to be used against them. Sometimes they even have the right to have all of the information, classified or not, be introduced into evidence, or the case can be dismissed. That's part of our constitutional provision. It's the right to be confronted by one's accusers.

Are you disturbed, as I am, about the provisions of allowing information that a defendant will not even know what it is or where it came from being introduced into the American trial system?

Ms. GORELICK. The provisions with respect to deportation, No. 1, do not affect criminal defendants; they affect aliens who have an interest, of course, and rights to due process with regard to potential deportation, but it is not a criminal proceeding.

Mr. CONYERS. True.

Ms. GORELICK. The procedures that we have proposed for the protection of classified information are taken directly from the Classified Information Procedures Act, and they are similar in every way to the procedures that we give criminal defendants in our courts when they are facing criminal sanctions. And we have looked at this issue very carefully and are comfortable that it is consistent with the Constitution and it is consistent with a statute that is completely analogous.

I must say, as well, that you do not get to the point at all where the person does not receive a summary until very, very far down the line. There first needs to be an application that shows that the alien meets the definition of an alien terrorist and that adherence to the normal deportation procedures would pose a risk to national security, and then the judge only invokes the special procedure—this is an article 3 judge, a Federal judge, not an immigration

judge, not someone working for the Department of Justice—if there is probable cause to support those two criteria.

Mr. CONYERS. Well, are you saying that in these deportation proceedings that are civil that an individual has the right to be confronted with the evidence that is used against him, and that is not being restricted under H.R. 896?

Ms. GORELICK. The person has a right to notice of the basis of the proceeding. The person has the right to all of the evidence unless the evidence is classified, and if the evidence is classified, a person has the right to a summary, except in two very, very extraordinary circumstances, when the court finds that there would be a serious risk of death or bodily injury or risk to the national security in the provision of the summary in the alien's presence——

Mr. CONYERS. Which is different from the Classified Information Procedures Act?

Ms. GORELICK. Well——

Mr. CONYERS. There's where we——

Ms. GORELICK. It's not apt in the Classified Information Procedures Act. The procedures are the same. In other words, in a criminal proceeding where the Classified Information Procedures Act is used, the Government can utilize classified information by providing a summary and has the option, of course, of not providing a summary and dealing with the rest of the proceeding without the summary and without that information, without utilizing it.

Mr. CONYERS. Well, let me move to the third consideration. We've linked humanitarian fundraising and terrorism together here, and I think that this may be a little bit different from our usual procedures. I understand that we allow for exemptions through a licensing process, allowing humanitarian efforts to continue, but I'm concerned about the first amendment encroachment which could come and go under the whims of any particular President. It's not at all clear to me that, by creating a licensing process, we still haven't violated first amendment rights by the arbitrary power that is now going to be vested in the President of the United States in terms of really linking humanitarian fundraising to terrorist groups.

Now if they're using one as a cover for the other, I'm not trying to defend that, but what I am talking about is that, as we know, many of these organizations—the PLO, for example, have hospitals and other organizations. IRA has peace missions. The ANC in South Africa might have been prevented from receiving support for some of their causes, had we had this kind of a proposal that is now before us in the law at that time.

It's a very difficult and sensitive area, and what I'm trying to do is find out the rationale for all of this. I mean, nobody suggested that there have been peace groups or hospitals or fundraising activities that have been used to build bombs or explosives or to do activity that would clearly be prohibited. And so what if this was taken out of the measure; would you then fail to support it or would you think that we're doing a great damage to the issue that you bring to the committee today?

Ms. GORELICK. We believe, sir, that this is a very important part of the legislation for the following reasons: first of all, money is

fungible, and if you support an organization that gives half of its money to charitable purposes and half of its money to terrorist purposes, while it is true that we want to encourage people, and, obviously, permit people, to give money to charitable purposes, I think it's an important policy for this country to have that we will not be a base for the support of terrorist activity. And I thought I heard you say that you do not feel that such organizations should provide, be able to provide, cover for the funding of terrorist activities. That is what we think is happening, and have very good reason to believe it's happening, with the organizations subject to this determination.

And I would suggest that very material to our consideration—and I would believe very material to your consideration—would have to be a classified briefing, which I've already discussed with the chairman, on the basis for the determination, so that you can see that these determinations are not being made willy-nilly. This is a very serious attempt to stop the United States from being used as a base for the support of terrorist activities.

I would like to see if the Director would like to add to that in any way in terms of the example.

Mr. CONYERS. Well, let me just say this: I'm not concerned about whether President Clinton would handle this in a way that I would agree with, but what might have President Reagan done about South Africa and the ANC? Or any future President as far as we're concerned? We're making a pretty strong departure, I think, and I will be willing to join in any classified hearing, and I'm going to be looking at this with much more detail.

But this bill has excited our friends in civil liberties and civil rights organizations across the country. I think somebody ought to tell you that. I mean, we're disturbed. I am disturbed. I want to stop terrorism, but I'm not about to come up here and go through a metal detector and find out that there's a whole lot going on, supposedly, that I didn't know about, and so we've now got to bring 111 pages of new proposals that I think we're going to find, as we get into this, are really treading on first amendment rights and constitutional guarantees, such as the right to confront people. We're giving the executive branch unlimited power to make unilateral designations that I don't see where we're concerned with.

And I would urge that you listen carefully to other testimony. At least we've been able to get people before this committee that will be speaking in detail about it.

But I want to close on this, Mr. Chairman—and you've given me, obviously, far more time than I would have normally had. But I have constituents who have been asking me from Iraq to help them get medical aid and assistance into that country. They're trying to get it to the people who are suffering in that country. They have no brief for Saddam Hussein. And I'm very much afraid, under this provision, they would have to go through a complicated licensing process to be able to create this kind of nonprofit activity, and I might get in trouble writing a $25 check to them because, how do I know—I mean, I'm looking at a piece of letterhead, and taking a grave risk of what's going to be happening. As a matter of fact, most people will say, under this provision, forget it; I'm not going to run into any kind of a terrorism law that's just got passed trying

to help out people who are trying to help medically-indigent people in another country. It has a chilling effect that is very, very troubling to me, as you can tell.

Ms. GORELICK. Let me just say, with regard to the last point that you made, that there is not a basis in the statute for prosecuting someone who writes a $25 check to an organization, not knowing anything about terrorist organizations. The statutory language is fairly clear. You would have to be providing support to an organization knowing, or you reasonably should know, that it has or has plans to commit terrorism activity, which is hijacking, sabotage, seizing or detaining, threatening to kill or injure, et cetera. This is—there has to be a very serious nexus between what you know when you write that check and the activities of a terrorist organization.

Mr. CONYERS. Well, great. OK. Well, then, I'll remember that the next time some women's organization from the Middle East says we're trying to feed kids, and I'll say, well, God, as a Congressman and a member of the Judiciary Committee, how could I say I didn't know that there was a direct nexus, and I'll get my staff to research it out, but what about everybody else in the country that might not be able to do that? That's what I'm concerned about.

Ms. GORELICK. I would simply suggest to you, sir, that someone who does not know that an organization is engaged in terrorist activity when he or she provides material support has no basis for concern about this provision of the statute.

Mr. CONYERS. Well, thank you very much. Let's all stay in touch, and I hope that this classified briefing will occur as soon as possible.

Mr. HYDE. Well, I thank the gentleman, and it is certainly true that the gentleman was given great latitude, but I think it's important because Mr. Conyers asks the tough questions and has a perspective on this that some of us may not have, and I think it's good for the advocates of this bill from the administration to understand the depth and the range of the problems that are ascertained by Mr. Conyers and others.

I don't want to foreclose anybody from asking questions, but this panel has been here a long time, and so I'm going to invoke the burning need rule, and if you have a burning need, we'll assuage that. So I see a couple of——

Mr. GEKAS. Burning fingers here.

Mr. HYDE [continuing]. Burning—yes. The gentleman from Florida.

Mr. MCCOLLUM. Thank you, Mr. Chairman, and I'll try to get my burning needs answered as quickly as possible. I really have three different questions, and I'll be quick with them.

Ambassador Wilcox, we just had some folks killed over in Karachi. We have the Washington Post reporting on March 8 that more than 10,000 Islamic militants have been trained in camps in Pakistan since the Afghan war ended in 1989. We know that Pakistan has a relationship with Iran that's very strong and also with China, and I don't have any desire to get into anything that's classified today, but there are a lot of relationships that are disturbing here, to say the least. Why have we not declared and put Pakistan

on the terrorist state list along with Iran and the few other countries that are listed? I think there are five now. Why is it not?

Mr. WILCOX. Mr. Congressman, we have not designated Pakistan a state sponsor of terrorism because it's the judgment of the Department of State that Pakistan's activities do not qualify as state sponsorship of terrorism. There have been some troubling activities by the Government of Pakistan, which we have raised with them very emphatically, and that dialog continues, but those activities do not, when taken together, represent the—fulfill the criteria for designating Pakistan a state sponsor——

Mr. MCCOLLUM. Well, let me just say, Ambassador Wilcox—and I don't want to spend all my time on it—that it is disturbing to me, and I know to other Members, that the definition is so narrow that it would not encompass this continual training, and if it's not direct, hey, I'm going to go out and plant the bomb and order it, it's condoning it; it's encouraging; it's allowing this to go on. It's having all kinds of connections that many of us are disturbed about, and I think that there needs to at least be a message sent. Quite a number of us in this Congress are concerned that the definition the State Department is applying in this case is too narrow, more narrow than the interpretation I would give.

Ms. Gorelick, I want to ask you a couple of questions. One pertains to the March 25, 1995, New York Times article about the CIA's involvement in Guatemala. In particular, the Justice Department's role is what I want to ask about in connection with the report that a Guatemalan military officer reportedly ordered the assassination of an American citizen, Michael Devine. Now my understanding from the newspaper report—it's in that article and that's all I'm going to quote from here today—is that, and this is a quote, "The Justice Department reviewed the case, but decided Mr. Devine's killing did not fall under a United States antiterrorism law which makes it a Federal crime to kill an American citizen overseas. The law is limited to killings tied to political action, and the Justice Department, apparently, found no political motive for Mr. Devine's death." Are the facts that I just quoted from the Washington Post correct?

Ms. GORELICK. The only part of that that I can confirm at this time is that a referral of a question from the CIA was made to the Department of Justice, and the Department of Justice in that time period determined that there was no jurisdiction to proceed further.

Mr. MCCOLLUM. On the basis that there was no political motive?

Ms. GORELICK. No, that is—that is the part that I cannot confirm, and I expect that our Inspector General inquiry into this matter—that is, the Justice Department involvement in the larger Guatemala issue—will be done shortly and that we will be able to give you a fuller——

Mr. MCCOLLUM. It is reported from recent Senate hearings that there was a 5-month delay involved in this process from the time that the CIA brought this to the attention of the proper authorities in the Justice Department to the time of this ruling, this decision, this determination. Is that true?

Ms. GORELICK. There was a period of approximately 4 months between the inquiry and the response of the Department of Justice, and one of the things that we are looking at is what happened dur-

ing that period in 1991 and 1992, whether the question that was put to us was one of some urgency; what did we know; what we were told; what were the assumptions under which our assignment was being undertaken?

Mr. MCCOLLUM. All right. We are, of course, very interested in pursuing the reason for this delay. It does have relevance, I believe, to this incident.

I want to ask you one technical——

Ms. GORELICK. As am I, sir.

Mr. MCCOLLUM [continuing]. One technical question. In the witness statement of one of the witnesses to appear on the next panel, he says, in the bill that's before us on terrorism, "The term 'terrorism' as used in this bill needs to be further defined and clarified." And he goes on to say, "The bill does not appear to address what is now called 'information warfare.' By 'information warfare,' I mean attempted disruption of the United States communications infrastructure. As we approach the 21st century, our society is particularly vulnerable to attacks on the computer systems controlling operations of air traffic control, for example, or to attack on our telephone networks. Such attacks could originate from inside or outside of our borders."

Is the criticism that this witness has given us in written testimony, as I presume he'll give in a few minutes when that panel comes before us justified on this point? Do you know if, indeed, the bill covers——

Mr. HYDE. The gentleman's time has expired, if the gentleman could come to a close.

Mr. MCCOLLUM. Well, that's the question. Do you know if the bill covers this area?

Ms. GORELICK. I have not addressed that question specifically, but the aim of the bill is to incorporate, as a basis for prosecution, a wide variety of State crimes. And so I would be—with the nexus to terrorism—I would be surprised if it does not cover it. It should, and I will——

Mr. MCCOLLUM. Well, our subcommittee, I'd just like to comment, will follow up, as the chairman has designated in the hearings, and we'll discuss this matter with you further.

Ms. GORELICK. We'd be happy to work with you on that.

Mr. MCCOLLUM. Thank you. Thank you, Mr. Chairman.

Mr. HYDE. I might make the point that we will want to submit written questions, additional questions, and I'm confident you will do your best to answer to whomsoever they apply, and we will do that in writing.

[See appendix 1.]

Mr. HYDE. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Well, thank you, Mr. Chairman. And given the time, and the California delegation representing flood counties is going to the White House. So rather than take more time, I will submit all of my questions in writing. I thank you for your courtesy.

Mr. HYDE. I thank the gentlelady, and give our warm regards to the President.

The gentleman from Massachusetts—I'm sorry, we've got to go this way. The gentleman from Pennsylvania.

Mr. GEKAS. I thank the Chair.

It's apparent to me that many of the sections of the bill, the proposed bill, are driven by anecdotes or incidents that have occurred. For instance, the plastic bomb sections are a response to the Pan Am; the fundraising portions are based on evidence that such things have occurred or are beginning to occur with increased frequency. I'm anxious to know from the Deputy Attorney General if her recitation of the testimony as to 102, section 102, "conspiracy to harm people or property overseas," which, as I understand it, is an amendment to the existing section 956 in 18—I haven't put these provisions side by side with exactly what is the current law in most of these situations, but looking at 956 in the existing law, it appears that the conspiracy mode is visited only against destruction of property, and that, therefore, what you intend to do in this bill is to expand that to include murder, et cetera, crimes against the person; is that correct?

Ms. GORELICK. Yes, that's correct. The section of the bill would cover conspiracy to murder, kidnap, maim, conspiracies directed at harm to the person.

Mr. GEKAS. And my question is—I don't remember seeing or hearing about or listening to testimony about any incidents where a domestic conspiracy might have occurred or have been brewing to take the life of someone in another country. That seems almost nonexistent in my recollection.

Ms. GORELICK. Well, speaking hypothetically, in advance of a classified briefing on this, hypothetically, you would have individuals in the United States planning for, helping to prepare for, a terrorist act abroad; that is, the murder of someone abroad to disrupt the Middle East peace process, for example, or otherwise to disrupt an activity of the United States abroad, by providing the infrastructure in the United States for such activity.

Mr. GEKAS. My question is—I'm sorry to—do we have any evidence that such things might—are brewing or could be——

Ms. GORELICK. As I say, I'm——

Mr. GEKAS [continuing]. Launched?

Ms. GORELICK [continuing]. Not at liberty to share with you information in this hearing that we do have that would respond to that question, but Director Freeh has an example that I guess is in the public record.

Mr. FREEH. There's a recent prosecution in Canada. Six individuals were arrested, four prosecuted, who were leaving the United States to enter Canada, members of a group called Fuqua, which is a fundamentalist radical group with not only explosives, but plans to destroy a Hindu temple and some other locations in Canada. They were prosecuted in the—in Canada because of what was determined to be in large measure lack of jurisdiction within the United States. That would be one very current example.

Mr. GEKAS. Well, that's not a bad example. I thought that the Anti-Terrorist Act of 1986, which is now law, would cover terroristic acts against American citizens abroad, but I—and there were many anecdotes then and episodes that required our attention to that particular part of the law, but I saw nothing—now you're making at least one example vivid for us.

There's only—do I have any—what's the burning time?

Mr. HYDE. The burning time is the yellow light, and I'm waiting anxiously for it to turn red.

[Laughter.]

Mr. GEKAS. Well, I share your enthusiasm.

Mr. HYDE. It just did.

[Laughter.]

Mr. HYDE. I thank the gentleman.

The gentleman from Massachusetts.

Mr. BERMAN. Mr. Chairman, could I just ignore it for one—ask you a question on the burning need test?

Mr. HYDE. If the gentleman from Massachusetts can yield.

Mr. FRANK. No, not if I have to stick to 5 minutes.

Mr. BERMAN. This is to save you time.

Mr. HYDE. All right, talk to me, Mr. Berman.

Mr. BERMAN. Not on Mr. Frank's time.

I have a need, but it doesn't need to burn today. Are there going to be further hearings in the subcommittee on this bill before——

Mr. HYDE. Yes.

Mr. BERMAN. Will there be representatives of the Department of Justice?

Mr. MCCOLLUM. If the gentleman will yield—we're going to have further hearings, and I would fully expect there will be representatives of the Department of Justice at those hearings.

Mr. BERMAN. And will nonmembers of your subcommittee participate in that hearing?

Mr. MCCOLLUM. You're always welcome, and we will certainly let you participate after the regular subcommittee members finish their questioning.

Mr. HYDE. The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman.

This is a very important hearing because for many of us this is the toughest kind of legislation, legislation we support in general, but have some serious problems with, and that's why it is so important. And I hope people will understand the fact that not all the Members are here isn't a sign of lack of interest; it's just when people saw the metal detector things, we figured we'd keep half the committee out of the room at any one time, so we'd always have a functioning Judiciary Committee in case of an emergency.

[Laughter.]

Mr. FRANK. The problem I have, one, you said—this Presidential determination, if the President—because a lot would turn on that. Does the President make those kinds of determinations now or would this be a new type of a determination?

Ms. GORELICK. The President makes an analogous determination under IEEPA, which is the determination he's most recently made.

Mr. FRANK. OK, but this would be a new——

Ms. GORELICK. Yes.

Mr. FRANK. What's the duration? In other words, once he declares it, is that in existence forever or until it's undeclared?

Ms. GORELICK. Until he rescinds it.

Mr. FRANK. One very important change I think we should make is to make that annually renewable. When you're talking about notice to people, et cetera, we are in a sensitive area. At the very

least, it seems to me that determination ought to be for 1 year at a time. I would think he could do that again.

Now I have some problems with the language. On page 58, it says, "For purposes of subparagraph (3)(b)(1), the determination by the Secretary of State or the Attorney General that an alien is a representative of the organization shall be controlling and shall not be subject to review by any court." Why would a court not be able to do that? You've got classification procedures in court, and you've got summaries of evidence. Why should the determination by the Secretary or the Attorney that someone is a representative of an organization not be subject to review in any court? Bottom of page 58. If you don't have an answer right now, I'll take one in writing, but that's bothersome.

Ms. GORELICK. Let me just say that the structure of the statute is to permit such challenges as——

Mr. FRANK. No, No, specific answer to the specific question. I mean, I've only got 5 minutes. If you don't have a specific answer to that, give it to me in writing. But should the determination that you're a representative not be subjected to review by any court?

Ms. GORELICK. I was trying to answer it, to say that you—such process as you might have to be able to challenge it when the determination is made, as opposed to in the course of a criminal proceeding, is not spoken to by the bill; that is, you have such process as you have to challenge the initial determination.

Mr. FRANK. Could you challenge it in court at that point? But it says—my point is not chronological, but structural. "The determination by the Secretary or the Attorney General shall not be subject to review by any court." You mean it could be subjected to review by a court but earlier?

Ms. GORELICK. The—there is nothing in the bill that would prohibit you from challenging the determination at the time it was made——

Mr. FRANK. In court?

Ms. GORELICK. Yes.

Mr. FRANK. Well, how about—gee, I'm not as experienced a lawyer as I might be, but I would think the phrase "shall not be subject to a review by any court" would be a pretty good obstacle to going to court.

[Laughter.]

Ms. GORELICK. That's by the defendant in the criminal case. That's the distinction I was trying to make.

Mr. FRANK. But earlier on it wouldn't be a problem?

Ms. GORELICK. There is no obstacle in the bill to doing that, to an earlier challenge.

Mr. FRANK. Beyond that, let me just go quickly to what else bothers me here. And here's an example—because we do have a chilling effect. We have a history in this country of treating in the immigration area first amendment rights without proper respect, and on pages 60 and 61 we have—here's what could become an engaging in terrorism activity——

Mr. NADLER. Point of order, Mr. Chairman. Point of order, Mr. Chairman.

Mr. HYDE. The gentleman will state his——

Mr. NADLER. I have requested a copy of the bill, and the staff tells me there are no copies available.

Mr. HYDE. Each Member, I'm told, was given a copy. Someone may have purloined yours.

Mr. NADLER. Well, can we get another copy?

Mr. HYDE. I would—no copies on this side, I'm told. How did that happen?

Mr. FRANK. Maybe with the staples, you couldn't get it through the metal detector.

[Laughter.]

Mr. HYDE. I am told by my staff that every Member on this side got a copy of the bill. Now if the gentleman doesn't have one, I'm sorry.

Mr. FRANK. Mr. Chairman, I was not—Mr. Chairman——

Mr. HYDE. Just a minute. They were delivered yesterday to your offices. I would suggest the gentleman quiz his staff.

Mr. NADLER. Mr. Chairman, I did not mean to cast aspersions on the chairman or on the staff, but even if they were delivered—and I don't know whether they were—we didn't get one. But, be that as it may, if a member of the committee is sitting at the committee and asks for a copy, I think he can be given a copy. But thank you very much.

Mr. HYDE. I'm delighted to give the gentleman as many copies as he would like—within reasons.

We will give the gentleman from Massachusetts extra time if he wishes.

Mr. FRANK. Thank you, Mr. Chairman.

Yes, my problem is this with regard to the way this is structured——

Ms. GORELICK. Could you just tell me where you are again? I'm sorry, I missed——

Mr. FRANK. Pages 60 and 61, the bottom of 60, top of 61. And you would be engaging in terrorism activity if you did the following: if as a member of an organization you engaged in an act which you reasonably should have known afforded material support to any individual or organization which reasonably should have known that they planned to commit terrorism, which includes the providing of any type of material support. I mean, you could construct the sentence, starting in line 18 on page 60, going through line 15 or 20, or actually line 21 on page 61, which would have about five "should have knowns," "might have knowns," et cetera. And individual activities that might have looked innocent, providing material support, raising money—I think you could find a situation where people could really very well be entrapped. So I'd like you to just parse out from pages 60 through 61: you should have known and the organization should have known, and it could have been something that looked innocuous, and you are holding people—you're subjecting people to potential problems here, potential serious sanctions, with a fairly tenuous line of reasoning as you get through it, because it becomes—it multiples. There are at least two "should have knowns." One person should have known that the other person should have known that this could have led to material support, and that's why in the present form I think this is real-

ly problematic. So I would hope that you would be able to help us address these things.

There isn't any question here that someone who did not have a great deal of respect for free speech could use these to interfere with free speech, and I would hope you would help us work on a bill that would legitimately interfere with terrorism, but wouldn't be subject, as I think this is, to that kind of manipulation. And I'd ask you again to look at it and get back to me on this 60 to 61 chain of "should have knowns" and "could have beens," and "might have beens," and what happens to you.

Ms. GORELICK. Let me say this: the only "should have known" that I know of is in the section that prohibits one from engaging in terrorism activity. If you should have known that the organization that you are supporting has committed, or plans to commit, terrorist activity, then the penalties are triggered. The terrorist activity says nothing about what should have been known. The terrorist activity is what the organization does.

The existing 1990 act has the "should have known" language, and we are not changing that.

Mr. FRANK. No, but what you've got is you should have known—you've got two "should have knowns" in here. "You know or reasonably should know . . . for the material support"—here's the double "should know": one, you should know that what you were doing provided support to an organization which you should know was doing things. So there's two uncertainties here. You should have known that what you were doing—in other words, you might have been giving it to a front group, but you should have known that the group you gave it to was not really the group, and then you get a second "should have known" as to the underlying group.

So on page 60 there's a double "should have known," and I think as you multiply these things, you get into more problems. You should have known that what you were doing was helping an organization and you should have known that that organization was doing bad things, and the bad things might have included providing material support, soliciting of funds, which seems to be a third ambiguity because you do run into the problem that the gentleman from Michigan talked about: the solicitation of funds could like one thing and be another. So I think you've got a triple contingency here on the basis of which people could get kicked out of the country without full procedures, and I think that becomes excessive. But there's a double "should have known" on page 60. You should have known that you were really helping this organization and you should have known that this organization was really doing bad things, and the bad things might have been a kind of fundraising, which might not have been so obvious.

Ms. GORELICK. We will work with the committee to tighten up the language. Our intention is to bring forward the concept that's already in the 1990 act and to make the decisions on deportation based upon factual findings

Mr. FRANK. Well, last point—yes, but the—if the 1990 act worked, you wouldn't need to change it. So you can't selectively go back to it.

The point is this: this gives more power to the executive branch. So saying, well, that concept was already embedded in the law,

and, therefore, it's not controversial, doesn't work when you are, in fact, then giving the executive more power, cutting down the procedures, et cetera. It may be one thing to have a concept in the law when it's in one set of procedures; that could be something very different when you've got this expedited set of procedures. So I don't think the argument that some phraseology like this was in the previous law solves the problem we have with a new law that would greatly expedite the procedures.

Ms. GORELICK. As I said, we're happy to work with the committee to tighten up the language so that it meets our mutual expectations of what it should be.

Mr. HYDE. The gentleman's time has expired.

The Chair would just add its two cents' worth in this controversy. I'm not offended by "should have known" or "ought to have known" in the exercise of reasonable care and caution. Sometimes it's very hard to prove direct knowledge, but if the circumstances are such that anybody with eyes and ears and a room temperature IQ should have known, or ought to have known, that seems to me a reasonable basis for predicating a penalty——

Mr. FRANK. But, Mr. Chairman——

Mr. HYDE. Yes?

Mr. FRANK. The problem, though, is that when you—there's a certain inevitability there of uncertainty, but when you multiply it, and at least in this situation you've got two of them, you get into a problematic area, especially since we're doing this within the context in which the accused has less procedural rights than elsewhere. So you become a kind of a——

Mr. HYDE. I appreciate the delicacy of the problem.

The gentleman from New Mexico, Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. I'll be brief.

There's two matters I'd like to ask about. I want to say, first, that I think we do have the mounting threat of terrorism in this country. I think we are extraordinarily vulnerable because we are a free country. I think, however, we have to be mindful, in trying to solve that problem, of the civil liberties questions which have been raised. And one that's been raised directly with me is by members of the Muslim community in the United States who have expressed a concern that, because the terrorist organizations most frequently talked about, practice terrorism in the name of the Muslim religion, even though they are only a very, very small part of the number of people who practice that religion around the world, that the Muslim-American community will be by stereotype brought into this—into this situation, where they will be subject to more surveillance, more observation, perhaps even more investigation and prosecution, for no other reason than they happen to be practicing Muslims.

And, particularly, Attorney General Gorelick and Director Freeh, I wonder if you could respond? If this legislation is passed, how would you prevent that from occurring?

Ms. GORELICK. Well, let me speak to the policy, and perhaps Director Freeh can speak to the practice. The Federal Bureau of Investigation and all of our investigative agencies, as well as our prosecutors, operate under Attorney General guidelines with regard to investigations that can in any way impinge on first amend-

ment activities. And we prohibit ourselves from taking as a predicate for any inquiry first amendment protected activity. There must be, before an investigation can be undertaken, a predicate act, a criminal act, that is beyond any exercise of first amendment rights. And we are assiduous in trying to live up to the spirit and the letter of that, of those guidelines.

Mr. FREEH. Not to repeat that, but I think the guidelines that we have with respect to either general criminal investigations or terrorism investigations are fairly strong, and there's not a lot of room for error. We've had this concern, of course, for many, many years with respect to organized crime groups. Primarily and historically, the organized crime groups in the United States have been from Italy, have been either Italian-Americans or Italians, and there was always a great concern that we would direct more investigations and direct more resources to that, and, obviously, the overwhelming and huge majority of both Italians and Italian-Americans are decent, law-abiding people.

So it's a concern that we're familiar with. We've treated it in the past successfully, I think. Even the Italian-American groups will not complain that the FBI or the Justice Department have singled them out as an ethnic group for investigation or prosecution, and we would be equally vigilant and mindful with respect to any other group, including the Arab-American community.

Mr. SCHIFF. Thank you.

Final question: Ambassador Wilcox, this country, as you know, provides military assistance to countries like Egypt and Israel and Turkey and other countries with whom we have a strategic military alliance. I'm wondering if we provide antiterrorism technology as part of our assistance. For example, I'm informed there's new technology that would allow the detection of explosives, if they exist, say, in a suitcase, and so forth. And I wonder if we share that technology, because I think we probably have a mutual need to fight terrorism with the same governments with whom we have a strategic military alliance.

Mr. WILCOX. We do, indeed, Mr. Congressman. We have a—under our antiterrorism assistance program, which is funded by the Congress at about $15 million a year, a very active program of providing antiterrorism methodology to friendly governments around the world.

Mr. SCHIFF. Do we provide technology with that?

Mr. WILCOX. We do not provide—we are authorized under the statute to provide modest amounts of equipment, but we are limited in the extent to which we can use these funds to purchase equipment. We do have an active program of cooperation in research and development in antiterrorism technology with the United Kingdom, Israel, and Canada, and under those programs we work together in sharing research, technological data, to develop more effective means. These are also funded by the Congress at about $10 million a year, an extraordinarily valuable program.

Mr. SCHIFF. Thank you, Ambassador Wilcox.

I yield back, Mr. Chairman.

Mr. HYDE. I thank the gentleman.

The gentlelady from Texas, simply because the gentlelady is less likely to get her turn as we go down the long line, and the gen-

tleman from New York, Mr. Schumer, is happy to let you go ahead of him.

Ms. JACKSON LEE. I thank both the chairman and the very distinguished gentleman from New York. I appreciate it very much, and I will simply raise three questions, hypotheticals, if I might, just to determine where the points that you've made might fit into even the legislation that we are addressing.

To our CIA Director, if I might, tragically, of course, we witnessed the utilization of a poisonous gas 2 weeks or so ago in Tokyo, Japan, another evidence, if you will, of the use of chemical weapons. Would that, from your perspective, be impacted by the present proposed legislation or would you view that in some other capacity, whether that is international political policy, or what ways would we have to impact upon the utilization of chemical warfare, or chemicals rather, in this kind of effort?

Mr. STUDEMAN. Well, first off, let me say that my understanding of the legislation is that such an act would have to have occurred here. The disturbing thing for us, of course, is that we are now beginning the phase where weapons of mass destruction—in this case, we believe sarin, although it's not actually, in my view, totally confirmed—sarin-like, nerve agent-like substance was used in a foreign country by an organization in a terrorist act. So that's my understanding of the situation.

Ms. JACKSON LEE. And that's, I guess, the point that I wanted to make. You had mentioned the increase or the danger, obviously, of utilization. That would even have to be dealt with, the incident in Japan, on some other level totally. I mean, do we have any way of impacting that at all, just frankly?

Mr. STUDEMAN. Not to my knowledge.

Ms. JACKSON LEE. OK. The other question I wanted to acknowledge is the seemingly attacks on what we call "soft" targets—I think the subway, tourist attractions, et cetera—would the legislation, in your opinion, respond to that for incidents that may occur in the States?

Mr. STUDEMAN. I'm not sure that's a question for me because my interest is in the foreign intelligence aspects of this. I believe you're asking a domestic question, which is better answered by Judge Freeh or Secretary——

Ms. JACKSON LEE. You don't have an answer to it?

Mr. STUDEMAN. Not really.

Ms. JACKSON LEE. I'm asking you at this point.

Mr. STUDEMAN. No, I'm not sure of, again, the application. I mean, I would say "yes" to your question, but, again, in terms of the relevance of the bill, if it was a domestic act, the bill would apply.

Ms. JACKSON LEE. But if it was an incident that occurred in the States and had some international ramifications, would you not be involved?

Mr. STUDEMAN. We would certainly have an interest, yes.

Ms. JACKSON LEE. OK. Let me go ahead, then, and ask the questions to the Deputy Attorney General and ask her, what impact would this legislation have had on the Pan Am 103 incident?

Ms. GORELICK. It would have made prosecution here easier. Actually, I think I would rather submit a fuller answer to that, if I can look at that case against the current proposal.

Ms. JACKSON LEE. I would appreciate that.

Ms. GORELICK. Certainly. Thank you.

[See appendix 1.]

Ms. JACKSON LEE. Director Freeh, if you would, if you'd take the questions that I've just—I know the FBI was somewhat involved in the investigation, somewhat tangentially, I imagine, in Pan Am 103, to a certain extent. How does this legislation help in the efforts that you're making with respect to terrorism?

Mr. FREEH. Well, certainly, in some respects, it would have an immediate application. The provision in the proposed legislation that would implement the international convention with respect to marking explosives would be something that we could have taken advantage of under the current statute that was not available when Pan Am 103 was attacked.

More importantly, because that particular attack had to do with an American carrier with American passengers on it, there was some substantial coverage under our existing statutes, but that would not be one of the new areas that we're addressing in the current proposals.

Ms. JACKSON LEE. Do you have any comment on the "soft" target situation in terms of any efforts that we would need to wage here in the States to protect against that?

Mr. FREEH. I think with respect to prevention, it takes two forms, obviously: having the intelligence base and the existing, very good relationships between the Counterterrorism Center at CIA and the FBI, which is the primary domestic counterintelligence agency. That relationship is good. It has prevented, in the past, documented proposed acts of terrorism which we could go into with you at a closed session. That is the primary basis for the preventive action.

We also believe that having some of these tools available would give us the ability to do prosecutions and investigations on the groups who are likely to mount or assist a state-sponsored activity to choose and attack soft targets. The case I mentioned before, the individuals crossing the Canadian border, were attacking a very similar soft target in Canada and were interdicted only because they were stopped by a very vigilant border officer from Canada.

Mr. HYDE. The gentlelady's time has expired.

Ms. JACKSON LEE. Mr. Chairman, I do thank you, and I see the subcommittee Chair is gone, but I understand, Mr. Chairman, there will be further hearings——

Mr. HYDE. That is correct.

Ms. JACKSON LEE. Thank you very much.

Mr. HYDE. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I came back late and much of my time has been tied up on the telephone. So my problems are self-inflicted. I will not engage in an extended exchange here, but I just want to make a comment or two.

Prior to our departure for lunch, the gentleman from Michigan, Mr. Conyers, made a provocative statement—and, Mr. Conyers, I mean that in the complimentary sense—and I think I'm going to

paraphrase what he said. His question was, do we need new laws addressing this problem? Now I'm not saying that we don't, but I'm associating myself with Mr. Conyers' question. I'm not convinced that we do.

People who practice terrorism—"thugs who practice terrorism" might be a more accurate way of saying it—do not enjoy a prominent billing on my marquee, and I am by no means comfortable with a soft-on-terrorism approach, but, not unlike Mr. Conyers, I'm not convinced that we need this additional law.

I guess that conclusion is frustrated by our first witness this morning. If we do have additional remedies available, why, I ask then, was the Colonel Higgins matter not resolved? Conversely, if you did not have the wherewithal at hand, maybe we do need this additional assistance in the form of written statutes.

So having said that, Mr. Chairman, if anybody wants to comment I'll be glad to hear from you, if you want to be heard.

And I'll say it's good to have you all with us today.

Mr. HYDE. The gentlelady, Ms. Gorelick, is recognized to answer the good gentleman from North Carolina.

Ms. GORELICK. Thank you.

We have discussed at some length what difference the new criminal jurisdiction could have made, had the facts in the World Trade Center bombing been slightly different. I won't repeat that.

The impetus for the changes in deportation procedures comes from a fairly intense frustration that we have, wearing our Immigration and Naturalization Service hats, that when the FBI identifies people who do, indeed, pose a danger to this country, because that information cannot be shared as fully as ordinary evidence might be, we are in a position of choosing to allow someone who would otherwise be deportable to stay here, and for that threat to continue, or to compromise information which we need to continue to protect the people of the United States. And that is a choice that we do not enjoy having, and we are trying to figure out a way—and this represents our best effort—to accommodate both of those interests at the same time as one protects the fairness of the process for those who would be the subject of deportation proceedings.

That's what is motivating this. It is not, as I think some have suggested, a hysterical response to a nonproblem. It's a real problem, and the solutions are difficult, and everyone on this panel from all points of view I think is struggling with those difficulties, but it is a real problem. And I think together we have to come to some real solutions. It is not something that I think can be dismissed as unnecessary to address.

Mr. HYDE. I thank the gentleman.

I just want to announce that this panel has been here since 10 o'clock and we have another panel to go. We want to certainly hear them. We want to ask them questions, and so I entreat my colleagues to let—to forgo any extended—let my people go.

[Laughter.]

Mr. HYDE. And I say that with some trepidation as I recognize the gentleman from New York, Mr. Schumer.

[Laughter.]

Mr. SCHUMER. And the point I was going to make, Mr. Chairman, follows along the like motif of what you've said. And I wanted

to pick up on the gentleman from New Mexico, Mr. Schiff's comment that there is concern in the Muslim community that this unfairly deals with all Muslims.

And I would simply say I think that's a concern; I am very sympathetic to it, but I would simply say that there are organizations that don't represent the mainstream of the Muslim community at all. And it's sort of toward a logical reasoning to say, well, if Hezbollah or Abunidahl organization is on a list, that all Muslims are encompassed. And I would think that that's not the case.

In fact, when the administration put out its list of terrorist organizations which threat to disrupt the Middle East peace process, it did include organizations like Hezbollah and Abunidahl organization. It also included organizations like Koche and Kahanihi, which are Jewish organizations which they believed were extremists. And just as I wouldn't characterize all Jewish people as being blemished by the fact that these two organizations are on the list, nor do I think all Muslims are blemished by the fact that there are groups like Abunidahl and Hezbollah on that kind of list. And I think that's an important point.

Let me just ask——

Mr. CONYERS. Would the gentleman yield just briefly, please?

Mr. SCHUMER. Just briefly, and then——

Mr. CONYERS. I just want you to know that a lot of people don't look at it with the farsighted and fairness that you do. A lot of people suspect, unfortunately, that a Muslim—they can't distinguish between these organizations, and that's the danger and the problem that you pose, Mr. Schumer, quite accurately.

Mr. SCHUMER. I appreciate the chairman's viewpoint, and I think that's why we do have to be careful in this legislation. I'm the first to say that this is a difficult question, although I'd certainly agree with Ms. Gorelick, it's a real problem, and I don't think it's a hysterical response at all. It's a nuanced response. Some may disagree with where the nuances come down, but I think some of the arguments used against it in the literature that I have seen go way beyond what this legislation not only was intended to be all about—and I know how the Justice Department worked it and worked it through again and again, but what it is.

But I'd just like to ask two quick questions which I think are important.

The first relates to CIPA, and I know Ranking Democrat Conyers had asked this, but I just want to reiterate it. Have there been—now the CIPA, it's modeled on CIPA, the provisions used here——

Mr. HYDE. Would the gentleman explain CIPA for people who might know what it means.

Mr. SCHUMER. CIPA is—yes—the Classified Information Procedures Act. And what happens is we have had other instances, not just in terrorism, where there's classified information that points to criminal activity or bad activity that might not rise to a criminal level, that might merit, say, deportation, and we've had to deal with these issues for the last several decades because you're in a dilemma. And it is a true dilemma.

Let us say there is classified information that says somebody is going to blow up something and might hurt a lot of people. They're conspiring to do that. And, yet, to reveal that classified information

might bring down to the defendant—might bring down a whole group of informants who are helping us expose this kind of activity. Well, there's no easy choice. There is no easy choice, my colleagues. To simply say, well, unless you reveal that information, you can't prosecute the defendants, may mean that their conspiracy will proceed to fruition and hundreds of innocent people might be hurt or even killed. To not allow the information does, indeed, say to the defendants that you're not going to get the full battery of charges against you.

I think, given that there is independent review of an article III judge who has a lifetime appointment, given the fact that the legislation makes real constraints on only classified information being not given, and whenever possible, only in the rarest of circumstances—and this is another place where there's been misinformation. They say they'll never get the classified information. Only if that classified information, if revealed, would inevitably lead to the source being revealed, it's a very——

Mr. HYDE. The gentleman's time has expired.

Mr. SCHUMER. Well, could I just ask unanimous consent for a minute?

Mr. HYDE. Is the gentleman asking a question or——

Mr. SCHUMER. Yes, I'm going to ask a question.

Mr. HYDE. Oh, thank you. Without objection, one——

Mr. SCHUMER. Mr. Chairman, you asked for trouble when you asked me to explain what CIPA was.

[Laughter.]

Mr. SCHUMER. But, in any case——

Mr. HYDE. I'll never do that again.

[Laughter.]

Mr. SCHUMER. I didn't think you would.

Mr. HYDE. Unanimous consent, one additional minute.

Mr. SCHUMER. Thank you.

My question relates, then, to—it's a two-part question. One, where CIPA—in the 1 minute—where CIPA has been used before in spy and other kinds of cases, has there been objection from not only—well, from defendants' lawyers there might be, but from the general community, the general civil liberties and other communities that there have been abuses. And, No. 2—and this is a question that bothers me about the bill; this is different part of the bill relating to the money organizations. And this is the part I have the most trouble with. I think the rest of it is fine.

How do you deal with the situation where a President might label a terrorist—might use the labeling of terrorist organizations with something of a political hue? Back in the eighties many people felt that, you know, these Sandanistas might have been labeled a terrorist organization, whereas those fighting Chinese communism might not have been labeled a terrorist organization.

When I speak to my colleagues, that's the question that most vexes them, and I think we need an answer.

Mr. HYDE. The gentleman's minute has expired, and to answer those could take several minutes. Would the gentleman accept answers in writing?

Mr. SCHUMER. Mr. Chairman, I'd ask the first one be in writing. I think the second one's important, and I'd like to hear the Deputy Attorney General on that, if you——

Mr. HYDE. Very well.

Mr. SCHUMER. Thank you, Mr. Chairman.

[See appendix 1.]

Ms. GORELICK. Very short answer: there is nothing in this legislation that would prevent someone from challenging the determination in court, the determination of the President to list such an organization under this procedure.

Mr. HYDE. I want to thank this panel for their extraordinary contribution, not to say patience, but you have been very informative. This is a tough subject. This is an important subject.

Mr. NADLER. Mr. Chairman, some additional Members have questions of this panel.

Mr. HYDE. I understand, but it is now nearly a quarter to 3 and there will be further hearings. I don't want to foreclose the gentleman. We can stay a quite a bit more, if you want. I have nothing to do, but there's another panel—and the gentleman, I'd just ask for him to submit questions in writing, if he doesn't mind, and attend the subcommittee hearings and question further. But I'm just trying to be civil to people who have been more than civil to us. So with the gentleman's leave, I thank the gentleman.

I want to thank this panel for an extraordinary contribution, and you'll be hearing from us again. Thank you very much.

Ms. GORELICK. Thank you.

Mr. HYDE. Thank you, Ambassador, Director, Ms. Gorelick, and Admiral.

For our third and final panel of witnesses today, we're joined by two nongovernmental experts on the threat of terrorism, its international character, its changing face, and our need to take dramatic steps to protect our citizens from its indiscriminate swipe.

Those witnesses are Dr. Roy Godson, a professor at Georgetown University, teaching courses on governance, security, and intelligence. Dr. Godson is also president of the National Strategy Information Center, which is a nonpartisan, nonprofit public policy institute in Washington. Dr. Godson contributes to, as a consultant, the workings of the National Security Council, the President's Foreign Intelligence Advisory Board, several U.S. agencies of the intelligence community, and, recently, the Terrorism Advisory Board of the Department of Defense.

Also, Dr. Michael A. Ledeen, a resident scholar with the American Enterprise Institute in Washington. From 1982 to 1986, Dr. Ledeen was a consultant to the National Security Advisor to the President, to the Under Secretary for Political Affairs of the State Department, and to the Office of the Secretary of Defense. From 1981 to 1982, Dr. Ledeen was Special Adviser to the Secretary of State. From 1975 to 1977, he was the Rome correspondent for the New Republic magazine.

The third witness on this panel is Gregory T. Nojeim, who is the legislative counsel for the American Civil Liberties Union in its Washington legislative office. Mr. Nojeim is responsible at the ACLU for analyzing the civil liberties implications of Federal legislation relating to national security and immigration.

Prior to his position with the ACLU, Mr. Nojeim was the director of legal services of the American Arab Antidiscrimination Committee, the ADC. He held that position for 4 years. While with the ADC, he spearheaded its response to hate crimes against Arab-Americans during the Persian Gulf War.

Gentlemen, welcome, and shall we proceed with Dr. Godson first?

STATEMENT OF ROY GODSON, PROFESSOR, GEORGETOWN UNIVERSITY

Mr. GODSON. Thank you very much, Mr. Chairman.

There is, of course, no single solution, no quick fix to the problem of terrorism. I don't think we should underestimate the problem, but, on the other hand, I don't think we want to overreact, either.

Very briefly, Mr. Chairman, what I would like to do is outline five elements for an effective kind of terrorism policy. I will be very brief on each of these elements. I go into them in considerable detail in my written testimony. And then I'd like to comment on the legislation before the committee, as well as on the role of the Congress in general.

To prevent, to deter, and to defeat terrorism requires five interrelated elements. The first is the need for ongoing intelligence assessments. As the committee heard this morning, the United States is faced with threats from state-sponsored as well as from nonstate actors, especially in recent times from religious-inspired actors.

Moreover, I think a threshold has been crossed. We now face a task with technologies of mass destruction which we have been talking about and anticipating, but have not really witnessed until recently.

We need to know about these threats. We need to know about the overt, as well as the covert, structures that make up and make possible terrorist organizations. I would argue that we do not—that the U.S. Government at this time does not have an overview of the magnitude of the threat that the country faces.

Congressman Conyers, this morning you asked a very interesting question: whether we have more or less terrorism. I don't know—and you raised the question. I don't know any reason to believe we've got more of a problem than we had before. I think it's a very good question. And I personally think that the Government has been, the executive branch has been deficient in not providing an overview. The Attorney General, the Deputy, said that she was going to have a classified briefing. That should have happened some time ago, if there is, in fact, a magnitude of terrorism with which she is concerned.

So I would argue that, yes, we do need ongoing intelligence assessments. We need to be aware of the magnitude of the overt and covert structures, and we need to keep and nurture the intelligence connections we have so established with considerable difficulty in recent years.

Now as we develop our intelligence capabilities, we also need a policy to deal with terrorism and a strategy that is clearly laid out. We have made considerable progress, I think, in the last 20 years in our terrorism policy. But I think we need to have a clearly laid-out, specific set of objectives. We need to examine whether the means are calibrated to achieve all of these objectives, and maybe

we can get into some discussion of this, but I would suggest we do not at the moment have such a clearly laid-out policy.

The third element would be the need for effective law enforcement. I think law can do many things, Mr. Chairman. I think it can do a great deal. It can provide legal norms. It can provide judicial mechanisms. It can provide enforcement in the United States and other countries. But the problem will not be solved by law enforcement alone. There just will be many circumstances and opportunities where we will need to use other instruments in addition to law enforcement.

Further, we are, unfortunately, entering into an age of what I would call emerging global ungovernability. We are faced with the fact that a number of states around the world are characterized by having weak governments and weak law enforcement capabilities. And although we can try to help them, they have to do the job alone.

You heard the example of Lebanon this morning. There just is no way we can get effective law enforcement in states such as Lebanon, and there are many other areas of the world where governments are weak and substate organizations are playing a significant role, many of them using terrorism.

So as we seek to build up law enforcement, we need other aspects of strategy to deal with terrorism. One of the most promising that has produced results, results we often tend to forget about, is the strategy of disruption. Now I think it is worth spending a minute or two on what disruption is and what it is not, and the special role of Congress in monitoring disruption activities.

Disruption means frustrating terrorism. It means making it very difficult for the terrorist organizations to operate. Fine, if you can arrest them, catch them and arrest them, and prosecute them, and so on, but there are also times—there are times when you cannot do that, and you heard a graphic example of Hezbollah this morning.

What I'm talking about is intercepting, interceding, making it difficult for terrorist organizations to raise money, to transfer money, money which is the lifeblood of terrorism. Without money, it is very difficult for terrorist organizations to operate.

Another thing terrorist organizations need is communication and travel capabilities. Again, to frustrate, to make difficult, to make impossible travel, communication, and funding of terrorist organizations would be the kinds of things I'm talking about in disruption. I am not talking—I am not proposing that we use what I would consider to be rather extreme measures at this point, such as kidnapping.

Now I think we have had some great successes with regard to disruption and we should really pay tribute to our law enforcement people, to our intelligence community, and in this case also to the State Department and the other parts of the Government that have, in fact, run a rather successful disruption operation.

I'll speak of just a couple of recent examples.

Mr. COBLE [presiding]. Doctor, pardon me just a moment. If you would suspend, we have a vote on now, and I think it would be a good idea for us to sit in recess for 5 minutes, Mr. Chairman?

Mr. HYDE. Fifteen minutes.

Mr. COBLE. Fifteen minutes, and we will return. Thank you, sir.
Mr. GODSON. Thank you.
[Recess.]
Mr. HYDE [presiding]. The committee will come to order.
We'll wait while Dr. Ledeen approaches the podium.
Thank you for your patience, and would you please continue?
Mr. GODSON. Thank you.

I was discussing five elements, and I had reached discussing disruption, which I suggest we have practiced quite successfully.

As we talk about the problems connected with terrorism, we ought to remember the successes that we have had in avoiding a much greater loss of life than we would have otherwise. I cite the Persian Gulf War period of 1990 and 1991, where we didn't arrest many terrorists—we arrested a few—but we were able to prevent and frustrate a great deal of loss of life on the part of the United States and the American citizens abroad, and of our allies in the Persian Gulf War.

But I also would point to a very recent success that we've had which has been too little discussed in recent days, and that is the success against a man who calls himself Ramzi Yousef. He's now identified himself with another name, and his attempt to blow up American airliners most recently—I am particularly grateful for the frustration that he has suffered in his failure because my wife, together with specialists in organized crime and law enforcement, were on their way to a conference we were organizing in Asia, and those particular planes were the ones that Ramzi Yousef had targeted. So disruption, I would argue, is a very successful, very useful part of antiterrorism strategy.

And, finally, my last point is really prevention and education. I do not think we can be the world's policeman. I do not think we can be the world's social worker. I do, however, believe there are times, through education and prevention, we can defuse terrorism. We can prevent it from developing or increasing, where it has already developed. Sometimes this can be done through diplomatic initiatives, and we have some examples of that, but sometimes it can be done through educational programs and helping moderates in their struggles with extremists. And I would suggest one area now in the world where we could be helpful is with those Muslim elements who are requesting assistance in their political struggle with extreme Islamists in various parts of the world. This would be part of an education/prevention strategy, and it would be worth considering in our counterterrorism policy.

Now if I may turn to the bill before you and the role of the Congress. I believe that the administration and the bipartisan cosponsors of the bill are moving in the right direction. I think the bill does a number of good things. It makes more coherent the definition of terrorism in some respects. It extends and codifies U.S. jurisdiction. It does a number of other things, but, most importantly, I would argue, it does prevent—protect vital U.S. intelligence sources.

I'm sure, Mr. Chairman, this bill is particularly gratifying to you. For many years, in your work on the Intelligence Committee and afterwards you were instrumental in improving U.S. intelligence capabilities, and one of the ways that you did so was by your en-

couragement of oaths of secrecy by members of the legislative branch and new rules for staffs on congressional committees.

I am surprised and concerned by an apparent breach in recent weeks by a member of another committee of the rules that pertain to naming American intelligence assets abroad, but I think this is an aberration. I think, on the whole, the oath and the rules are working well, but we do have to protect our intelligence sources. That's part of effective counterterrorism.

I think this bill does balance—and I know there will be others who have different points of view on this panel and amongst the members of the committee—but I think this bill does strike the right balance.

We're moving in the right direction. But I still think there are a number of weaknesses in this bill, and I think there's more that Congress can do to deal with terrorism. I think Congress can do things under the five elements that I've discussed, but let me just briefly touch on three, in the interest of time, that I think you might wish to consider.

First, with regard to intelligence, I do not think we have an overview of the terrorism problem. The Government just does not provide you with such an overview of the magnitude of the problem or of the opportunities the United States has to influence this problem. That's part of the reason why there isn't as much consensus as there could be on this bill that you have before you, and we need that consensus in this country.

I think there are some specific procedures in the intelligence area that need to be addressed, and this committee would seem to me an appropriate place to address them. Take for example, the Attorney General guidelines. A number of people have suggested—among them a recently retired, very senior FBI official—that the Attorney General guidelines do need to be rethought, not completely, but do need to be revamped. These people, and others who have actually much more far-reaching criticisms have asked for a forum, and this committee might be an appropriate place for them to air their views.

I think we also need an all-source analytical fusion center. I know it sounds like a strange term, but the case of the World Trade Center bombing, I believe, illustrates the need to reexamine the way we're doing our analysis on intelligence. Apparently—and I'm told by reliable authorities involved—when a man by the name of El Sayyid Nosair was arrested for shooting Meir Kahane, he had some notebooks in his possession. The notebooks were in Arabic. These notebooks were part of 17 boxes full of diaries and papers, and so on. And, unfortunately, the New York police and the FBI, apparently, did not have the capabilities, the resources, the personnel who could read that material and make sense of it. I am told that this material identified not by name, but with enough precision that a reasonable person could have identified the target of a group as being the World Trade Center. There was enough specific language in Arabic in that material. This material was not made available to the intelligence community for various reasons, and I'm suggesting that we look at the question of an all-source fusion center.

With regard to policy, I have suggested that I think we have some deficiencies in this area. I think it would be appropriate for Congress to ask the administration to spell out its objectives and then let us look at the means that are supposed to be achieving these objectives. I suspect that we are not calibrating our means as well we could with regard to our overall terrorism policy, and perhaps we can discuss it. I think there are good bits and pieces, but they are not well put together.

Finally, on the question of this law and law in general, I share some of the frustrations I think Congressman Frank raised, and others on this committee have raised, with the definition of terrorism in this omnibus terrorism bill before you. As a matter of fact, I would ask the committee to look for the definition of terrorism in this bill. I think you will have some difficulty finding it. It refers to terrorist acts, but then it retreats to basically, as far as I can understand, title 22 of the U.S. Code, and title 22 of the U.S. Code which states that premeditated political acts against noncombatants is the definition of terrorism.

I think that definition needs refinement, and I think it needs explication, particularly if you're going to suggest that individuals behave in a particular way with regard to fundraising, with regard to entry through the United States, with regard to action in the United States. We need a clear-cut definition of terrorism, which is not laid out in that bill. Furthermore, the definition speaks of politically-motivated acts. What about acts that are religiously motivated? Where is the line between religious and political? The bill doesn't address that. The title 22 definition doesn't address it, and, as I said, if we're going to extend this to covering aliens, to covering fundraising, all these kinds of questions, it would be appropriate really to make it clear so the average person can understand what would constitute a crime.

Well, Mr. Chairman, I think I've used up my time, and I'd be happy to respond to any questions at an appropriate time.

[The prepared statement of Mr. Godson follows:]

PREPARED STATEMENT OF ROY GODSON, PROFESSOR, GEORGETOWN UNIVERSITY

Mr. Chairman, I appreciate this opportunity to present my views on the threats to U.S. interests at home and abroad posed by a widespread and growing worldwide crisis of governance, and, more specifically, by international terrorism.

My name is Roy Godson. I am a professor at Georgetown University where, for more than twenty years, I have offered courses on governance, security, and intelligence. I am also president of the National Strategy Information Center (NSIC), a non-profit, non-partisan public policy institute here in Washington. As a consultant, I have had an opportunity to observe firsthand, and to contribute to, the workings of the National Security Council, the President's Foreign Intelligence Advisory Board, most agencies of the U.S. government concerned with intelligence, and recently, the Terrorism Advisory Board of the Department of Defense.

My work with NSIC involves extensive and in-depth consultations with the police, intelligence, and security services of nations around the world. In recent years, I have spent months in many of the countries most involved in the phenomenon of terrorism. During these visits I have met with security ministers and local police, as well as with many sectors of society from which terrorists draw their support. NSIC sponsors an ongoing Project on Global Ungovernability, and I also have greatly benefitted from the research of the many scholars, journalists, and governmental officials who have participated in this program.

I appear here in a personal capacity to offer my views on terrorism, its relation to ungovernability, and what I believe the United States can and should do in the face of this challenge.

My focus today will be on prescriptions rather than diagnosis. But this emphasis does not mean that I believe that we fully understand the causes of contemporary terrorism, or that now we can confidently turn exclusively to the search for solutions. On the contrary, we are still a long way from an adequate appreciation of the dynamics of terrorism, and of the threat it poses in the post-Cold War era.

Mr. Chairman, I think you will agree that there is no single solution—no magic bullet—to the problem of terrorism. Just as our conventional military defense depends on a combination of ground, sea, and air power, so must our defense against terrorism be a blend of strategies and capabilities. We face complex threats, and our response must recognize and mirror that complexity. Reliance on only one or two of the needed elements leaves us vulnerable to terrorist designs.

On the other hand, the comprehensive approach I advocate today will help to shield us against what may be one of our greatest international challenges in the years ahead. And, just as important, it will balance the need for protection against terrorism with the need to protect the civil liberties we so cherish. We should not overreact, but nor should we underestimate the problem we face, and the measures we will need to undertake.

To prevent, deter, and defeat terrorism, we need action in five areas:

(1) Ongoing assessments of the problem.
(2) Development of national policy and strategy.
(3) Enhancement of law enforcement.
(4) Disruption of terrorist organizations.
(5) Prevention and education.

This will require the combined cooperative efforts of a variety of American and foreign governmental agencies, as well as assistance from private sector organizations. Terrorism is not just a national problem; it is also an international problem. Some concerns can be addressed unilaterally; the United States is threatened in particular ways and we possess unique resources and opportunities to avoid and to respond to these threats. But there is no way the United States alone can "solve" terrorism. The fight against terrorism must be a global fight. It will require ongoing and ever new levels of commitment and cooperation from the international community. Some elements of this strategy can be put in place quickly; others will take time.

An important first step is recognition of the problem and the sustained commitment necessary to help solving it. As we establish a framework for effective strategy, we can erect the structures and systems to frustrate, to contain, and ultimately to defeat terrorism. The road map is before us. Initially, when the United States and its allies withstood massive security challenges earlier in this century, few fully grasped the dimensions of the threats. It took years to forge a national consensus on the magnitude of these problems and develop policy, and longer still to sustain the systems and to implement the policies to address them. They worked.

I. The Need for Ongoing Assessments

As we look around the world today, the contours of international terrorism of the near future are coming increasingly into focus. We continue to be threatened by state-sponsored or assisted terrorism—Iranian, Iraqi, Libyan, and Sudanese, to cite a few major examples. We also are threatened by independent, non-state actors. In the politically fragmented post-Cold War era, substate and transstate groups and individuals operate within and across state boundaries. They have the resources; they can travel and communicate across relatively open borders, relatively unpoliced by governments. And they have the motivation and capabilities to do us considerable harm. We should realize that many of these groups and individuals are motivated not just by narrow political considerations, but by ethno-religious zeal.

One of the best descriptions of the threat posed by contemporary forms of terrorism can be found in a 1995 study prepared by the Department of Defense entitled "Terror 2000: The Future Face of Terrorism." (Coauthored by Marvin Cetron and Peter Probst, this study, currently is being expanded and will be published in 1996.) The study anticipates that in addition to state sponsored and assisted terrorism, we will be faced with nonstate groups acting in relatively unconstrained ways using weapons of mass destruction. Indeed, we appear to have witnessed such attacks in Japan recently.

In the aftermath of sensational terrorist incidents—the World Trade Center bombing, or the nerve gas attacks in Japan, for instance—our reaction understandably tends to center on the immediate detective and police work—the who, the why, the criminal evidence, the arrests, the trials. But much more basic to our security is a comprehensive understanding of the phenomenon we face.

Without a deliberate and always current assessment, we can lose sight of what terrorism is. When we lack that understanding, we undermine our defenses against it. Moreover, a thorough knowledge of modern terrorism affords us opportunities, in my opinion often under-appreciated opportunities, to advance our interests.

We must realize that terrorism is much more than the terrorist act. The public face of terrorism is the one we see in the headlines and on the evening news. It may include:

Violent efforts to disrupt, to sabotage, to destroy property or the quality of life, and to maim and kill.

Propaganda that attempts to justify that violence.

Intimidation and threats.

But as the Members of this Committee well know, behind these very public events is—must be, if the terrorist is to operate effectively—an underground world. By its very nature, terrorism is in large part a secret plot. Our capability to intervene and defeat terrorism lies in specific knowledge and intelligence about this secret network.

I would like to briefly look at a couple of these necessary underground elements: One is recruitment. How is the terrorist created in the first place?

There are many reasons why individuals are attracted to terrorism. But the process begins with an individual's attraction to a cause. At first, involvement usually consists of legitimate political or religious activity. At some point, the budding terrorist is selected by leaders of the terrorist organization for recruitment into the secret apparatus, and soon after he or she makes the transition from the legal to the illegal—on the scale that begins with overt political or religious expression and runs to covertly-organized violent activity—a line has been crossed. We need to know when individuals have, or are about to cross that line. Another secret ingredient is a hidden infrastructure affording the terrorist organization documents, fake identifications, weapons, communications, covert travel.

This network is far more than a convenience—it is vital. Terrorist groups can no more operate without it than you and I could operate our automobiles without an integrated system of paved roads, gasoline stations, and repair shops. Nor can the terrorist underground function effectively without substantial funds. The funds have to be obtained from sponsors—either states or private groups—or from criminal activities such as robberies, smuggling, or narcotics trafficking. Drying up the flow of money—or otherwise intervening in that underground, by discouraging recruitment, finding weak links in the support network—cripples terrorism.

Our assessment capabilities must consider both the overt and covert nature of terrorism. A comprehensive assessment of terrorism is the necessary precursor to developing and refining a strategy to confront this phenomenon. But today, the United States does not possess this overall assessment.

This assessment should be an annual or biannual governmental review of the dimensions and activities of terrorism, addressing three key questions:

What do we know about contemporary terrorist organizations?

What do we need to know?

How can we influence their operations?

In instituting this assessment, we must avoid the common flaws of many previous efforts, which were basically descriptive. Our analytical intelligence should seek to go further—to emphasize what is *not* known as well as what is. It also needs to incorporate what intelligence specialists now term "opportunity analysis"—the identification of target group vulnerabilities, that can be exploited as major building blocks in policy development.

Suggesting an opportunity-oriented national assessment may appear to be stating the obvious, but it is a stage that, to a large extent, we have not yet accomplished. However, we already possess most of the major elements that would be necessary for such an assessment. Intelligence gathering and analysis in this area has been ongoing for years. In recent months, there has been increasing recognition in the intelligence community, particularly the CIA, that we need opportunity-oriented analytical products. The task now is the comprehensive assembly of various pieces so as to help policy makers recognize the magnitude of the problem, to understand what we need to know about in the future, and to know what opportunities we have to act.

Without this kind of assessment, terrorism is shadowy, amorphous, almost a nonentity until it explodes into the headlines with another spectacular incident. With this assessment, we begin to shine some bright lights into some very dark corners. Assessment is essential as our first line of defense.

It is entirely proper for Congress, if necessary, to take the lead in calling for this type of comprehensive assessment of terrorism. In the early 1980s, Congress, at the prodding of a then relatively little-known Congressman from Georgia, Newt Ging-

rich, forced the Executive Branch to issue annual public reports on Soviet efforts to influence Western public opinion, and in so doing performed a great service. If not for Congressional urging, today we would probably be without a national narcotics assessment as a weapon against international organized crime. As the national interest demanded it, Congress pushed the Executive Branch; today, a comprehensive opportunity-oriented assessment of terrorism is very much in that same national interest.

Such an assessment could be completed within twelve months, and is one of the most important short-term steps we could take.

An assessment of terrorism is a step we can and should take unilaterally. But effective intelligence requires international exchanges and cooperation. Today, there is a great deal of international cooperation with regard to terrorism. We need to nurture these sensitive relationships. Other countries must be convinced that we will not compromise their intelligence sources and methods. The media and the public need to understand that intelligence sharing saves American lives. Our national leadership can go a long way towards educating the public and sustaining and enhancing relationships with other governments.

While we are preparing these assessments, however, we need to forge ahead on other fronts in the struggle against terrorism.

II. The Need for Policy and Strategy

As we began to realize some years ago, the problem of international terrorism requires overall national and international strategies to deal with it. We have made considerable progress. Despite sometimes impressive planning, coordination and cooperation, we lack an overall list of specific objectives, and lack overall government planning of the means to achieve our goals. Indeed, we still lack an authoritative source precisely defining and operationalizing those goals, and integrating the political, preventative, and educational means with intelligence, law enforcement, and military means.

Some argue that the United States cannot develop a cohesive strategy, that for an issue so complex the checks and balances built into our pluralistic system make agreement and cooperation all but impossible.

Mr. Chairman, as you know well, we have put together such an effort in the past. In the late 1940s, this country developed an effective, sophisticated, and multifaceted strategy to contain Soviet-sponsored Communism. The economic dimension of the Marshall Plan was supported by the military dimension—the build-up of our armed forces and a series of enduring alliances, particularly NATO. These economic and military dimensions were coordinated with a diplomatic dimension, which included the effort to rebuild democracy in Europe and foster democracy in Japan and elsewhere. And there was another, seldom acknowledged intelligence dimension, something that might be termed the "covert action annex" to the Marshall Plan and NATO. We engaged in massive covert action, providing unacknowledged support to political groups, trade unions, intellectuals, and others struggling to maintain democracy in the face of massive, secret Soviet efforts to undermine the Marshall Plan and NATO. The U.S. government also worked successfully to mobilize the private sector to support this endeavor.

Looking back at containment and the fall of communism, some may be tempted to believe this was inevitable or that there was little controversy about drawing a line in the sand and taking a variety of measures to hold it. They would be mistaken. It was not inevitable that Western Europe would remain free after the war, and there was a great deal of controversy about the efficacy of the Marshall Plan. As we know, containment policy worked reasonably well. Not every aspect meshed perfectly, but the objectives of the administration and the Congress of the time became clear, and overall, the strategy was remarkably effective.

Strategy must flow from policy, and policy in turn rests on political decisionmaking. And that, of course, depends on leadership. In any administration, the primary responsibility for that political decision rests with the President. If the administration does not act, Congress must lead, as it sometimes has in the past.

Our long-term strategy should include international cooperation and coordination. We need to integrate policy and strategy and that will take time and diplomacy. U.S. leadership is a necessary condition for the formulation of a multilateral effort.

We have come a long way since this country and its allies first began to confront modern terrorism in the early 1970s. Repeated tragedies led to the recognition that our approach could not be unilateral. Other countries came to believe that we would not compromise their security, and saw that we were willing to act. This led to extensive sharing of information and equipment, and more uniform international treaties, thus fostering a more coordinated international response.

There remains, nonetheless, a huge gap between strategy and implementation. One of the major ways it can be bridged is with an effective national and international law enforcement framework.

III. The Need for Enhanced Law Enforcement

Mr. Chairman, we should understand two overriding factors about law enforcement and the struggle against terrorism:

The first is that law enforcement can do many things, and do them quite well, particularly if it is served by effective intelligence.

The second is that this problem will not be solved by law enforcement alone. Law enforcement must be enhanced by other means to deter, detect, and prevent terrorism. The alternative is to be caught flat-footed again and again—unable to respond until the bombs have exploded.

Being quite clear about the proper role of law enforcement is of particular concern because, while we need to defend ourselves against terrorism, we must simultaneously defend our system of civil liberties. The law, and law enforcement, must not impede constitutional freedoms. While maintaining that proper balance, there is much we can do to enhance domestic law enforcement unilaterally both in the near future and in the longer term. There is also much that can be done multilaterally, although this effort will be particularly difficult.

Enhancing law enforcement and the administration of justice internationally requires more than joint programs and the training of foreign officials. This testimony has emphasized the need for U.S. leadership to spur action abroad. Some reforms, however, must come from within foreign societies. Building honest and effective law enforcement and judicial systems takes local purpose and will. They cannot be imposed, exported, and erected on site. The United States has provided assistance to aid in the development of local police departments and judicial mechanisms overseas, and these efforts should continue.

We should recognize, however, that a cohesive international response will be very difficult to achieve. One of the most far-reaching trends of our immediate post-Cold War era is emerging global ungovernability. Political systems in many parts of the world are fragmenting, and governments and their institutions are becoming weaker. This debilitation extends to the law enforcement mechanisms of those countries. At the same time and partly as a result of this emerging ungovernability, other elements—a variety of criminal, ethnic, and religious groups—are gaining in strength; they operate both within states and across international boundaries, and some employ or collaborate with terrorists. Indeed, one of the major areas of emerging ungovernability is the former Soviet Union, a region rife with weapons of mass destruction.

So, even as we try to improve law enforcement in the United States and abroad, we should recognize that enhanced law enforcement will carry our anti-terrorism efforts only so far. Another weapon in this battle is the isolation and frustration of terrorism and its leaders. This is the strategy of disruption.

IV. Strategy To Disrupt Terrorism

Disruption means degrading the organizational capabilities of terrorists.

It is unrealistic to suppose that we can rely on law enforcement to arrest and convict most international terrorist leaders and dismantle their organizations. However, we can disrupt terrorist organizations and operations, this must be part of our anti-terrorist arsenal.

Disruption is not new to our security agencies. The CIA, the Customs Service, and the DEA acknowledge disruption strategies in the war against international organized crime, and disruption practitioners built a praiseworthy, if largely unknown, legacy during the Cold War.

We—academics, policy makers, and certainly in a democracy such as ours, the public need to understand what disruption is, and what it is not. Disruption includes active overt and convert measures against terrorism, such as propaganda and political pressure. It does not include granting special police powers to the military or other non-law enforcement entities. Nor does it include assassination, kidnapping, or other extreme measures.

Here are some possible disruption tactics in the struggle against terrorism:

Stopping, or at least minimizing, travel and the transfers of money.

Publicizing secret bank account balances to stir jealousy and rivalries within or among terrorist organizations.

Tampering with or stopping communications within terrorist organizations.

Discrediting an individual terrorist so that comrades come to believe that he or she has betrayed their trust.

Our experience with disruption against terrorism is quite good; over the past ten years or so, the United States and its allies have leaned heavily on such tactics to thwart many terrorist organizations. Leaders were identified, modes of operation tracked, lifestyles, personal habits, and money-handling techniques catalogued. Often, an intense public spotlight was disruption enough. It made it difficult for the secret apparatus to function. A variety of public and not-so-public measures protected Americans overseas and at home, and kept terrorism in the United States at a minimum. There may have been only a few arrests, but many violent acts were prevented from happening at all.

Among the successes that can be cited, and that have been forgotten or too little noticed, were those that took place before and during the Persian Gulf War of 1990–1991. The United States, in cooperation with other states, was able to neutralize fairly extensive Iraqi efforts to use their own and the secret apparatus of non-state terrorist groups around the world. These events were a triumph for both our intelligence and law enforcement agencies as well as for the policy of international antiterrorist cooperation.

Earlier this year, through a combination of international cooperation, and luck a potentially disastrous plot by Islamist elements to blow up American airliners in Asia was neutralized. Although the details are sketchy, according to the New York Times (March 26, 1995), a man who used the name Ramzi Ahmed Yousef was plotting to blow up at least two United Airlines 747 jumbos in Asia on or about January 22, 1995. "Ramzi Yousef" is now being prosecuted for masterminding the World Trade Center bombing when he had come to the United States requesting political asylum. As the police and FBI were identifying the group that carried out the bombing, he fled abroad, and apparently used the secret funds and contacts of the terrorist underground to rent an apartment in the Philippines under an alias as part of a plan to carry out terrorist acts there.

The plan failed when Filipino police found the apartment and information which led to the unravelling of the plot. "Mr. Yousef" was not caught in the Philippines, but a month later he was apprehended in Pakistan, and extradited to the United States to stand trial for the World Trade Center bombing. In a statement released by his lawyer toward the end of March, he said his real name was Abdul-Basit Balochi, a Pakistani trained in electronics and explosives. He also stated that it was his duty as a Muslim to attack U.S. targets because of U.S. support of Israel.

I am particularly grateful that "Yousef/Balochi" was apprehended, and that the plot to blow up American airliners was disrupted. My wife, and many antiterrorist and law enforcement experts, were on the particular planes that had been targeted in January. They were travelling to Indonesia for a conference on organized crime and terrorism that NSIC had arranged for Asian police chiefs.

Hence, Mr. Chairman, for me disruption is hardly a security side-show. Done correctly, it can give us a tremendous return on the assets we invest in it. If we slight disruption efforts, we deprive ourselves of one of the most potent anti-terrorist weapons. Disruption should be a key element in any overall anti-terrorism strategy.

There are other points about disruption to keep in the forefront as we forge a renewed national policy on dealing with terrorism:

Because disruption is an unconventional strategy, Congress should be especially sensitive to its oversight and review responsibilities in this area. This is necessary both to protect civil liberties and to ensure performance.

Disruption is a valuable tool, and we need to develop much more elaborate disruption techniques in the future. But all disruption planning should incorporate indicators of success and weaknesses.

Disruption can sometimes be unilateral, but at its most effective it will often be part of an international effort. We may wish to provide money and technical support to other governments for disruption activities.

Action to disrupt terrorist organizations is not enough, however. There is an even greater need to prevent terrorism before it occurs.

V. The Need for Prevention and Education

People become terrorists for a variety of reasons. For some it fills psychological needs. For others, however, the reason is a genuine frustration with seemingly intractable political, social and economic conditions. In that case, merely the existence of another way—a legitimate alternative—can mean that a future terrorist is never created in the first place. We cannot become the world's policeman or social worker, but to the extent that we can help maximize the opportunity to achieve ends through the political process in other societies, we can go a long way towards lancing the boil of terrorism.

The role of the outsider in such a situation usually is limited, and there is the risk that U.S. involvement in disputes abroad may breed resentment. At times, however, we may be able to play a constructive role. We should consider opportunities to do so.

Sometimes, for example, this may take the form of diplomatic initiatives, to bring parties together to help ameliorate what seems to be an intractable conflict. At other times, prevention may involve helping moderate political or religious groups or factions compete effectively in a political contest with extremists who are recruiting and running terrorist operations. For example, the United States and other countries could help moderate Muslim requesting assistance in their battles with Islamist extremists.

We can also educate. For example, earlier I described the secret recruitment process whereby an individual exercising legitimate political rights might be drawn into the dangerous, illegal world of the terrorist organization. When the dark side of terrorism—the isolation, the haunted existence, the cynical manipulation of idealism and religion—is better known, there have been far fewer candidates for the job. This is an area that, in my opinion, the United States and other governments need to explore continuously.

VI. Congress, Counter-Terrorism, and the Enhancement of the Law

Mr. Chairman, the draft legislation under consideration by this Committee has many strong points.

It recognizes the increasing threat of terrorism, and the increasing complexities of that threat, now facing the United States and its allies. I particularly note here the Bill's coverage of threatening the use of some technologies of mass destruction.

It makes clearer and more coherent the basis of the United States government jurisdiction in terrorism cases.

It seeks to balance our duty to protect against terrorism with our duty to protect civil liberties and due process of law, attempting to make the legal process as equitable as possible.

Especially heartening is the legislation's clear recognition of the necessity of protecting United States intelligence sources. I am sure that this proposal is particularly gratifying to you, Mr. Chairman, in view of your many years of work to enhance our intelligence capabilities. I applaud your consistent efforts to ensure that both the Executive and Legislative Branches adequately safeguard United States secrets and particularly your championing of the oaths of secrecy and new rules for Members of Congress and their staffs. An apparent breach of that trust recently is cause for concern.

The Administration and the bipartisan Congressional co-sponsors of this Bill are moving in the right direction. The legislation as drafted reflects a clear recognition that there are gaps in our current counterterrorism policy, and that those gaps should be filled. But there is much that still needs to be included.

An effective counterterrorism policy is not entirely a creation of laws or of the Congress. Yet, as the draft legislation before this Committee demonstrates, law and the Congress can play an important role. I have outlined five parts of an effective approach to terrorism. Congress should address all five areas.

Let me turn to three of them to illustrate how Congress in its legislative and oversight roles, can enhance our counterterrorism policy and capabilities.

(1) The term terrorism as used in this Bill needs to be further defined and clarified.

It does not appear to cover adequately the use or threat of all technologies of mass disruption and destruction. We need only harken back a few weeks, to the events on the Tokyo subway system, to realize the potential of such weapons for terrorists.

The Bill does not appear to address what is now called "information warfare." By information warfare, I mean attempted disruption of the United States communications infrastructure. As we approach the twenty-first century, our society is particularly vulnerable, for example, to attacks on the computer systems controlling operations of air traffic control or our telephone networks. Such attacks could originate from inside or outside our borders.

Current definitions in U.S. statutes apparently do not incorporate implied threats to United States personnel and their families, which are very much a part of the terrorist arsenal. An example: a note bearing the emblem of a religious or political movement that practices terrorism is given to the grade school child of a newly-posted American diplomat. The contents of that note are seemingly innocuous—a welcoming of the parent to the country, for instance. But the

real message is chilling; the threat is clear: We know who you are, and we can get to your child.

(2) Intelligence needs to be enhanced. As I have emphasized, Congress should call for annual or biannual assessments of the country's anti-terrorism capabilities. Such a call should, of course, include the provision of the necessary resources and capabilities. Knowledgeable observers have pointed out various deficiencies in our current procedures. I cite two such alleged shortcomings:

The Attorney General guidelines should be reviewed. One of the most senior and experienced FBI officials in this area, Oliver "Buck" Revell, recently retired. He has stated that these guidelines seriously hamper the Bureau's ability to collect information from public sources about, and thus protect our citizens from, terrorism. His views deserve to be taken very seriously. He, and others who have offered similar and more far reaching criticisms should be offered a forum in which to present their case. I do not suggest that this initially be done in public, but I strongly urge that it be done.

Better methodologies for all-source analysis are needed. An illustration of the need for combining information from all sources can be found in our apparent failure to analyze and exploit the materials in government possession to prevent the World Trade Center bombing. I have been told by various officials that the New York police took approximately 17 boxes of notes, diaries, and papers in Arabic from El Sayyid Nosair when he was charged with the murder of Meir Kahane in 1991. Most of this material was not translated and analyzed because the police and FBI in New York did not have the skilled personnel to do it. As a result, the U.S. government missed this and other significant clues and information describing the nature of the target that would have pointed directly to the World Trade Center, even though that specific site was not mentioned in Nosair's materials.

To help prevent, deter, or frustrate terrorism, we need mechanisms to ensure that all government agencies are required to turn over to an all-source fusion center information that may be relevant to anticipating or investigating terrorism, and that this center be provided with the skilled analysts and resources necessary for the analytical exploitation of this material. Probably, this will require personnel from the intelligence community, as well as law enforcement. There are, of course, some difficulties with such an approach, but these are outweighed by the advantages that would be achieved.

(3) Policy: Congress needs to review United States efforts to match the terrorist threat environment with current and anticipated anti-terrorist capabilities. Where we find disconnects, remedial action should be taken.

Further, we should ensure that when comprehensive policy is formulated, that policy is followed at all governmental levels. Pledges that we "will never negotiate" with terrorists or only "use the military option as our last resort" may make good sound bites, but is this really sound policy? We can all imagine instances where we would want a designated component of the government to negotiate with terrorists, (as the Israelis, Germans, British and others have done) or when a military response is the best first option. We have seen different bureaucracies, and bureaucracies at different levels of government, marching to different drummers; that costs lives.

What I am calling for here is a new level of analysis, leadership and the building of consensus—in the Executive Branch, in the Legislative Branch, and throughout states and communities across the United States.

Mr. Chairman, as far as we can foresee, international terrorism, especially weapons of mass destruction in the hands of state-sponsored or non-state groups, poses a major threat to United States and international security and welfare. This threat, like a virus, is likely to mutate and increase in severity. It is likely to get worse before it gets better.

But Mr. Chairman, I do not believe that contemporary terrorism is beyond our reach. It should be not be dismissed as just another intractable problem in an increasingly complex world. The opposite is true. With an improved and coordinated response, we can mitigate the scourge of terrorism. By using the tools available to us, we can tip the odds in our favor.

The United States, and the world, have faced and met threats as serious before. Leadership, both at the Presidential and Congressional levels, led first to understanding the dangers and, ultimately, to responses.

If we strengthen our stand and continue to lead a worldwide effort against terrorism, we can successfully reduce and frustrate international terrorism and slow the pace of global ungovernability.

Mr. HYDE. Thank you, Dr. Godson, very much. We'll certainly rely on you and call on you in the future for continued assistance.

Next, Dr. Michael Ledeen, who is an author and statesman and man of many parts, and a good friend. Dr. Ledeen.

STATEMENT OF MICHAEL A. LEDEEN, RESIDENT SCHOLAR, THE AMERICAN ENTERPRISE INSTITUTE

Mr. LEDEEN. Thank you, Mr. Chairman. Thank you for the invitation to talk to you today.

In the interest of time, I'm going to read my summary instead of trying to summarize it.

While there are many elements in the proposed legislation that seem quite positive, some raise difficult questions. The creation of a special tribunal to expel terrorist suspects is bothersome, as is the federalization of virtually all criminal acts that can be defined as terrorist. Both these provisions lend themselves to possible abuse.

Perhaps a better visa policy, more effectively enforced, would eliminate the need for special tribunals. It is not immediately obvious to me why prosecutors need the additional weapons offered them in this proposed legislation. If they have a convincing case against those who have committed terrorist acts, they shouldn't have any trouble getting maximum penalties enforced.

But the problem is certainly a serious one. The administration should be commended for making an attempt to cope with it, and it may well be that these remedies are, in fact, the best available, but I have a lot of questions. My main concern is to suggest ways to deal effectively with terrorists.

On defense, we can greatly improve the coordination among various Government agencies which today is highly fragmented. We should encourage the development of better and more rapid sensing devices for use in airports and other public places.

But no defense will be able to protect us from determined terrorists and we must have ways to strike at them when that becomes necessary. In order to do that effectively, we will, I believe, want to cancel the Executive order on assassination. This Executive order is a classic example of a well-intentioned action that eventually works at cross-purposes with the original intent.

Initially designed to prevent the American intelligence services from carrying out lethal operations, it now puts us in the absurd position of having to choose between diplomatic requests for steps like putting terrorists on an Interpol watch list—or bombing targets in foreign countries. Surely, there will be times when something more aggressive than Interpol requests, yet less violent than a bombing raid, will be the most appropriate response. Unfortunately, the Executive order has taken it away from us. Furthermore, the Executive order prevents us from gathering valuable information from terrorists as agents, as we are unable to recruit them under the terms of this order.

Finally, we will not be able to cope with international terrorism unless our own international working relationships are in good order, and that means both a willingness to share sensitive information with our friends and allies, and to take action with them when they reasonably ask us for it. When our friends and allies see

that sharing sensitive information with us does not lead to action, then they will stop sharing, and we will be severely hindered in our efforts to fight back.

Thank you, Mr. Chairman. I'll be happy to respond to questions.

[The prepared statement of Mr. Ledeen follows:]

PREPARED STATEMENT OF MICHAEL A. LEDEEN, RESIDENT SCHOLAR, THE AMERICAN ENTERPRISE INSTITUTE

I am grateful for the invitation to testify before the Committee on the Judiciary on the subject of International Terrorism. My credentials in this field are variegated. In the mid-seventies, I was Rome correspondent for *The New Republic*, and consequently spent a good deal of time covering the spread of terrorism in Western Europe. When I moved to Washington in 1977, I wrote some scholarly articles on the subject. While Special Adviser to the Secretary of State in 1981–82, some terrorist issues came across my desk, although I had no formal responsibilities in that area. I devoted considerable time to the subject as a consultant on counterterrorism to both the Pentagon and the National Security Council in the mid-1980s. I then did some professional work in the security field as a private businessman. I have maintained Top Secret clearances, and I have tried to stay relatively informed about the general phenomenon, if not the details of each and every terrorist movement and/or event.

Talking to Americans about terrorism is a bit like describing purple to a blind man, because we have been free of it for most of our history, and it is obviously not high on our list of contemporary anxieties. Yet, given the fearsome record of international terrorism in the past thirty years, and the explicitly anti-American rhetoric of the leading terrorist organizations and sponsor states, any responsible government must take it seriously. I hope this country never experiences the frightful assaults to which many Western European countries were subjected in the 1970s, some of which I witnessed first hand. As has so often been the case, Italy served as Europe's sociopolitical laboratory, and the country that gave us fascism, the Mafia, and Eurocommunism, created Euroterrorism. Most of Western Europe was soon under terrorist assault. Civilian government was overwhelmed by the terrorists in Turkey, and the military seized power to stop the carnage (at the high point of the terrorist wave, one Turk was killed every five minutes). Just as democracy was destroyed by terrorists in Uruguay and Argentina in the sixties, it fell in Turkey a decade later. The only difference was that it took nearly thirty years for democracy to return to the Latin American countries, while the Turkish generals, true to their promises, turned the country back over to civilian government within five.

Even the more solid democracies of France, England, Germany and Italy found it impossible to fight terrorism and maintain the high standards of civil liberties that had been slowly and dearly won over the course of the post-war period; all of these countries passed tough laws that strengthened the ability of the state to inquire into citizens' private behavior, hold prisoners without bail for extended periods of time, and give greater powers to police and other anti-terrorist forces. In most cases, these harsh measures were not enough to put an end to the scourge; the IRA continued to murder innocent civilians in Northern Ireland and in England, the Basques still killed in Spain, and Islamic terrorists killed in Europe and the Middle East, financed and trained by the usual club of Iran, Libya, Syria and Iraq.

As leading businessmen, journalists, politicians and even military officers were gunned down or taken hostage in the capitals of Europe, the Middle East, and Latin America, the political elites and the national electorates began to wonder if their democratic institutions were capable of withstanding the challenge. In some cases, the governments came to terms with the terrorists, permitting them to live safely in European countries so long as they promised not to conduct violent operations there. In Italy, for example, the military intelligence organization had a man in Beirut who served as liaison with the PLO, and whenever a Palestinian terrorist was captured in Italy, he or she was generally flown to some safe haven (often Libya) on a chartered Alitalia airliner. In other cases, the success of the terrorists was used as an argument for a radical leftward change in government—as when the Italian Communists proclaimed that terrorism could only be effectively controlled if they were brought into the governing coalition. In other countries, like Spain and, to a somewhat lesser degree, Germany, the terrorists' success served as an excuse for devastating attacks against existing institutions from the political right. This was precisely what the terrorists wanted, for their strategy was the same one that was adopted by West European communists after the First World War, and which

helped bring fascism to power: terrorize the society and force it to choose between extremes.

Terrorism also exacerbated tensions between Europe and the United States, because when the Europeans turned to Washington for help in combatting terrorism, they often found us either unwilling or unable to give effective assistance. Under President Carter, the CIA was forbidden to help allies fight terrorism unless the terrorist group in question could be shown to be "international." This was a response to the scandals of the early and mid-seventies, in which covert American assistance was sometimes given to repressive, right-wing regimes that crushed their domestic critics under the mantle of anti-terrorism. But this well-intentioned policy had the unfortunate effect of reducing our ability to help allies. Just at the moment that Spain was in the midst of its difficult and terribly important transition from dictatorship to democracy, the Spaniards asked us for help in fighting the Basque terrorists, who were a serious threat to the new democracy. We refused, on the grounds that the Basques were "domestic," not "international" terrorists, even though they lived in France, trained in North Africa, and killed in Spain. As Prime Minister Adolfo Suarez once rhetorically demanded, "isn't that international enough for the Americans?" The Italians found that one of the leading terrorist suspects regularly spent his summers in Cambridge, Massachusetts, and they asked the FBI for information about his activities there. The FBI coolly responded that, since the gentleman in question had not committed illegal acts in the United States, there were no grounds for surveillance. This baffled and annoyed the Italians, who felt we should have been more forthcoming.

So we are well advised to prepare to fight, and it's encouraging to see the administration trying to help. I have no particular legal expertise, but if it is true, as asserted by the Department of Justices that we have failed to fully comply with our treaty obligations, then the recommendations in the Omnibus Act should certainly be adopted. I also agree that it's a good idea to make it easier for our law enforcement organizations to block and seize funds belonging to, or intended for, terrorist organizations. And, along the same lines, if it's a good idea to take money headed their way, it's even smarter to stop it from being collected in the first place. I consequently welcome the effort to make it more difficult for people to raise money for terrorist causes. Finally, along with most everyone else who has worked in counterterrorism, I've been frustrated by the speed and generosity with which the full protection of the Constitution is extended to terrorists, once they set foot on American soil—indeed, even before passing through immigration and customs. Surely there is a better way, and perhaps the creation of a special tribunal, which can speedily examine the government's claims without exposing its possibly sensitive sources and methods, is a workable solution. I confess to an abiding distrust of special tribunals, but FISA courts have worked well so far, and perhaps this one would work equally well. I wonder, however, if the goal of the special tribunal envisaged in this legislation could not be just as well accomplished by a better visa system. At present, it seems that our consular officials are operating under one set of guidelines—which tend to favor terrorists trying to enter the country—while our law enforcement officers are trying to remedy the problems thereby created. Why not insist that visa-issuing offices go through the databases overseas, and give the intelligence community and law enforcement agencies the chance to ask that visas not be issued to individuals who would be brought in front of the special tribunals once they entered the country? I would rather try to keep terrorists out than have to track them down and go through an extraordinary legal procedure once they're in.

Before turning to a discussion of other kinds of steps that might usefully be taken, I would like to raise an additional concern about this proposed legislation. In essence, I take it that the government would like to make all terrorist acts federal offenses, so that federal law enforcement agencies can work on them, and federal prosecutors can prosecute them. I gather that much of the proposed legislation comes from FBI officers with considerable experience in counterterrorism, and one must listen very carefully to such people, who have a generally exemplary record. Yet I think we must also consider the risk of unintended consequences. By upping the ante for crimes committed by people we can define as terrorists, we will tempt future prosecutors and law enforcement officers to brand as "terrorists" as many targets as possible, with all the attendant dangers of abuse. Is it really necessary to make the penalty for a given crime even greater when we can define it as "terrorist"? After all, we're dealing with serious crimes here, and it shouldn't require special laws for prosecutors to get the maximum penalties.

What *is* clearly required, is better coordination among all the various law enforcement agencies, at all levels We've got a lot of federal agencies involved in counter terrorism, yet much of the work is fragmented. The intelligence community, narrowly defined, learned a terrible lesson a few years ago, when, after the terrorist

bombing of the Marine Barracks in Beirut, it was discovered that we actually had all the information necessary to have predicted the event, but failed to realize it because of the excessive compartmentalization. Nowadays most of the fragmentation is due to bureaucratic turfmanship rather than compartmentalization, but it is a similar problem and needs the same kind of solution: the creation of an all-sources clearing house where representatives from all agencies can meet to compare notes, discuss policies, and coordinate actions.

In addition to better coordination among ourselves, there are some technical steps that would probably help in the fight against terrorism, including the development of better sensing devices for use in airports and public buildings. I see that the proposed legislation calls for the marking of plastic explosives, and of course that is all to the good, but some of the terrorists have their own labs, and have the capacity to make plastique that will not be tagged. We must be able to detect it in luggage, and the detecting devices have to be fast enough to make security checks bearable for travellers. I believe that the kind of research and development necessary to improve current technology is already under way, and the government should do everything it can to speed up the process. And, once the technology is perfected, the government should help defray the expense of acquisition and installation.

But no matter how strong our defenses, determined terrorists will find ways to beat them, and that is why we must have a tough, aggressive policy that takes the fight to the terrorist camp. With few exceptions—one of which I will discuss shortly—a vigorous counter terrorist policy does not require changes in law, or in bureaucratic structure, or even in existing technology. It simply requires the will and the courage to wage war against terrorists, and against their sponsors. And although there is invariably a great hue and cry whenever we take vigorous action, there is usually a positive result.

It will be recalled, for example, that when the United States armed forces bombed Tripoli, Libya, a few years ago, in retaliation for the terrorist bombing of a cafe frequented by American soldiers, it was widely denounced—even by a former director of central intelligence—and the critics forecast that the Libyans would retaliate on an awesome scale. Instead, there was a noticeable decline in the level of Libyan support for international terrorism. I say this not to recommend large-scale bombing as an appropriate counterterrorist strategy; as will be seen, I think there are better ways. But it is important, I think, to appreciate that that the use of military power had a definite effect on a terrorist regime.

Most of the time we will be directing our attention against terrorist groups, rather than regimes, and consequently bombing raids are too blunt an instrument. Moreover, small terrorist groups present difficult intelligence targets, and it is hard for us to learn the exact nature of the groups, and next to impossible for us to obtain their plans. In order to do that, we would have to recruit members of the group, and have them pass to us the information we require. Unfortunately, the chances of penetrating a terrorist group in this way have been gravely reduced as a result of a well-intentioned but nonetheless misguided act by President Ford, which has been renewed by every subsequent president: the executive order banning assassination. In their usual way, the lawyers interpreted the stricture against assassination to include any working relationship between an official of the American Government and anyone involved in, or about to be involved in, an assassination. For all practical intents and purposes, that means that an American intelligence officer cannot recruit and run a terrorist, because the terrorist is in the assassination business.

So, just on the grounds of getting desperately-needed information, the executive order has to go. But it also has to go on operational grounds, because as things currently stand, if we want to retaliate against a terrorist group, our options are quite limited. At one end of the scale, there is the full-scale military response, of the sort adopted against Libya. At the other extreme, is diplomacy—asking foreign governments to arrest the bad guys—and putting out requests for arrest through Interpol and other similar networks. Most of the time, a military response against a military target will be inappropriate, and in any event such an action invariably causes the maximum casualties to innocent civilians. The terrorists seem to know this, because on several occasions when it looked like we might be gearing up for an attack on them, terrorists we were watching actually moved women, children and nurses and doctors into their compound, so that any attack on the terrorist site would inevitably kill some of the innocents.

The proper response, most of the time, will be small, perhaps directed against a mere handful of terrorists. The most desirable action is to apprehend them and bring them back here to face judgment, and we will be far more successful in gaining the assistance of foreign countries, once they see that we are prepared to send our own people into action against the terrorists. But there will be times when the

use of lethal force is unavoidable, and if we are going to continue to forbid it, we're going to have a tough time crafting an effective counterterrorist policy.

There will also be times when a proper response should be directed against a regime that sponsors terrorism, and here it seems luminously clear that the lesson we wish to deliver is: a regime that launches terrorism against the United States will not survive. It should be clear that I am speaking of political survival; this is not a call for mass vengeance. But the best way to ensure that we will not be targetted by the terrorists of the future is to show that anyone who aids and abets the terrorists will have to find another line of work, at a much lower level of status. This is not to gainsay the very positive gains posted as a result of vigorous gestures like the bombing of Libya or embargoes against terrorist states. But Qadaffi was able to support terrorists even after we bombed Tripoli, as the sad story of Pan Am 103 eloquently confirms.

Finally, there is the all-important question of international cooperation. We can neither attack nor defend effectively without a considerable amount of help from around the world. We need intelligence and operational assistance as well as legal coordination and cooperation. All this depends upon good working relations—which for the most part means good *personal* relations, beginning with reciprocal trust, and ending with a certain degree of confidence that if they take risks for us, we will act in an appropriate way. If friendly countries give us sensitive information, only to see us do nothing (or worse, leak the information to the public), they will soon stop sharing. Without such information, much of the legislation this committee is considering will be a dead letter. The sensitive information presented to the special tribunal, for example, will come primarily from foreign governments rather than from our own first-hand investigations.

If foreign governments lose confidence in us, no Omnibus Act and no special court will make up for it.

That means that we're going to have to demonstrate real resolve, and real capacity. I wonder, for example, what British counterterrorist officials will say when informed that our government is introducing legislation to make it more difficult for foreign terrorist groups to raise money in the United States. After all, a leading official of the IRA was just raising money here, with the embrace of the president of the United States. It will take some time, under the best circumstances, to convince the British of the seriousness of our resolve. I should stress that the question of the credibility of American resolve is not new, nor is it at all the special problem of this administration; it has been with us for many years, and no administration in recent memory has been free of it.

To sum up: while there are many elements in the proposed legislation that seem quite positive, some raise some difficult questions that need to be studied. Above all, we should not permit ourselves the luxury of believing that such defensive methods suffice in the war against terrorism; we need more aggressive measures, and in order to do that effectively we will, I believe, want to cancel the executive order on assassination.

Mr. HYDE. Thank you, Dr. Ledeen.

Mr. Nojeim.

STATEMENT OF GREGORY T. NOJEIM, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. NOJEIM. Mr. Chairman, I appreciate the opportunity to testify before you today on behalf of the ACLU, a nonpartisan organization, of more than 275,000 members devoted to protecting the freedoms set forth in the Bill of Rights.

Following the bombing of the World Trade Center and the recent gas attack in Japan, nobody can deny the terrorist threat. At the same time it is important to remember that existing laws and investigatory authority have proven adequate to apprehend, try, and incarcerate those who committed the World Trade Center bombing.

FBI and State Department statistics show that terrorism in the United States and terrorism abroad against U.S. targets has actually declined in the past few years. Terrorism legislation must respect the Constitution. It should prohibit unlawful activity, not merely associations, because to do otherwise would be to operate on

guilt by association. It should preserve the due process rights of those accused and should not be so broadly drawn as to invite selective prosecution based on political beliefs.

I'll focus my remaining time on how the Omnibus Counterterrorism Act of 1995, the administration's terrorism bill, runs afoul of these principles. The proposed legislation would attack citizens who support nonviolent legal activity of unpopular groups designated by the President in a nonreviewable determination as terrorist organizations. It would criminalize support not only for violent activity, but also for such acts protected by the first amendment as soliciting funds and members for the charitable or educational work of a designated organization. Giving the President absolute authority to designate groups as terrorist organizations without any opportunity for a person supporting that group to challenge the designation in court is extreme, dangerous, and prone to abuse.

If a person wanted to contribute to the legal activities of a designated group, in theory, under the legislation, they could apply for a license. However, the bill provides for licensing procedures so onerous as to render them illusory. To obtain a license to contribute to the legal activity of a designated group, the donor who would transfer money abroad would have to open its books to the Treasury Department and be able to show "the source of all funds it receives, expenses it incurs, and disbursements it makes."

Maybe it's appropriate that these hearings are held just a few days before April 15. Taxpayers, scrambling for records used to file their income tax returns, know very well that maintenance of records meeting this licensing requirement is all but impossible for individuals. Even more telling, to satisfy the licensing requirement, the recipient abroad—abroad—would have to open its books to inspection by the Treasury Department, a virtual impossibility in many cases.

The legislation would also attack aliens who would support the nonviolent, legal activities of groups designated by the President. Like citizens, noncitizens in the United States have first amendment rights. Under current law, an alien can be deported as a terrorist only for providing material support in conducting terrorist activity. The proposed legislation would do away with this focus on activity and substitute guilt by association. The alien would be deportable if the alien provided material support to an individual, government, or organization which the alien reasonably should have known has committed terrorist activity. Even if the alien had no connection to the terrorist activity, had no intent to further that activity, intended only to support charitable activity of the organization, the alien would be deportable. Under this provision, an alien who financed a trip by Yasser Arafat to go to the White House to sign a peace treaty with Israel and shake President Clinton's hand would be deportable for supporting the peace process.

The bill would also render deportable from the United States any alien who is a spokesperson for, or official of, any "terrorist organization" found by the President to be "detrimental to the interests of the United States." This is a dangerous throwback to the days of the discredited and unconstitutional McCarran-Walter Act which Congress repealed just a few years ago. It would roll back nearly

two decades of movement in Congress to bar people from the United States on account of their illegal activities, not merely on account of their associations and political beliefs.

Most importantly, the bill would establish a new court that could deport aliens as terrorists without allowing them to see the evidence against them. This would be an unprecedented violation of the due process rights of aliens. The Government has never before used secret evidence to deport an alien living in the United States. The most fundamental requisite of due process is that any evidence the Government relies upon must be disclosed, so that it can be responded to and defended against. The Supreme Court and the lower courts have consistently held that aliens who have entered the United States gain the full protection of the due process clause. Secret evidence has no place in American jurisprudence.

Finally, the bill would invite selective prosecution based on political beliefs because it would federalize as terrorism offenses a multitude of violent crimes that are already prohibited by State law. These acts would be terrorism offenses only if the Attorney General certifies that the act appears to have been intended to coerce, intimidate, or retaliate against a government or a civilian population or a segment thereof. Given the multitude of activity covered, this provision is fraught with risk to the first amendment and invites the most invidious kind of selective prosecution, prosecution based on implied political belief. The conspiracy provision in the bill raises the same concerns.

Mr. Chairman, the administration's terrorism bill does substantial damage to the U.S. Constitution. Tinkering with the bill by deleting a word here and adding a section there will not cure the bill of its constitutional infirmities. Rather, this legislation and other legislation drafted to respond to perceived terrorist threats must be rethought from top to bottom with fidelity to the following constitutional concepts:

First, people, whether citizens or aliens, have the right to support the legal, nonviolent activities of the organizations and groups they choose to support.

Second, people have the right to see evidence offered against them, whether the evidence is offered in a criminal trial or in a deportation proceeding, and regardless of the nature of the charges against them.

Third, any terrorism statute should not be so broadly drawn as to give the Government the power to selectively prosecute persons based on their political beliefs. Terrorism legislation consistent with the Constitution can be promulgated. The aspects of such legislation, including tighter controls on plastic explosives and nuclear materials already appear in the administration's bill. However, Congress need not maltreat the Bill of Rights to protect people here or abroad.

Thank you very much.

[The prepared statement of Mr. Nojeim follows:]

PREPARED STATEMENT OF GREGORY T. NOJEIM, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Committee: I appreciate the opportunity to testify before you today on behalf of the American Civil Liberties Union (ACLU). The ACLU is a nationwide, non-partisan organization of more than 275,000 mem-

bers devoted to protecting the principles of freedom set forth in the Bill of Rights. This hearing was called on "International Terrorism: Threats and Responses." I will focus on the Omnibus Counterterrorism Act of 1995, the Administration's terrorism bill, introduced on February 10 as H.R. 896. In an effort to battle terrorism, this bill would eviscerate provisions of the Constitution and the Bill of Rights to an extraordinary extent.

Following the bombing of the World Trade Center and the recent gas attack in Japan, nobody can deny the terrorist threat. At the same time, it is important to note that existing laws and investigatory authority have proven adequate to apprehend, prosecute and incarcerate, for a long, long time, those who perpetrated the World Trade Center bombing. Moreover, according to the FBI's own statistics, terrorism in the United States, and terrorism abroad against U.S. targets, has actually decreased over the past few years. In just the last session, Congress enacted legislation prohibiting people in the United States from providing material support for violent acts of terrorism. It is therefore incumbent upon the Administration to explain why Congress would be asked to damage the Constitution today to do battle with a threat against which adequate law enforcement tools already exist, and have proven effective.

Mr. Chairman, Americans are fearful of terrorism. And they support the Constitution. Effective terrorism legislation can be enacted without doing grave damage to civil liberties.

SUMMARY OF ACLU CONCERNS

The Omnibus Counterterrorism Act of 1995, would, in short:

(i) allow the government to deport aliens, convicted of no crime at all, based on secret information;

(ii) grant the president the power to freeze the assets of, and bar contributions to, unpopular organizations the president proclaims are "detrimental to the interests of the United States," and bar judicial review of such presidential proclamations;

(iii) make deportable aliens who contribute to the legal, non-violent, even charitable activities of organizations or governments unpopular with the U.S. government;

(iv) subject U.S. persons to lengthy prison sentences and fines for doing the same, unless they first meet impossibly onerous licensing requirements;

(v) abrogate the confidentiality provisions of the Amnesty and Special Agricultural Workers Immigration programs;

(vi) expand federal wiretap authority in violation of the Fourth Amendment;

(vii) permit FBI investigations without evidence of criminal activity;

(viii) allow permanent detention of aliens convicted of no crime; and

(ix) violate notions of equal protection by making aliens, but not citizens who engage in the same conduct; responsible for a wide range of federal crimes unrelated to immigration status.

I will highlight below some the these concerns.

FIRST AMENDMENT CONCERNS

The First Amendment to the Constitution guarantees to people in the United States the right to freely associate. This right extends both to citizens and to non-citizens. Courts have interpreted the First Amendment to mean that people are to be held accountable for their own actions, not for the actions of others. The courts have consistently held that raising and contributing money, and recruiting members, are activities protected by the First Amendment. Only support intended to further the unlawful activities of a group can be prohibited. To be consistent with the Constitution, effective terrorism legislation must prohibit unlawful activity, not merely associations, because to do otherwise would be to operate on nothing less than guilt by association. The Omnibus Counterterrorism Act of 1995 does violence to this notion in the case of both citizens and non-citizens.

I. Provisions Relating to Citizens and Aliens

The proposed legislation would attack citizens who support the non-violent. legal activity of unpopular groups labelled as "terrorist organizations." Section 301 would give the president unprecedented authority to designate any foreign organization found by the president to engage in "terrorism activity." "Terrorism activity" would include not only violent activity, but also such acts as soliciting funds or members for the charitable or educational work of an organization if the organization or any subgroup of the organization has engaged in any "terrorism activity" at any time. Once labelled, the assets of the organization would be frozen, and anybody in the

U.S. who without a license sent money to a designated organization, even to support non-violent, charitable activity of the organization, would be subject to a fine of up to $50,000 and up to ten years in prison.

This section of the statute smacks of McCarthyism at its worst. It gives the president virtually unlimited power to label groups as "terrorist organizations" and prohibit people from supporting even their lawful, non-violent activities.

The president would have nearly unfettered authority to bar contributions to any group at all because the proposed legislation provides that the president's determination that a group is a terrorist organization could not be challenged in court. This is extreme, dangerous, and prone to abuse. Once designated a terrorist organization, a group would have no recourse at all. Though it most certainly does not meet the definition of a "terrorist organization" contained in the bill, the president could designate the Republican Party a "terrorist organization" and thereby bar fundraising for its activities. The GOP could not appeal the designation, even to show that it is not a "foreign" organization, because the president's designation would be conclusive. It would then be a crime to contribute to the GOP without a license. The legislation would even bar the contributor from arguing in court that the GOP is not a terrorist organization.

Of course, a mainstream political party would never be so designated. However, the president could designate unpopular groups abroad and prohibit even in kind contributions to the lawful, charitable activity of unpopular groups. Criminalizing such legal activities is not the way to deal with terrorism.

Though the bill provides that a license could be obtained to give money to a designated group, it also provides for licensing procedures so onerous as to render the licensing provision illusory. To obtain a license to contribute to the legitimate activity of a designated group, the donor would have to open its books to the Treasury Department and be able to show "the source of all funds it receives, expenses it incurs, and disbursements it makes" regardless of whether the expenses, disbursements, and income relate to the charitable activity they would like to support.

Maybe it is appropriate that these hearings are held six days before April 15. Taxpayers scrambling for records used to file their income tax returns know very well that maintenance of such records is virtually impossible—and would not be attempted by a person who simply wanted to write a $100.00 check to a hospital abroad. Even more ludicrous, to satisfy the licensing requirement, the hospital abroad would have to open its books to inspection by the Treasury Department.

There is no exception in the bill to the licensing requirement in the case of religious institutions. A religious institution in the United States supporting religious and charitable activity abroad through the charitable works of an organization designated by the president would have to open its books to the Treasury Department. This risks impermissible government entanglement with religious activities.

The Omnibus Counterterrorism Act of 1995 would also subject citizens and aliens to FBI investigation for their activity protected by the First Amendment. Only last year, Congress adopted legislation prohibiting people in the U.S. from providing "material support" for terrorist acts. To prevent FBI "fishing expeditions" into activities protected by the First Amendment, the legislation included a clause prohibiting investigations in cases in which the government lacks facts that reasonably indicate that the target of the investigation knowingly and intentionally has or will engage in the violation of a federal criminal law. This legislation would repeal that modest protection and permit investigation in the absence of such facts. The FBI has a history of such unfounded investigation into First Amendment activity, including its investigation of the Committee in Solidarity with the People of El Salvador (CISPES).

II. Provisions Relating Only to Aliens

Like citizens, non-citizens in the United States have First Amendment rights. The proposed legislation would attack aliens who support the non-violent, legal activity of unpopular groups labelled as "terrorist organizations."

Section 202 of the proposed legislation would make two substantial changes to immigration law. First, it would render excludable or deportable from the U.S. any alien who is a spokesperson for, or official of, any "terrorist organization" found by the president to be "detrimental to the interests of the United States."

This proposed section of the legislation is a throwback to the days of the discredited and unconstitutional McCarran-Walter Act, repealed by Congress just a few years ago, after being ruled unconstitutional. It would roll back nearly two decades of movement by Congress to bar people from the United States on account of their illegal activities, instead of on account of their associations and political beliefs. It is extreme and dangerous. It would allow the president virtually unchecked author-

ity to deport or bar from the United States aliens undesirable merely because of their political beliefs.

Just last year, the Administration testified in Congress against legislation that would bar from the United States aliens based on their political beliefs and affiliations. On February 23, 1994, Mary A. Ryan, Assistant Secretary for Consular Affairs of the Department of State testified that one could not presume that a member of a group that engages in widespread social welfare programs was a "terrorist" just because other members of the group engage in objectionable violent activity.[1]

Second, it would render an alien excludable and deportable if the alien provides material support, even in-kind donations, to any organization that the alien reasonably should know has ever engaged in any "terrorism activity." No presidential proclamation would be required. Aliens would have no notice in the Federal Register of which groups they could not support. Even if the overwhelming majority of the activity conducted by the organization was legal, nonviolent, charitable activity, such as running hospitals and orphanages, and even if the alien contributed only to that activity, by for example, giving a blanket to a hospital, the alien would be deportable if any subgroup of the organization had ever engaged in terrorism activity, and the alien reasonably should have known. In addition to certain violent acts, "terrorism activity" is broadly defined to include soliciting funds or members for a "terrorist organization."

Under current law, there must be a nexus between the material support and the terrorist activity, and one can be deported only for providing material support in conducting a terrorist activity. The proposed legislation would do away with this focus on activity and substitute guilt by association: the alien would be deportable if the alien provided material support to an individual, government or organization which the actor reasonably should have known has committed terrorist activity. Even if the alien had no connection to the terrorist activity, had no intent to further that activity, and intended only to support charitable activity of the organization, the alien would be deportable.

This section of the proposed legislation threatens to make literally thousands of aliens deportable from the United States. It would violate the rights of aliens to fund the legal, nonviolent, charitable activity of organizations found to have ever engaged in any "terrorism activity" at all. Under this provision, an alien who financed a trip by Yasser Arafat to go to the White House to sign a peace treaty with Israel would be deportable for supporting the peace process. An alien who donated a fax machine to the Zapatistas in Chiapas, Mexico to help them publish their grievances against the government of Mexico would be deportable as well.

Moreover, the section renders deportable aliens who afford material support to any "terrorist government" and fails to define the term "terrorist government." This leaves open the possibility that the payment of taxes to governments abroad would render an alien deportable.

To pass First Amendment muster, these provisions must be entirely re-thought to address activity, not associations. Absent such a re-thinking, one can be sure that this legislation would be applied selectively, and only against unpopular groups, governments and individuals labelled for political reasons as "terrorists."

FIFTH AMENDMENT CONCERNS

The Fifth Amendment to the U.S. Constitution guarantees that a person shall not be deprived of life, liberty or property without due process of law. The Section 201 of the bill would establish a new court that could deport aliens as "terrorists" without allowing them an opportunity to see the evidence against them. This would be an unprecedented violation of the due process rights of aliens.

Under the proposed procedures, the new court could receive classified information about the alien out of the presence of the alien and the alien's attorney. It would commence a special removal hearing. During the proceedings, the accused alien who is not a permanent resident would be held in custody, and an alien who is a permanent resident would bear the burden of proving that he or she should be released. The government would summarize any classified information to be used against the alien, and the summary would be provided to the alien upon a finding by the court that the summary informs the alien of the nature of the evidence that he or she is deportable, and is sufficient to permit the alien to prepare a defense. However, if the court found either that the presence of the alien in the U.S., or the provision of the summary, would cause serious and irreparable harm to the national security,

[1] Written Testimony of Mary A. Ryan, Assistant Secretary for Consular Affairs, Department of State, Before the Subcomm. on International Law, Immigration and Refugees of the House Judiciary Comm., February 23, 1994, at 6–7.

or serious bodily injury to a person, the alien could be deported based on the classified evidence, kept secret from the alien.

The section is similar to legislation Congress declined to adopt in each of its two previous sessions. It is unconstitutional. The government has never before used undisclosed, secret information to deport an alien living in the United States. The most fundamental requisite of due process is that any evidence the government relies upon must be disclosed so that it can be responded to and defended against. The Supreme Court and the lower courts have consistently held that aliens who have entered the United States gain the full protections of the due process clause, and therefore cannot be deported on the basis of information not disclosed to them. The courts have permitted the government to use classified information only to exclude aliens who have not yet entered the United States or to deny an alien a discretionary immigration benefit—never to deport an alien already present.

The danger presented by withholding from aliens the evidence upon which they would be deported is real and significant. In one case that went to the Supreme Court, *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950) secret evidence was allowed to be used to exclude from the United States the alien wife of a U.S. citizen. Mrs. Knauff was in exclusion proceedings and had not yet entered the United States. As a result of public pressure, a hearing was granted notwithstanding the Court's ruling that because Mrs. Knauff had not entered the U.S., she did not have the right to see the secret evidence. In the course of the hearing, the secret evidence was found to be worthless because the "confidential source" offering the evidence was determined to be a jilted lover. Mrs. Knauff was allowed to enter the United States. The case provides a graphic illustration of the danger of allowing secret evidence to be used against aliens in deportation proceedings.

This section does not track the Classified Information Procedures Act (CIPA)[2] and the Clinton Administration has not proposed in this bill a "civil CIPA" that will pass constitutional muster. CIPA itself raises constitutional concerns because it can operate to require a defendant to mount a defense only with substituted evidence. However, under the proposed legislation, even the substituted evidence could be denied the alien in deportation proceedings.

CIPA establishes a procedure by which a defendant in a criminal case may seek to use classified information in his or her defense. If the government objects to the use of classified information, it can submit to the court a summary of the classified information which must provide the defendant with the same ability to make a defense as would disclosure of the classified information. Under CIPA, if no fair summary protecting the classified information can be provided, the summary is rejected, the information cannot be used, and the court sanctions the government for refusing to consent to public disclosure, by dismissing the entire indictment or counts of the indictment, by entering findings against the government, or by striking the testimony of witnesses.

Thus under CIPA, when a fair summary protecting disclosure of classified information cannot be provided the defendant, the government cannot use the classified information. The proposed legislation would turn CIPA on its ear: under the proposal, the government would seek to use classified information to deport an alien, and if provision of a fair summary of the classified information would disclose the name of an informant the government claims could be injured if identified, no summary would be required, the classified information would be used as evidence to deport the alien, and the government would suffer no sanctions.

The proposed legislation would *allow* the use of classified information against the alien in the absence of substituted evidence, where as CIPA *prohibits* the use of classified information in such a circumstance. This use of classified information, kept secret from an alien, would violate the due process rights of aliens.

Under rulings of the Supreme Court, the Fourth Amendment requires in a criminal trial the suppression of evidence obtained in an illegal search, with limited exceptions. In a civil deportation proceeding, the Fifth Amendment can require the suppression of evidence obtained in circumstances so egregious as to offend the Fifth Amendment notion of fundamental fairness. The Omnibus Counterterrorism Act of 1995 would prohibit aliens accused under the special "terrorism" procedures from seeking the suppression of evidence. This proposed exception to the Fifth Amendment protection is tantamount to telling law enforcement officials that in the case of aliens accused of certain activity, there will be no sanction of suppression of evidence, even if the evidence is obtained in the most outrageous circumstances. By removing the threat that evidence would be suppressed, the proposed legislation increases the likelihood of illegal searches and acquisition of evidence in outrageous circumstances.

[2] 18 U.S.C. App. IV, Section 1 et seq.

FOURTH AMENDMENT CONCERNS

The Omnibus Counterterrorism Act of 1995 threatens the Fourth Amendment, which protects people in the United States from unreasonable searches. The Fourth Amendment requires that the government "particularly describe" in its request for a search warrant the premises to be searched. In the case of wiretaps, the government must specify the location of the telephone to be tapped, unless the government can show that the suspects were attempting to evade the wiretap by changing the phones they used. Section 101(e) of the proposed legislation would do away with the Fourth Amendment's specificity requirement in the case of wiretaps employed in investigations of alleged terrorists. The government could tap any phone in a terrorism investigation without specifying which phone, and without showing that such a "roving" wiretap was made necessary by attempts to evade a tap on a specific telephone.

EIGHTH AMENDMENT CONCERNS

The Eighth Amendment prohibits excessive bail. The Omnibus Counterterrorism Act of 1995 would practically prohibit bail altogether in certain prosecutions. Under Section 101(d), anyone accused of engaging in activity outlawed under the section would be presumed ineligible for bail. Instead of the government bearing the burden of showing that the accused is a flight risk and potentially dangerous to the community, the burden would be shifted to the defendant to show that he or she should be released. The government has asked that the burden be shifted to the defendant so that it could keep secret from the defendant the evidence it has against him or her. Absent such evidence, burden of rebutting this presumption would be immense, and rises to constitutional proportions.

SELECTIVE PROSECUTION FOR POLITICAL REASONS

The Omnibus Counterterrorism Act of 1995 would turn into federal "terrorism" crimes certain violations of state law and certain conspiracies. These portions of the proposed legislation are so broad that they invite selective prosecution of unpopular groups for their political beliefs.

Section 101 of the proposed legislation would allow federal prosecution of acts that violate state laws prohibiting killing, kidnapping, or assault, and the vast category of damage to buildings or personal property, if: (i) a jurisdictional base could be met; and (ii) the Attorney General certifies that any activity preparatory to the act crossed national boundaries, and that the act "appears to have been intended to coerce, intimidate, or retaliate against a government or a civilian population, including any segment thereof."

All of the *activity* described in this section is already a crime under the laws of the states. However, the bill would turn these state law crimes into federal crimes when the Attorney General makes a non-reviewable certification that the crime was politically motivated. Having the government presume the political opinion and motivation of an actor, in an unreviewable determination, is fraught with risk to the First Amendment.

There is a risk that the Attorney General will make this certification only when it is politically expedient to do so because so many violent crimes would otherwise be federalized. Under the bill, a Canadian who during the Gulf War painted, "Nuke Saddam" on the store-front of a grocery store owned by an Iraqi-American could be prosecuted federally for committing an act of terrorism. The Attorney General would be put in the position of picking and choosing, based on an unreviewable determination about the political motivation of the actor, whether to prosecute such crimes as terrorist acts.

Section 102 would create a new federal crime for conspiring in the United States to (a) murder, kidnap, or maim outside of the U.S.; or (b) damage property abroad that either belongs to a government with which the U.S. is "at peace." or is a railroad, canal, bridge, airport, airfield other public structure or "religious, educational, or cultural property" abroad. In either case, a predicate act to effect an object of the conspiracy would have to occur in the U.S. This section, like the section above, is overbroad and fraught with the risk that it would be enforced only against politically unpopular individuals and groups.

Under this legislation, the government could prosecute as terrorists a group of veterans that planned to rescue a comrade in post-war Vietnam if the rescue involved blowing the lock off of a prison door. This is the kind of activity swept up within the legislation, but unlikely to be prosecuted for political reasons. Instead, this section would be enforced only against unpopular groups and individuals.

CONCLUSION

The Omnibus Counterterrorism Act of 1995 does substantial damage to the U.S. Constitution. We have not even attempted to lay out all of the civil liberties concerns raised by the bill because they are so numerous. The ACLU intends to supplement this testimony with a section by section analysis of the bill that will more fully lay out our concerns.

Tinkering with the bill, by deleting a word here and adding a section there. will not cure the bill of its constitutional infirmities. Rather, this legislation, and other legislation drafted to respond to perceived terrorist threats, must be re-thought from top to bottom. with fidelity to the following constitutional concepts:

(i) People, whether citizens or aliens, have the right to support the legal activities of the organizations and groups they choose to support. This right is fundamental to the right of free association.

(ii) People have the right to see evidence offered against them, whether the evidence is offered in a criminal trial or in a deportation proceeding, regardless of the nature of the charges against the person.

(iii) Any terrorism statute should not be so broadly drawn as to give the government the power to selectively prosecute persons for conduct the government judges is calculated to serve an undesirable political end.

Terrorism legislation that is consistent with the Constitution can be promulgated. Aspects of such legislation, including tighter controls on plastic explosives and nuclear materials, already appear in the Administration's bill. However, Congress need not maltreat the Bill of Rights to protect the population.

I will be happy to entertain any questions you might have.

Mr. HYDE. Thank you, Mr. Nojeim.

Mr. Nadler, I would recognize you first, if you have some questions, because of your forbearance on the last panel.

Mr. NADLER. Thank you, Mr. Chairman.

I'd like to ask Mr. Nojeim a number of questions. Under the definition of "terrorism," which is attacking a person's property, et cetera, the people who pulled down the Berlin Wall or toppled the statue of Stalin or Ceaucsceau in Romania, would they be guilty of terrorism under this bill?

Mr. NOJEIM. They could be charged under the bill because the bill——

Mr. NADLER. They could or could not be——

Mr. NOJEIM. I think they could. The bill brings in crimes against property, and that's a broad category of crime, and it brings in crimes against property owned by the Government. I don't see—I don't see something in this bill that says that that wouldn't be prosecuted. I think that the section that you're referring to——

Mr. NADLER. Excuse me. I'm sorry, because I only have 5 minutes. That's sufficient——

Mr. NOJEIM. All right.

Mr. NADLER [continuing]. For that purpose. "Conspiracy to kill, kidnap, maim, or injury to certain property in a foreign country"—but to let me go to a different subject for the moment.

We have this procedure for deporting aliens who are engaged or who support terrorism, et cetera, and we have this secret testimony that if there national security is implicated, they can be given a summary of the testimony against them which the judge deems sufficient for them to answer, unless the judge thinks that even that's too dangerous, in which case they can be prosecuted on the basis of testimony that they're not even told about.

Your memo says this does not track the Classified Information Procedures Act because CIPA applies only to evidence to be introduced by the defense which the Government objects to making public. Congressman Schumer says that your memo is wrong, that

what the bill seeks to do, and what the Justice Department says the bill seeks to do, is the same as under the Classified Information Procedures Act. Does this, in fact, go farther than the existing law or not?

Mr. NOJEIM. Yes, and let me explain why. When push comes to shove in CIPA, if substituted evidence, a fair summary of the evidence would disclose classified information, the evidence is kept out of court. When push comes to shove under this legislation, if that summary couldn't be provided, because provision of a summary would result in exposing an informant, for example, the evidence comes in. So it turns CIPA on its ear. It reverses the key protection that CIPA has to keep that evidence out when a summary can't be provided.

Mr. NADLER. So, in other words, under CIPA the evidence would be excluded if it cannot be fairly summarized in open court, and here the evidence would come in if it cannot be fairly——

Mr. NOJEIM. Exactly.

Mr. NADLER [continuing]. Summarized in open court?

Now one other thing, under this bill, the President's designation of an organization as terrorist, would not be subject to review. The Deputy Attorney General said before that what that means is that someone prosecuted as a member of that organization could get judicial review at that point. What do you think it means when it says it's not subject to review? If the National Association of Stamp Collectors was determined by the President to be a terrorist organization, do they have standing to go to court and say, "We're not terrorists and we want this expunged."?

Mr. NOJEIM. Mr. Nadler, like you, I'm reading the statute, and the statute says that the President's determination is conclusive.

Mr. NADLER. And, therefore, they would not be able to go into court on that?

Mr. NOJEIM. That—I mean that's what the statute says.

Mr. NADLER. And under your reading of the statute, if someone were then prosecuted for being a spokesman for or a contributor to the National Association of Stamp Collectors, which the President determined to be terrorist, would they have standing to raise the issue that the President's determination was erroneous——

Mr. NOJEIM. No.

Mr. NADLER [continuing] In the defense against their prosecution?

Mr. NOJEIM. No.

Mr. NADLER. They could not?

Mr. NOJEIM. No, they could not raise that.

Mr. NADLER. So it would be conclusive even to that point?

Mr. NOJEIM. It's conclusive as to the donor, and I think that Ms. Gorelick was saying that it was conclusive as to the donor also. I think that she conceded that point, but where we seem to have some conflict is over whether that language in the statute makes it conclusive as to the group itself.

Mr. NADLER. Should it be conclusive as to either one?

Mr. NOJEIM. It shouldn't be. There should be an opportunity for a person to be able to challenge the designation in fact, the opportunity should come before the designation would ever happen. There should be an opportunity to show that you're not a terrorist

organization before you get blacklisted, so that people would then stay away from you and not contribute to legitimate activity. That should happen before——

Mr. NADLER. But there should be a due process hearing of some sort before you're listed as a terrorist organization?

Mr. NOJEIM. Of course.

Mr. NADLER. Why——

Mr. HYDE. The gentleman's time has expired.

Mr. NADLER. Can I have the committee's indulgence for 30 seconds?

Mr. HYDE. Thirty seconds.

Mr. NADLER. Thank you, Mr. Chairman. Why is that important, given the fact that you can be prosecuted for being a spokesman or a donor to a terrorist organization that's not listed?

Mr. NOJEIM. Say it again now?

Mr. NADLER. Why is that important, to give due process as to whether you're listed or not, given the fact that someone can be prosecuted for being a donor or a spokesman of an unlisted organization which he should have known was terrorist?

Mr. NOJEIM. The persons who can be prosecuted for that are aliens in the sense that they would be deportable for doing that. The aliens would have no warning. For citizens, there would be something printed in the Federal Register.

Mr. NADLER. Thank you. Thank you very much.

Mr. HYDE. The gentleman's time has expired.

The ranking member of the committee has graciously agreed with me that we can adjourn the meeting. He has a statement to make, but we have a vote on, and rather than keep you here while we run over and then run back, with your indulgence, we will—we would like to submit questions in writing to you, and we shall do so.

And I want to yield to my friend, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, thank you.

I want to commend this panel, all of the members on it. I'm going to be in touch with ACLU and both the other members, so that we can continue this very important discussion. Your analyses are all valuable to us, and I think that this hearing has opened matters up much wider than they might have otherwise. I'm very grateful to you.

Mr. COBLE. Mr. Chairman.

Mr. HYDE. The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, only 30 seconds. I want to thank the panel, and I want to reiterate what Mr. Conyers said. This has been a very good hearing. And, Mr. Chairman, I believe you said there will be subsequent hearings, and I look forward to those and perhaps some hearing from this same panel at another time.

Thank you. I thank the chairman.

Mr. HYDE. I thank—I thank everybody, and the gentlelady from Texas I especially thank.

Ms. JACKSON LEE. And I thank them as well, and I will submit written questions because I do have them.

Mr. HYDE. That's great.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. HYDE. Mr. Schumer.

Mr. SCHUMER. Yes, I would have liked to have asked questions, but I——

Mr. HYDE. And we would have liked to have heard them.

Mr. SCHUMER. I'm sure you would like to hear every word, but I will defer and submit written questions.

Mr. HYDE. You're a real sport, and I thank you.

[Laughter.]

Mr. HYDE. I want to thank you very much, though, and we will submit written questions. Thank you.

The meeting is adjourned.

[Whereupon, at 3:43 p.m., the committee adjourned.]

INTERNATIONAL TERRORISM: THREATS AND RESPONSES

MONDAY, JUNE 12, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, Carlos J. Moorhead, George W. Gekas, Steven Schiff, Charles T. Canady, Bob Goodlatte, Ed Bryant of Tennessee, Steve Chabot, Bob Barr, John Bryant of Texas, Patricia Schroeder, Zoe Lofgren, and Robert C. Scott.

Also present: Alan F. Coffey, Jr., general counsel/staff director, Patrick B. Murray, counsel; Thomas Smeeton, administrator/chief investigator; Paul J. McNulty, counsel; Glenn R. Schmitt, counsel; Cordia Strom, counsel; Perry Apelbaum, minority counsel; Betty Wheeler, minority counsel; and Tom Diaz, minority counsel.

Mr. HYDE. The committee will come to order.

The perils of holding committee hearings at 9:30 in the morning of a Monday are evident, when the House is not in session. It does not add to the attractiveness of coming in here, but nonetheless, in our witnesses we have a quality presence and among our Members we have a quality presence, and we do have enough for a working quorum. Therefore, we will proceed.

On February 9, 1995, President Clinton submitted his proposals relating to the threat of international terrorism for consideration and legislative action by Congress.

On February 10, Congressman Schumer introduced his bill, H.R. 896, in the House and it was referred to this committee. On April 6, 1995, the full committee held a hearing on issues related to international terrorism at which time various provisions of H.R. 896 were discussed. Less than 2 weeks later, we experienced the horror of another terrorist attack in this country, but from an apparent domestic source.

Shortly thereafter, on May 3, 1995, the Subcommittee on Crime held a hearing to discuss and air the issues involved from the domestic side of the terrorism quandary. On May 15, 1995, Congressman Gephardt introduced H.R. 1635 which provided the administration's response to the Oklahoma City catastrophe.

After careful deliberation, and much study of the administration's two proposals, I introduced H.R. 1710 to the House of Representatives on May 25, 1995, which is now before our committee and the subject of this hearing.

This bill represents the culmination of many months of work on the very important issues of national security, physical protection of Federal employees and citizens generally, deportation and exclusion of aliens, and additional law enforcement capabilities.

Original cosponsors of this measure are subcommittee Chairmen McCollum, Smith, Gekas, and Canady, and Congressmen Hoke and Bono. When the President initially submitted his international counterterrorism bill to the Congress, there was much criticism from various groups troubled by provisions contained in the President's bill with respect to constitutionally protected freedoms.

In the wake of the Murrah Building bombing, other voices were raised expressing the need to do something about domestic terrorism. Understandably, some individuals became even more distressed about the possible erosion of our constitutional protections. At the same time, the pressure continued for Congress to do something.

Let me assure all those here, and any others, that the civil liberty concerns expressed through faxes, letters, and phone calls were ever present in our minds even before our first committee hearing on April 6. Nothing is more important to me than crafting legislation that protects individual rights and withstands constitutional scrutiny while at the same time provides our citizens the safety and security from future terrorist attacks they well deserve.

This legislation is not a knee-jerk reaction, or wild-eyed approach, to the devastation of April 19. I believe it is a considered and thoughtful response to a serious problem facing America. In fact, it includes many provisions contained in the President's legislative recommendations.

The next 2 days of hearings on H.R. 1710 should cover the full range of issues, including first and fourth amendments concerns, due process issues, changes in immigration policy, expansion of Federal jurisdiction over international criminal activities, amendments to the wiretap statutes, use of the military's technical and logistical expertise in cases involving weapons of mass destruction, and the marking and tagging of explosive materials, plastic and otherwise.

We have 2 full days of testimony from a wide range of witnesses. I expect these hearings to be educational and enlightening. Without question, the insights and experiences of these witnesses will assist us as we move ahead with this important legislation.

[The bill, H.R. 1710, follows:]

104TH CONGRESS
1ST SESSION

H. R. 1710

To combat terrorism.

IN THE HOUSE OF REPRESENTATIVES

MAY 25, 1995

Mr. HYDE (for himself, Mr. MCCOLLUM, Mr. SMITH of Texas, Mr. GEKAS, Mr. CANADY of Florida, Mr. HOKE, and Mr. BONO) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To combat terrorism.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Comprehensive Antiterrorism Act of 1995".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

TITLE I—NEW OFFENSES

SEC. 101. PROTECTION OF FEDERAL EMPLOYEES.

(a) HOMICIDE.—Section 1114 of title 18, United States Code, is amended to read as follows:

"§ 1114. Protection of officers and employees of the United States

"Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch

of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished, in the case of murder, as provided under section 1111, or in the case of manslaughter, as provided under section 1112, except that any such person who is found guilty of attempted murder shall be imprisoned for not more than 20 years.".

(b) THREATS AGAINST FORMER OFFICERS AND EMPLOYEES.—Section 115(a)(2) of title 18, United States Code, is amended by inserting ", or threatens to assault, kidnap, or murder, any person who formerly served as a person designated in paragraph (1), or" after "assaults, kidnaps, or murders, or attempts to kidnap or murder".

SEC. 102. PROVIDING FINANCIAL SUPPORT TO TERRORIST ORGANIZATIONS.

(a) IN GENERAL.—That chapter 113B of title 18, United States Code, that relates to terrorism is amended by adding at the end the following:

"§ 2339B. Providing financial support to terrorist organizations

"(a) OFFENSE.—Whoever, within the United States, knowingly provides material support or resources in or af-

fecting interstate or foreign commerce, to any organization designated by the President under section 212(a)(3)(B)(iv) of the Immigration and Nationality Act as a terrorist organization shall be fined under this title or imprisoned not more than 10 years, or both.

"(b) DEFINITION.—As used in this section, the term 'material support or resources' has the meaning given that term in section 2339A of this title.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 113B of title 18, United States Code, is amended by adding at the end the following new item:

"2339B. Providing financial support to terrorist organizations.".

SEC. 103. MODIFICATION OF MATERIAL SUPPORT PROVISION.

Section 2339A of title 18, United States Code, is amended read as follows:

"§ 2339A. Providing material support to terrorists

"(a) OFFENSE.—Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for or in carrying out, a violation of section 32, 37, 351, 844(f) or (i), 956, 1114, 1116, 1203, 1361, 1363, 1751, 2280, 2281, 2332, 2332a, or 2332b of this title or section 46502 of title 49, or in

preparation for or in carrying out the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than ten years, or both.".

"(b) DEFINITION.—In this section, the term 'material support or resources' means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets.".

SEC. 104. ACTS OF TERRORISM TRANSCENDING NATIONAL BOUNDARIES.

(a) OFFENSE.—Title 18, United States Code, is amended by inserting after section 2332a the following:

"§ 2332b. Acts of terrorism transcending national boundaries

"(a) PROHIBITED ACTS.—

"(1) Whoever, involving any conduct transcending national boundaries and in a circumstance described in subsection (b)—

"(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any individual within the United States; or

"(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State or the United States shall be punished as prescribed in subsection (c).

"(2) Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished as prescribed in subsection (c).

"(b) JURISDICTIONAL BASES.—The circumstances referred to in subsection (a) are—

"(1) any of the offenders travels in, or uses the mail or any facility of, interstate or foreign commerce in furtherance of the offense or to escape apprehension after the commission of the offense;

"(2) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

"(3) the victim, or intended victim, is the United States Government or any official, officer, employee, or agent of the legislative, executive, or judi-

cial branches, or of any department or agency, of the United States;

"(4) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, used by, or leased to the United States, or any department or agency thereof;

"(5) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

"(6) the offense is committed in those places within the United States that are in the special maritime and territorial jurisdiction of the United States.

Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of such circumstances is applicable to at least one offender.

"(c) PENALTIES.—

"(1) Whoever violates this section shall be punished—

"(A) for a killing or if death results to any person from any other conduct prohibited by

this section by death, or by imprisonment for any term of years or for life;

"(B) for kidnapping, by imprisonment for any term of years or for life;

"(C) for maiming, by imprisonment for not more than 35 years;

"(D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

"(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

"(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

"(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

"(2) Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section

run concurrently with any other term of imprisonment.

"(d) LIMITATION ON PROSECUTION.—No indictment shall be sought nor any information filed for any offense described in this section until the Attorney General, or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions, makes a written certification that, in the judgment of the certifying official, such offense, or any activity preparatory to or meant to conceal its commission, is terrorism, as defined in section 2331 of this title.

"(e) PROOF REQUIREMENTS.—

"(1) The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

"(2) In a prosecution under this section that is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted.

"(f) EXTRATERRITORIAL JURISDICTION.—There is extraterritorial Federal jurisdiction—

"(1) over any offense under subsection (a), including any threat, attempt, or conspiracy to commit such offense; and

"(2) over conduct which, under section 3 of this title, renders any person an accessory after the fact to an offense under subsection (a).

"(g) DEFINITIONS.—As used in this section—

"(1) the term 'conduct transcending national boundaries' means conduct occurring in another country in addition to the conduct occurring in the United States;

"(2) the term 'facility of interstate or foreign commerce' has the meaning given that term in section 1958(b)(2) of this title;

"(3) the term 'serious bodily injury' has the meaning prescribed in section 1365(g)(3) of this title; and

"(4) the term 'territorial sea of the United States' means all waters extending seaward to 12 nautical miles from the baselines of the United States determined in accordance with international law.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of the chapter 113B of title 18, United States Code, that relates to terrorism is amended by inserting after the item relating to section 2332a the following new item:

"2332b. Acts of terrorism transcending national boundaries."

(c) STATUTE OF LIMITATIONS AMENDMENT.—Section 3286 of title 18, United States Code, is amended by—

(1) striking "any offense" and inserting "any non-capital offense";

(2) striking "36" and inserting "37";

(3) striking "2331" and inserting "2332";

(4) striking "2339" and inserting "2332a"; and

(5) inserting "2332b (acts of terrorism transcending national boundaries)," after "(use of weapons of mass destruction),".

(d) PRESUMPTIVE DETENTION.—Section 3142(e) of title 18, United States Code, is amended by inserting ", 956(a), or 2332b" after "section 924(c)".

SEC. 105. CONSPIRACY TO HARM PEOPLE AND PROPERTY OVERSEAS.

(a) IN GENERAL.—Section 956 of chapter 45 of title 18, United States Code, is amended to read as follows:

"§ 956. Conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country

"(a)(1) Whoever, within th · jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping,

or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).

"(2) The punishment for an offense under subsection (a)(1) of this section is—

"(A) imprisonment for any term of years or for life if the offense is conspiracy to murder or kidnap; and

"(B) imprisonment for not more than 35 years if the offense is conspiracy to maim.

"(b) Whoever, within the jurisdiction of the United States, conspires with one or more persons, regardless of where such other person or persons are located, to damage or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated, shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be imprisoned not more than 25 years.".

(b) CLERICAL AMENDMENT.—The item relating to section 956 in the table of sections at the beginning of chapter 45 of title 18, United States Code, is amended to read as follows:

"956. Conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country.".

SEC. 106. CLARIFICATION AND EXTENSION OF CRIMINAL JURISDICTION OVER CERTAIN TERRORISM OFFENSES OVERSEAS.

(a) AIRCRAFT PIRACY.—Section 46502(b) of title 49, United States Code, is amended—

(1) in paragraph (1), by striking "and later found in the United States";

(2) so that paragraph (2) reads as follows:

"(2) There is jurisdiction over the offense in paragraph (1) if—

"(A) a national of the United States was aboard the aircraft;

"(B) an offender is a national of the United States; or

"(C) an offender is afterwards found in the United States."; and

(3) by inserting after paragraph (2) the following:

"(3) For purposes of this subsection, the term 'national of the United States' has the meaning pre-

scribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).".

(b) DESTRUCTION OF AIRCRAFT OR AIRCRAFT FACILITIES.— Section 32(b) of title 18, United States Code, is amended—

(1) by striking ", if the offender is later found in the United States,"; and

(2) by inserting at the end the following the following: "There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterwards found in the United States. For purposes of this subsection, the term 'national of the United States' has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act.".

(c) MURDER OF FOREIGN OFFICIALS AND CERTAIN OTHER PERSONS.—Section 1116 of title 18, United States Code, is amended—

(1) in subsection (b), by adding at the end the following:

"(7) 'National of the United States' has the meaning prescribed in section 101(a)(22) of the Im-

92-166 O - 96 - 5

migration and Nationality Act (8 U.S.C. 1101(a)(22))."; and

(2) in subsection (e), by striking the first sentence and inserting the following: "If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.".

(d) PROTECTION OF FOREIGN OFFICIALS AND CERTAIN OTHER PERSONS.—Section 112 of title 18, United States Code, is amended—

(1) in subsection (e), by inserting "national of the United States," before "and"; and

(2) in subsection (e), by striking the first sentence and inserting the following: "If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.".

(e) THREATS AND EXTORTION AGAINST FOREIGN OFFICIALS AND CERTAIN OTHER PERSONS.—Section 878 of title 18, United States Code, is amended—

(1) in subsection (c), by inserting "national of the United States," before "and"; and

(2) in subsection (d), by striking the first sentence and inserting the following: "If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.".

(f) KIDNAPPING OF INTERNATIONALLY PROTECTED PERSONS.—Section 1201(e) of title 18, United States Code, is amended—

(1) by striking the first sentence and inserting the following: "If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the

United States, or (3) an offender is afterwards found in the United States."; and

(2) by adding at the end the following: "For purposes of this subsection, the term 'national of the United States' has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))."

(g) VIOLENCE AT INTERNATIONAL AIRPORTS.—Section 37(b)(2) of title 18, United States Code, is amended—

(1) by inserting "(A)" before "the offender is later found in the United States"; and

(2) by inserting "; or (B) an offender or a victim is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)))" after "the offender is later found in the United States".

(h) BIOLOGICAL WEAPONS.—Section 178 of title 18, United States Code, is amended—

(1) by striking "and" at the end of paragraph (3);

(2) by striking the "period" at the end of paragraph (4) and inserting "; and"; and

(3) by adding the following at the end:

"(5) the term 'national of the United States' has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).".

SEC. 107. EXPANSION AND MODIFICATION OF WEAPONS OF MASS DESTRUCTION STATUTE.

Section 2332a of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting ", without lawful authority" after "A person who";

(B) by inserting "threatens," before "attempts or conspires to use, a weapon of mass destruction"; and

(C) by inserting "and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce" before the semicolon at the end of paragraph (2); "

(2) in subsection (b), so that subparagraph (B) of paragraph (2) reads as follows:

"(B) any weapon that is designed to cause death or serious bodily injury through the re-

lease, dissemination, or impact of toxic or poisonous chemicals, or their precursors;";

(3) by redesignating subsection (b) as subsection (c); and

(4) by inserting after subsection (a) the following new subsection:

"(b) Any national of the United States who, without lawful authority and outside the United States, uses, or threatens, attempts, or conspires to use, a weapon of mass destruction shall be imprisoned for any term of years or for life, and if death results, shall be punished by death, or by imprisonment for any term of years or for life.".

SEC. 108. ADDITION OF TERRORISM OFFENSES TO THE MONEY LAUNDERING STATUTE.

(a) MURDER AND DESTRUCTION OF PROPERTY.—Section 1956(c)(7)(B)(ii) of title 18, United States Code, is amended by striking "or extortion;" and inserting "extortion, murder, or destruction of property by means of explosive or fire;".

(b) SPECIFIC OFFENSES.—Section 1956(c)(7)(D) of title 18, United States Code, is amended—

(1) by inserting after "an offense under" the following: "section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influenc-

ing, impeding, or retaliating against a Federal official by threatening or injuring a family member),";

(2) by inserting after "section 215 (relating to commissions or gifts for procuring loans)," the following: "section 351 (relating to Congressional or Cabinet officer assassination),";

(3) by inserting after "section 793, 794, or 798 (relating to espionage)," the following: "section 831 (relating to prohibited transactions involving nuclear materials), section 844 (f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce),";

(4) by inserting after "section 875 (relating to interstate communications)," the following: "section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country),";

(5) by inserting after "section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution)," the following: "section 1111 (relating to murder), section 1114 (relating to protection of officers and employees of the United States), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons),";

(6) by inserting after "section 1203 (relating to hostage taking)" the following: "section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction),";

(7) by inserting after "section 1708 (theft from the mail);" the following: "section 1751 (relating to Presidential assassination),";

(8) by inserting after "2114 (relating to bank and postal robbery and theft)," the following: "section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms),"; and

(9) by striking "of this title" and inserting the following: "section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), 2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code,".

SEC. 109. EXPANSION OF FEDERAL JURISDICTION OVER BOMB THREATS.

Section 844(e) of title 18, United States Code, is amended by striking "commerce," and inserting "interstate or foreign commerce, or in or affecting interstate or foreign commerce,"

SEC. 110. CLARIFICATION OF MARITIME VIOLENCE JURISDICTION.

Section 2280(b)(1)(A) of title 18, United States Code, is amended—

(1) in clause (ii), by striking "and the activity is not prohibited as a crime by the State in which the activity takes place"; and

(2) in clause (iii), by striking "the activity takes place on a ship flying the flag of a foreign country or outside of the United States,".

SEC. 111. POSSESSION OF STOLEN EXPLOSIVES PROHIBITED.

Section 842(h) of title 18, United States Code, is amended to read as follows:

"(h) It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or

after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.".

TITLE II—INCREASED PENALTIES

SEC. 201. MANDATORY MINIMUM FOR CERTAIN EXPLOSIVES OFFENSES.

Section 844(f) of title 18, United States Code, is amendedto read as follows:

"(f) Whoever damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, or any department or agency thereof, shall be fined under this title or imprisoned for not more than 25 years, or both, but—

"(1) if personal injury results to any person other than the offender, the term of imprisonment shall be not more than 40 years;

"(2) if fire or an explosive is used and its use creates a substantial risk of serious bodily injury to any person other than the offender, the term of imprisonment shall not be less than 20 years; and

"(3) if death results to any person other than the offender, the offender shall be subject to the

death penalty or imprisonment for any term of years not less than 30, or for life.".

SEC. 202. INCREASED PENALTY FOR EXPLOSIVE CONSPIRACIES.

Section 844 of title 18, United States Code, is amended by adding at the end the following:

"(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as those prescribed for the offense the commission of which was the object of the conspiracy.".

SEC. 203. INCREASED AND ALTERNATE CONSPIRACY PENALTIES FOR TERRORISM OFFENSES.

(a) TITLE 18 OFFENSES.—

(1) Sections 32(a)(7), 32(b)(4), 37(a), 115(a)(1)(A), 115(a)(2), 1203(a), 2280(a)(1)(H), 2281(a)(1)(F), of title 18, United States Code, are each amended by inserting "or conspires" after "attempts".

(2) Section 115(b)(2) of title 18, United States Code, is amended by striking "or attempted kidnapping" both places it appears and inserting ", attempted kidnapping, or conspiracy to kidnap".

(3)(A) Section 115(b)(3) of title 18, United States Code, is amended by striking "or attempted murder" and inserting ", attempted murder, or conspiracy to murder".

(B) Section 115(b)(3) of title 18, United States Code, is amended by striking "and 1113" and inserting ", 1113, and 1117".

(4) Section 175(a) of title 18, United States Code, is amended by inserting "or conspires to do so," after "any organization to do so,".

(b) AIRCRAFT PIRACY.—

(1) Section 46502(a)(2) of title 49, United States Code, is amended by inserting "or conspiring" after "attempting".

(2) Section 46502(b)(1) of title 49, United States Code, is amended by inserting "or conspiring to commit" after "committing".

SEC. 204. MANDATORY PENALTY FOR TRANSFERRING A FIREARM KNOWING THAT IT WILL BE USED TO COMMIT A CRIME OF VIOLENCE.

Section 924(h) of title 18, United States Code, is amended—

(1) by inserting "or having reasonable cause to believe" after "knowing"; and

(2) by striking "imprisoned not more than 10 years, fined in accordance with this title, or both." and inserting "subject to the same penalties as may be imposed under subsection (c) on a transferee for a first conviction for the use or carrying of the firearm.".

SEC. 205. MANDATORY PENALTY FOR TRANSFERRING AN EXPLOSIVE MATERIAL KNOWING THAT IT WILL BE USED TO COMMIT A CRIME OF VIOLENCE.

Section 844 of title 18, United States Code, is amended by adding at the end the following:

"(n) Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3) of this title) or drug trafficking crime (as defined in section 924(c)(2) of this title) shall be subject to the same penalties as may be imposed under subsection (h) on a transferee for a first conviction for the use or carrying of the explosive materials.".

SEC. 206. DIRECTIONS TO SENTENCING COMMISSION.

The United States Sentencing Commission shall forthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though

the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism also applies to domestic terrorism.

TITLE III—INVESTIGATIVE TOOLS

SEC. 301. INTERCEPTIONS OF COMMUNICATIONS.

(a) AUTHORIZATION OF INTERCEPTIONS IN CERTAIN TERRORISM RELATED OFFENSES.—Section 2516(1) of title 18, United States Code, is amended—

(1) by striking "and" at the end of subparagraph (n);

(2) by redesignating subparagraph (o) as subparagraph (q);

(3) by inserting after paragraph (n) the following:

"(o) any violation of section 842 (relating to explosives violations), section 956 or section 960 (relating to certain actions against foreign nations), section 1114 (relating to protection of officers and employees of the United States), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1751 (relating to Presidential assassination), section 2332 (relating to terrorist acts abroad), section 2332a (re-

lating to weapons of mass destruction, section 2332b (relating to acts of terrorism transcending national boundaries), section 2339A (relating to providing material support to terrorists), section 37 (relating to violence at international airports) of title 18, United States Code, or;

"(p) any violation of section 46502 of title 49, United States Code; and".

(b) REPORTS CONCERNING INTERCEPTED COMMUNICATIONS.—Subsection (6) of section 2518 of the United States Code is amended to read as follows:

"(6) Whenever an order authorizing interception is entered under this chapter, the order shall require the attorney for the Government to file a report with the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such report shall be made 15 days after the interception has begun. No other reports shall be made to the judge under this subsection.".

SEC. 302. PEN REGISTERS AND TRAP AND TRACE DEVICES IN FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS.

(a) APPLICATION.—Section 3122(b)(2) of title 18, United States Code, is amended by inserting "or foreign counterintelligence" after "criminal".

(b) ORDER.—

(1) Section 3123(a) of title 18, United States Code, is amended by inserting "or foreign counterintelligence" after "criminal".

(2) Section 3123(b)(1) of title 18, United States Code, is amended in subparagraph (B), by striking "criminal".

SEC. 303. DISCLOSURE OF INFORMATION AND CONSUMER REPORTS TO FEDERAL BUREAU OF INVESTIGATION FOR FOREIGN COUNTERINTELLIGENCE PURPOSES.

(a) IN GENERAL.—Chapter 33 of title 28, United States Code, is amended by adding at the end the following:

"§ 540B. Disclosures for counterintelligence purposes

"(a) IDENTITY OF FINANCIAL INSTITUTIONS.—Notwithstanding any provision of the Fair Credit Reporting Act, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 1101 of the Right to Financial Privacy Act of 1978) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau

of Investigation, or the Director's designee (in a position not lower than Deputy Assistant Director), which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that—

"(1) such information is necessary for the conduct of an authorized foreign counterintelligence investigation; and

"(2) there are specific and articulable facts giving reason to believe that the consumer—

"(A) is a foreign power (as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978) or a person who is not a United States person (as defined in such section 101) and is an official of a foreign power; or

"(B) is an agent of a foreign power and is engaging or has engaged in international terrorism (as that term is defined in section 101(c) of the Foreign Intelligence Surveillance Act of 1978) or clandestine intelligence activities that involve or may involve a violation of criminal statutes of the United States.

"(b) IDENTIFYING INFORMATION.—Notwithstanding any provision of the Fair Credit Reporting Act, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that—

"(1) such information is necessary to the conduct of an authorized foreign counterintelligence investigation; and

"(2) there is information giving reason to believe that the consumer has been, or is about to be, in contact with a foreign power or an agent of a foreign power (as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978).

"(c) COURT ORDER FOR DISCLOSURE OF CONSUMER REPORTS.—Notwithstanding any provision of the Fair Credit Reporting Act, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director, a court may issue an order ex parte direct-

ing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that—

"(1) the consumer report is necessary for the conduct of an authorized foreign counterintelligence investigation; and

"(2) there are specific and articulable facts giving reason to believe that the consumer whose consumer report is sought—

"(A) is an agent of a foreign power; and

"(B) is engaging or has engaged in international terrorism (as that term is defined in section 2331 of this title) or clandestine intelligence activities that involve or may involve a violation of criminal statutes of the United States.

The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

"(d) CONFIDENTIALITY.—No consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person, other than those officers, employees, or agents of a consumer reporting agency necessary to fulfill the requirement to disclose information to the Federal Bureau of Investigation under

this section, that the Federal Bureau of Investigation has sought or obtained the identity of financial institutions or a consumer report respecting any consumer under subsection (a), (b), or (c) and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information or a consumer report.

"(e) PAYMENT OF FEES.—The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing reports or information in accordance with procedures established under this section, a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

"(f) LIMIT ON DISSEMINATION.—The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to the Department of Justice as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of

Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

"(g) RULES OF CONSTRUCTION.—Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, or in connection with a judicial or administrative proceeding to enforce the provisions of this Act. Nothing in this section shall be construed to authorize or permit the withholding or information from the Congress.

"(h) REPORTS TO CONGRESS.—In January of each year, the Attorney General, shall report to the Congress concerning all requests made pursuant to subsections (a), (b), and (c) during the preceding year.

"(i) DAMAGES.—Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of—

"(1) $100, without regard to the volume of consumer reports, records, or information involved;

"(2) any actual damages sustained by the consumer as a result of the disclosure;

"(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

"(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

"(j) DISCIPLINARY ACTIONS FOR VIOLATIONS.—If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

"(k) GOOD-FAITH EXCEPTION.—Notwithstanding any other provision of the Fair Credit Reporting Act, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reli-

ance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under the Fair Credit Reporting Act, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

"(l) LIMITATION OF REMEDIES.—Notwithstanding any provision of the Fair Credit Reporting Act, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

"(m) INJUNCTIVE RELIEF.—In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered

"(n) DEFINITIONS.—Any term used in this section that is defined for the purposes of the Fair Credit Reporting Act shall have the meaning given that term for those purposes.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of the Fair Credit Reporting Act (15 U.S.C. 1681a et seq.) is amended by adding after the item relating to section 623 the following:

"624. Disclosures to FBI for counterintelligence purposes.".

SEC. 304. ACCESS TO RECORDS OF COMMON CARRIERS, PUBLIC ACCOMMODATION FACILITIES, PHYSICAL STORAGE FACILITIES AND VEHICLE RENTAL FACILITIES IN FOREIGN COUNTERINTELLIGENCE AND COUNTERTERRORISM CASES.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 121 the following new chapter:

"CHAPTER 122—ACCESS TO CERTAIN RECORDS

"Sec.
"2720. Access to records of common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities in counterintelligence and counterterrorism cases.

"§ 2720. Access to records of common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities in counterintelligence and counterterrorism cases

"(a) Any common carrier, public accommodation facility, physical storage facility, or vehicle rental facility shall comply with a request for records in its possession made pursuant to this section by the Federal Bureau of Investigation when the Director or the Director's designee (in a position not lower than Assistant Special Agent in Charge) certifies in writing to the common carrier, public accommodation facility, physical storage facility, or vehicle

rental facility that such records are sought for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the person or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act (50 U.S.C. 1801).

"(b)(1) Except as otherwise provided in the subsection, no common carrier, public accommodation facility, physical storage facility, or vehicle rental facility, or any officer, employee, or agent of such common carrier, public accommodation facility, physical storage facility, or vehicle rental facility shall disclose to any person any information about that request.

"(2) The prohibition of this subsection does not apply to a disclosure to those officers, agents, or employees of the common carrier, public accommodation facility, physical storage facility, or vehicle rental facility necessary to fulfill the requirement to disclose the information to the Federal Bureau of Investigation under this section,

"(3) The prohibition of this subsection ends 180 days after the request is made under subsection (a), unless the Director or the Director's designee certifies in writing, at the beginning of each succeeding 180-day period, to the recipient of the request that the continuation of the prohi-

bition during that period is necessary to the success of an ongoing investigation.

"(c) As used in this section—

"(1) the term 'common carrier' has the meaning given that term in section 10102 of title 49, United States Code, and also includes an air carrier (as defined in section 40102 of title 49, United States Code) and a private commercial interstate carrier for the delivery of packages and other objects;

"(2) the term 'public accommodation facility' means any inn, hotel, motel, or other establishment which provides lodging to transient guests;

"(3) the term 'physical storage facility' means any business or entity which provides space for the storage of goods or materials, or services related to the storage of goods or materials, to the public or any segment thereof; and

"(4) the term 'vehicle rental facility' means any person or entity which provides vehicles for rent, lease, loan, or other similar use to the public or any segment thereof.".

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by

inserting after the item relating to chapter 121 the following new item:

"122. Access to certain records ..... 2729".

SEC. 305. STUDY OF TAGGING EXPLOSIVE MATERIALS, RENDERING EXPLOSIVE COMPONENTS INERT, AND IMPOSING CONTROLS OF PRECURSORS OF EXPLOSIVES.

(a) STUDY.—The Attorney General, in consultation with other Federal, State and local officials with expertise in this area and such other individuals as the Attorney General deems appropriate, shall conduct a study concerning—

(1) the tagging of explosive materials for purposes of detection and identification;

(2) whether common chemicals used to manufacture explosive materials can be rendered inert and whether it is feasible to require it; and

(3) whether controls can be imposed on certain precursor chemicals used to manufacture explosive materials and whether it is feasible to require it.

(b) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Attorney General shall submit to the Congress a report that contains the results of the study required by this section. The Attorney General shall make the report available to the public.

SEC. 306. LIMITATION OF STATUTORY EXCLUSIONARY RULE CONCERNING INTERCEPTED WIRE OR ORAL COMMUNICATIONS.

Section 2515 of title 18, United States Code, is amended by adding at the end the following: "This section shall not apply to the disclosure by the United States in a criminal trial or hearing or before a grand jury of the contents of a wire or oral communication, or evidence derived therefrom, unless the violation of this chapter involved bad faith by law enforcement."

SEC. 307. AUTHORITY FOR WIRETAPS IN ANY TERRORISM-RELATED OR EXPLOSIVES FELONY.

(a) DEFINITION OF "ELECTRONIC COMMUNICATION".—Section 2510(12) of title 18, United States Code, is amended—

(1) by striking or" at the end of subparagraph (B);

(2) by inserting "or" at the end of subparagraph (c); and

(3) by adding a new subparagraph (D), as follows:

"(D) information stored in a communications system used for the electronic storage and transfer of funds;"

(b) DEFINITION OF "READILY ACCESSIBLE TO THE GENERAL PUBLIC".—Section 2510(16) of title 18, United States Code, is amended—

(1) by inserting "or" at the end of subparagraph (D);

(2) by striking "or" at the end of subparagraph (E); and

(3) by striking subparagraph (F).

SEC. 308. TEMPORARY EMERGENCY WIRETAP AUTHORITY INVOLVING TERRORISTIC CRIMES.

(a) SECTION 2518.—Section 2518(7)(a) of title 18, United States Code, is amended—

(1) by striking "or" at the end of subparagraph (ii); and

(2) by inserting after subparagraph (ii) the following:

"(iii) conspiratorial activities involving domestic terrorism or international terrorism (as that term is defined in section 2331 of this title), or"; and

(3) by redesignating existing subparagraph (iii) as subparagraph (iv).

(b) DEFINITION OF DOMESTIC TERRORISM.—Section 2510 of title 18, United States Code, is amended.—

(1) by striking "and" at the end of paragraph (17);

(2) by striking the period at the end of paragraph (18) and inserting "; and"; and

(3) by inserting after paragraph (18) the following:

"(19) 'domestic terrorism' means terrorism, as defined in section 2331 of this title, that occurs primarily inside the territorial jurisdiction of the United States.".

SEC. 309. EXPANDED AUTHORITY FOR ROVING WIRETAPS.

Section 2518(11) of title 18, United States Code, is amended to read as follows:

"(11) The requirements of subsections (1)(b)(11) and (3)(d) of this section relating to the specification of facilities from which or the place where the communication is to be intercepted to do not apply if, in the case of an application with respect to the interception of oral, wire, or electronic communications—

"(a) the application is by a Federal investigative or law enforcement officer, and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General (or an official acting in any such capacity);

"(b) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the

offense and whose communications are to be intercepted; and

"(c) the judge finds that such specification is not practical.".

SEC. 310. ENHANCED ACCESS TO TELEPHONE BILLING RECORDS.

(a) SECTION 2709.—Section 2709(b) of title 18, United States Code, is amended—

(1) in paragraph (1)(A), by inserting "local and long distance" before "toll billing records"

(2) by striking "and" at the end of paragraph (1);

(3) by striking the period at the end of paragraph (2) and inserting "; and"; and

(4) by adding at the end a new paragraph (3), as follows:

"(3) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director or the Director's designee (in a position not lower than Deputy Assistant Director) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized domestic terrorism investigation.".

(b) SECTION 2703.—Section 2703(c)(1)(C) of title 18, United States Code, is amended by inserting "local and long distance" before "telephone toll billing records".

SEC. 311. REQUIREMENT TO PRESERVE EVIDENCE.

Section 2703 of title 18, United States Code, is amended by adding at the end the following:

"(f) REQUIREMENT TO PRESERVE EVIDENCE.—A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records, and other evidence in its possession pending the issuance of a court order or other process. Such records shall be retained for a period of 90 days, which period shall be extended for an additional 90-day period upon a renewed request by the governmental entity."

SEC. 312. MILITARY ASSISTANCE WITH RESPECT TO OFFENSES INVOLVING WEAPONS OF MASS DESTRUCTION.

(a) REQUEST FOR ASSISTANCE.—The Attorney General may request the Secretary of Defense to provide technical and logistical assistance by civilian and military personnel of the Department of Defense in support of Department of Justice activities relating to offenses involving weapons of mass destruction (as defined in section 2332a

of title 18, United States Code) if the Attorney General determines that—

(1) such assistance is needed to counter the threat posed by such a weapon or to enforce the criminal laws relating to such weapons; and

(2) civilian law enforcement expertise is not available to provide the required assistance.

(b) PROVISION OF ASSISTANCE.—The Secretary of Defense shall provide such assistance unless doing so would adversely affect the military preparedness of the United States.

(c) ASSISTANCE TO EXCLUDE ARREST OR APPREHENSION.—For the purposes of this section, the term "technical and logistical assistance" does not include the apprehension or arrest of any person.

(d) REIMBURSEMENT.—The Secretary of Defense may require reimbursement as a condition of providing assistance under this section.

(e) DELEGATION.—The Attorney General may delegate a function under this section only to a Deputy Attorney General, Associate Attorney General, or Assistant Attorney General.

SEC. 313. DETENTION HEARING.

Section 3142(f) of title 18, United States Code, is amended by inserting "(not including any intermediate

Saturday, Sunday, or legal holiday)" after "five days" and after "three days".

SEC. 314. REWARD AUTHORITY OF THE ATTORNEY GENERAL.

(a) IN GENERAL.—Title 18, United States Code, is amended by striking sections 3059 through 3059A and inserting the following:

"§ 3059 Reward authority of the Attorney General

"(a) The Attorney General may pay rewards and receive from any department or agency, funds for the payment of rewards under this section, to any individual who provides any information unknown to the Government leading to the arrest or prosecution of any individual for Federal felony offenses.

"(b) If the reward exceeds $100,000, the Attorney General shall give notice of that fact to the Senate and the House of Representatives not later than 30 days after authorizing the payment of the reward,.

"(c) A determination made by the Attorney General as to whether to authorize an award under this section and as to the amount of any reward authorized shall be final and conclusive, and no court shall have jurisdiction to review it.

"(d) If the Attorney General determines that the identity of the recipient of a reward or of the members

of the recipient's immediate family must be protected, the Attorney General may take such measures in connection with the payment of the reward as the Attorney General deems necessary to effect such protection.

"(e) No officer or employee of any governmental entity may receive a reward under this section for conduct in performance of his or her official duties.

"(f) Any individual (and the immediate family of such individual) who furnishes information which would justify a reward under this section or a reward by the Secretary of State under section 36 of the State Department Basic Authorities Act of 1956 may, in the discretion of the Attorney General, participate in the Attorney General's witness security program under chapter 224 of this title.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 203 of title 18, United States Code, is amended by striking the items relating to section 3059 and 3059A and inserting the following new item:

"3059. Reward authority of the Attorney General.".

(c) CONFORMING AMENDMENT.—Section 1751 of title 18, United States Code, is amended by striking subsection (g).

SEC. 315. DEFINITION OF TERRORISM.

Section 2331 of title 18, United States Code, is amended—

(1) so that paragraph (1) reads as follows:

"(1) the term 'terrorism' means the use of force or violence in violation of the criminal laws of the United States or of any State, or that would be in violation of the criminal laws of the United States or of any State if committed within the jurisdiction of the United States or that State that appears to be intended to achieve political or social ends by—

"(A) intimidating or coercing a segment of the population;

"(B) influencing or coercing a government official or officials; or

"(C) affecting the conduct of a government through assassination or kidnapping;";

(2) by inserting after paragraph (1) the following:

"(2) the term 'international terrorism' means terrorism that occurs primarily outside the territorial jurisdiction of the United States, or transcends national boundaries in terms of the means by which it is accomplished, the persons it appears intended to intimidate or coerce, or the locale in which its perpetrators operate or seek asylum;"; and

(3) by redesignating existing paragraphs (2) through (4) as paragraphs (3) through (5), respectively.

TITLE IV—NUCLEAR MATERIALS

SEC. 401. EXPANSION OF NUCLEAR MATERIALS PROHIBITIONS.

(a) EXPANSION OF SCOPE AND JURISDICTIONAL BASES.—Section 831 of title 18, United States Code, is amended—

(1) in subsection (a), by striking "nuclear material" each place it appears and inserting "nuclear material or nuclear byproduct material";

(2) in subsection (a)(1)(A), by inserting "or the environment" after "property";

(3) so that subsection (a)(1)(B) reads as follows:

"(B)(i) circumstances exist which are likely to cause the death of or serious bodily injury to any person or substantial damage to property or the environment; or (ii) such circumstances are represented to the defendant to exist;";

(4) in subsection (a)(6), by inserting "or the environment" after "property";

(5) so that subsection (c)(2) reads as follows:

"(2) an offender or a victim is a national of the United States or a United States corporation or other legal entity;";

(6) in subsection (e)(3), by striking "at the time of the offense the nuclear material is in use, storage, or transport, for peaceful purposes, and";

(7) by striking "or" at the end of subsection (e)(3);

(8) in subsection (e)(4), by striking "nuclear material for peaceful purposes" and inserting "nuclear material or nuclear byproduct material";

(9) by striking the period at the end of subsection (e)(4) and inserting "; or";

(10) by adding at the end of subsection (e) the following:

"(5) the governmental entity under subsection (a)(5) is the United States or the threat under subsection (a)(6) is directed at the United States.";

(11) in subsection (f)(1)(A), by striking "with an isotopic concentration not in excess of 80 percent plutonium 238";

(12) in subsection (f)(1)(C) by inserting "enriched uranium, defined as" before "uranium";

(13) in subsection (f), by redesignating paragraphs (2), (3), and (4) as (3), (4), and (5), respectively;

(14) by inserting after subsection (f)(1) the following:

"(2) the term 'nuclear byproduct material' means any material containing any radioactive isotope created through an irradiation process in the operation of a nuclear reactor or accelerator;";

(15) by striking "and" at the end of subsection (f)(4), as redesignated;

(16) by striking the period at the end of subsection (f)(5), as redesignated, and inserting a semicolon; and

(17) by adding at the end of subsection (f) the following:

"(6) the term 'national of the United States' has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

"(7) the term 'United States corporation or other legal entity' means any corporation or other entity organized under the laws of the United States or any State, district, commonwealth, territory or possession of the United States.".

TITLE V—CONVENTION ON THE MARKING OF PLASTIC EXPLOSIVES

SEC. 501. DEFINITIONS.

Section 841 of title 18, United States Code, is amended by adding at the end the following new subsections:

"(o) 'Convention on the Marking of Plastic Explosives' means the Convention on the Marking of Plastic Explosives for the Purpose of Detection, Done at Montreal on 1 March 1991.

"(p) 'Detection agent' means any one of the substances specified in this subsection when introduced into a plastic explosive or formulated in such explosive as a part of the manufacturing process in such a manner as to achieve homogeneous distribution in the finished explosive, including—

"(1) Ethylene glycol dinitrate (EGDN), $C_2H_4(NO_3)_2$, molecular weight 152, when the minimum concentration in the finished explosive is 0.2 percent by mass;

"(2) 2,3-Dimethyl-2,3-dinitrobutane (DMNB), $C_6H_{12}(NO_2)_2$, molecular weight 176, when the minimum concentration in the finished explosive is 0.1 percent by mass;

"(3) Para-Mononitrotoluene (p-MNT), $C_7H_7NO_2$, molecular weight 137, when the minimum concentration in the finished explosive is 0.5 percent by mass;

"(4) Ortho-Mononitrotoluene (o-MNT), $C_7H_7NO_2$, molecular weight 137, when the minimum concentration in the finished explosive is 0.5 percent by mass; and

"(5) any other substance in the concentration specified by the Secretary, after consultation with the Secretary of State and the Secretary of Defense, which has been added to the table in part 2 of the Technical Annex to the Convention on the Marking of Plastic Explosives.

"(q) 'Plastic explosive' means an explosive material in flexible or elastic sheet form formulated with one or more high explosives which in their pure form have a vapor pressure less than 10^{-4} Pa at a temperature of 25°C., is formulated with a binder material, and is as a mixture malleable or flexible at normal room temperature.".

SEC. 502. REQUIREMENT OF DETECTION AGENTS FOR PLASTIC EXPLOSIVES.

Section 842 of title 18, United States Code, is amended by adding at the end the following:

"(l) It shall be unlawful for any person to manufacture any plastic explosive which does not contain a detection agent.

"(m)(1) it shall be unlawful for any person to import or bring into the United States, or export from the United States, any plastic explosive which does not contain a detection agent.

"(2) During the 15-year period that begins with the date of entry into force of the Convention on the Marking of Plastic Explosives with respect to the United States, paragraph (1) shall not apply to the importation or bringing into the United States, or the exportation from the United States, of any plastic explosive which was imported, brought into, or manufactured in the United States before the effective date of this subsection by or on behalf of any agency of the United States performing military or police functions (including any military Reserve component) or by or on behalf of the National Guard of any State.

"(n)(1) It shall be unlawful for any person to ship, transport, transfer, receive, or possess any plastic explosive which does not contain a detection agent.

"(2)(A) During the 3-year period that begins on the effective date of this subsection, paragraph (1) shall not apply to the shipment, transportation, transfer, receipt, or

possession of any plastic explosive, which was imported, brought into, or manufactured in the United States before such effective date by any person.

"(B) During the 15-year period that begins on the date of entry into force of the Convention on the Marking of Plastic Explosives with respect to the United States, paragraph (1) shall not apply to the shipment, transportation, transfer, receipt, or possession of any plastic explosive, which was imported, brought into, or manufactured in the United States before the effective date of this subsection by or on behalf of any agency of the United States performing a military or police function (including any military reserve component) or by or on behalf of the National Guard of any State.

"(o) It shall be unlawful for any person, other than an agency of the United States (including any military reserve component) or the National Guard of any State, possessing any plastic explosive on the effective date of this subsection, to fail to report to the Secretary within 120 days after the effective date of this subsection the quantity of such explosives possessed, the manufacturer or importer, any marks of identification on such explosives, and such other information as the Secretary may by regulations prescribe.".

SEC. 503. CRIMINAL SANCTIONS.

Section 844(a) of title 18, United States Code, is amended to read as follows:

"(a) Any person who violates subsections (a) through (i) or (l) through (o) of section 842 of this title shall be fined under this title, imprisoned not more than 10 years, or both.".

SEC. 504. EXCEPTIONS.

Section 845 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "(l), (m), (n), or (o) of section 842 and subsections" after "subsections";

(2) in subsection (a)(1), by inserting "and which pertains to safety" before the semicolon; and

(3) by adding at the end the following:

"(c) It is an affirmative defense against any proceeding involving subsection (l), (m), (n), or (o) of section 842 of this title if the proponent proves by a preponderance of the evidence that the plastic explosive—

"(1) consisted of a small amount of plastic explosive intended for and utilized solely in lawful—

"(A) research, development, or testing of new or modified explosive materials;

"(B) training in explosives detection or development or testing of explosives detection equipment; or

"(C) forensic science purposes; or

"(2) was plastic explosive which, within 3 years after the effective date of this paragraph, will be or is incorporated in a military device within the territory of the United States and remains an integral part of such military device, or is intended to be, or is incorporated in, and remains an integral part of a military device that is intended to become, or has become, the property of any agency of the United States performing military or police functions (including any military reserve component) or the National Guard of any State, wherever such device is located. For purposes of this subsection, the term 'military device' includes shells, bombs, projectiles, mines, missiles, rockets, shaped charges, grenades, perforators, and similar devices lawfully manufactured exclusively for military or police purposes.".

SEC. 505. INVESTIGATIVE AUTHORITY.

Section 846 of title 18, United States Code, is amended—

(1) by inserting "subsection (m) or (n) of section 842 or" before "subsection (d)"; and

(2) by adding at the end the following: "The Attorney General shall have exclusive authority to conduct investigations with respect to violations of subsection (m) or (n) of section 842 to the extent such violations appear to be terrorism (as defined in section 2331 of this title. Upon request, the Secretary may assist the Attorney General in such investigations.".

SEC. 506. EFFECTIVE DATE.

The amendments made by this title shall take effect 1 year after the date of the enactment of this Act.

TITLE VI—IMMIGRATION-RELATED PROVISIONS

Subtitle A—Removal of Alien Terrorists

PART 1—REMOVAL PROCEDURES FOR ALIEN TERRORISTS

SEC. 601. REMOVAL PROCEDURES FOR ALIEN TERRORISTS.

(a) IN GENERAL.—The Immigration and Nationality Act is amended—

(1) by adding at the end of the table of contents the following:

"TITLE V—SPECIAL REMOVAL PROCEDURES FOR ALIEN TERRORISTS

"Sec. 501. Definitions.
"Sec. 502. Establishment of special removal court; panel of attorneys to assist with classified information.
"Sec. 503. Application for initiation of special removal proceeding.

and

(2) by adding at the end the following new title:

"TITLE V—SPECIAL REMOVAL PROCEDURES FOR ALIEN TERRORISTS

"DEFINITIONS

"SEC. 501. In this title:

"(1) The term 'alien terrorist' means an alien described in section 241(a)(4)(B).

"(2) The term 'classified information' has the meaning given such term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.).

"(3) The term 'national security' has the meaning given such term in section 1(b) of the Classified Information Procedures Act (18 U.S.C. App.).

"(4) The term 'special attorney' means an attorney who is on the panel established under section 502(e).

"(5) The term 'special removal court' means the court established under section 502(a).

"(6) The term 'special removal hearing' means a hearing under section 505.

"(7) The term 'special removal proceeding' means a proceeding under this title.

"ESTABLISHMENT OF SPECIAL REMOVAL COURT; PANEL OF ATTORNEYS TO ASSIST WITH CLASSIFIED INFORMATION

"SEC. 502. (a) IN GENERAL.—The Chief Justice of the United States shall publicly designate 5 district court judges from 5 of the United States judicial circuits who shall constitute a court which shall have jurisdiction to conduct all special removal proceedings.

"(b) TERMS.—Each judge designated under subsection (a) shall serve for a term of 5 years and shall be eligible for redesignation, except that the four associate judges first so designated shall be designated for terms of one, two, three, and four years so that the term of one judge shall expire each year.

"(c) CHIEF JUDGE.—The Chief Justice shall publicly designate one of the judges of the special removal court to be the chief judge of the court. The chief judge shall promulgate rules to facilitate the functioning of the court and shall be responsible for assigning the consideration of cases to the various judges.

"(d) EXPEDITIOUS AND CONFIDENTIAL NATURE OF PROCEEDINGS.—The provisions of section 103(c) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(c)) shall apply to proceedings under this title in the same manner as they apply to proceedings under such Act.

"(e) ESTABLISHMENT OF PANEL OF SPECIAL ATTORNEYS.—The special removal court shall provide for the designation of a panel of attorneys each of whom—

"(1) has a security clearance which affords the attorney access to classified information, and

"(2) has agreed to represent permanent resident aliens with respect to classified information under section 506 in accordance with (and subject to the penalties under) this title.

"APPLICATION FOR INITIATION OF SPECIAL REMOVAL PROCEEDING

"SEC. 503. (a) IN GENERAL.—Whenever the Attorney General has classified information that an alien is an alien terrorist, the Attorney General, in the Attorney General's discretion, may seek removal of the alien under this title through the filing of a written application described in subsection (b) with the special removal court seeking an order authorizing a special removal proceeding under this title. The application shall be submitted in camera and ex parte and shall be filed under seal with the court.

"(b) CONTENTS OF APPLICATION.—Each application for a special removal proceeding shall include all of the following:

"(1) The identity of the Department of Justice attorney making the application.

"(2) The approval of the Attorney General or the Deputy Attorney General for the filing of the application based upon a finding by that individual that the application satisfies the criteria and requirements of this title.

"(3) The identity of the alien for whom authorization for the special removal proceedings is sought.

"(4) A statement of the facts and circumstances relied on by the Department of Justice to establish that—

"(A) the alien is an alien terrorist and is physically present in the United States, and

"(B) with respect to such alien, adherence to the provisions of title II regarding the deportation of aliens would pose a risk to the national security of the United States.

"(5) An oath or affirmation respecting each of facts and statements described in the previous paragraphs.

"(c) RIGHT TO DISMISS.—The Department of Justice retains the right to dismiss a removal action under this title at any stage of the proceeding.

"CONSIDERATION OF APPLICATION

"SEC. 504. (a) IN GENERAL.—In the case of an application under section 503 to the special removal court, a single judge of the court shall be assigned to consider

the application. The judge, in accordance with the rules of the court, shall consider the application and may consider other information, including classified information, presented under oath or affirmation. The judge shall consider the application (and any hearing thereof) in camera and ex parte. A verbatim record shall be maintained of any such hearing.

"(b) APPROVAL OF ORDER.—The judge shall enter ex parte the order requested in the application if the judge finds, on the basis of such application and such other information (if any), that there is probable cause to believe that—

"(1) the alien who is the subject of the application has been correctly identified and is an alien terrorist, and

"(2) adherence to the provisions of title II regarding the deportation of the identified alien would pose a risk to the national security of the United States.

"(c) DENIAL OF ORDER.—If the judge denies the order requested in the application, the judge shall prepare a written statement of the judge's reasons for the denial.

"(d) EXCLUSIVE PROVISIONS.—Whenever an order is issued under this section with respect to an alien—

"(1) the alien's rights regarding removal and expulsion shall be governed solely by the provisions of this title, and

"(2) except as they are specifically referenced, no other provisions of this Act shall be applicable.

"SPECIAL REMOVAL HEARINGS

"SEC. 505. (a) IN GENERAL.—In any case in which the application for the order is approved under section 504, a special removal hearing shall be conducted under this section for the purpose of determining whether the alien to whom the order pertains should be removed from the United States on the grounds that the alien is an alien terrorist. Consistent with section 506, the alien shall be given reasonable notice of the nature of the charges against the alien and a general account of the basis for the charges. The alien shall be given notice, reasonable under all the circumstances, of the time and place at which the hearing will be held. The hearing shall be held as expeditiously as possible.

"(b) USE OF SAME JUDGE.—The special removal hearing shall be held before the same judge who granted the order pursuant to section 504 unless that judge is deemed unavailable due to illness or disability by the chief judge of the special removal court, or has died, in which case the chief judge shall assign another judge to conduct the special removal hearing. A decision by the chief judge

pursuant to the preceding sentence shall not be subject to review by either the alien or the Department of Justice.

"(c) RIGHTS IN HEARING.—

"(1) PUBLIC HEARING.—The special removal hearing shall be open to the public.

"(2) RIGHT OF COUNSEL.—The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien. Such counsel shall be appointed by the judge pursuant to the plan for furnishing representation for any person financially unable to obtain adequate representation for the district in which the hearing is conducted, as provided for in section 3006A of title 18, United States Code. All provisions of that section shall apply and, for purposes of determining the maximum amount of compensation, the matter shall be treated as if a felony was charged.

"(3) INTRODUCTION OF EVIDENCE.—The alien shall have a right to introduce evidence on the alien's own behalf.

"(4) EXAMINATION OF WITNESSES.—Except as provided in section 506, the alien shall have a rea-

sonable opportunity to examine the evidence against the alien and to cross-examine any witness.

"(5) RECORD.—A verbatim record of the proceedings and of all testimony and evidence offered or produced at such a hearing shall be kept.

"(6) DECISION BASED ON EVIDENCE AT HEARING.—The decision of the judge in the hearing shall be based only on the evidence introduced at the hearing, including evidence introduced under section 505(e).

"(7) NO RIGHT TO ANCILLARY RELIEF.—In the hearing, the judge is not authorized to consider or provide for relief from removal based on any of the following:

"(A) Asylum under section 208.

"(B) Withholding of deportation under section 243(h).

"(C) Suspension of deportation under section 244(a) or 244(e).

"(D) Adjustment of status under section 245.

"(E) Registry under section 249.

"(d) SUBPOENAS.—

"(1) REQUEST.—At any time prior to the conclusion of the special removal hearing, either the

alien or the Department of Justice may request the judge to issue a subpoena for the presence of a named witness (which subpoena may also command the person to whom it is directed to produce books, papers, documents, or other objects designated therein) upon a satisfactory showing that the presence of the witness is necessary for the determination of any material matter. Such a request may be made ex parte except that the judge shall inform the Department of Justice of any request for a subpoena by the alien for a witness or material if compliance with such a subpoena would reveal evidence or the source of evidence which has been introduced, or which the Department of Justice has received permission to introduce, in camera and ex parte pursuant to subsection (e) and section 506, and the Department of Justice shall be given a reasonable opportunity to oppose the issuance of such a subpoena.

"(2) PAYMENT FOR ATTENDANCE.—If an application for a subpoena by the alien also makes a showing that the alien is financially unable to pay for the attendance of a witness so requested, the court may order the costs incurred by the process and the fees of the witness so subpoenaed to be paid

for from funds appropriated for the enforcement of title II.

"(3) NATIONWIDE SERVICE.—A subpoena under this subsection may be served anywhere in the United States.

"(4) WITNESS FEES.—A witness subpoenaed under this subsection shall receive the same fees and expenses as a witness subpoenaed in connection with a civil proceeding in a court of the United States.

"(5) NO ACCESS TO CLASSIFIED INFORMATION.—Nothing in this subsection is intended to allow an alien to have access to classified information.

"(e) INTRODUCTION OF CLASSIFIED INFORMATION.—

"(1) IN GENERAL.—When classified information has been summarized pursuant to section 506(b) or where a finding has been made under section 506(b)(5) that no summary is possible, classified information shall be introduced (either in writing or through testimony) in camera and ex parte and neither the alien nor the public shall be informed of such evidence or its sources other than through reference to the summary provided pursuant to such section. Notwithstanding the previous sen-

tence, the Department of Justice may, in its discretion and, in the case of classified information, after coordination with the originating agency, elect to introduce such evidence in open session.

"(2) TREATMENT OF ELECTRONIC SURVEILLANCE INFORMATION.—

"(A) USE OF ELECTRONIC SURVEILLANCE.—The Government is authorized to use in a special removal proceedings the fruits of electronic surveillance and unconsented physical searches authorized under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) without regard to subsections (c), (e), (f), (g), and (h) of section 106 of that Act.

"(B) NO DISCOVERY OF ELECTRONIC SURVEILLANCE INFORMATION.—An alien subject to removal under this title shall have no right of discovery of information derived from electronic surveillance authorized under the Foreign Intelligence Surveillance Act of 1978 or otherwise for national security purposes. Nor shall such alien have the right to seek suppression of evidence.

"(C) CERTAIN PROCEDURES NOT APPLICABLE.—The provisions and requirements of sec-

tion 3504 of title 18, United States Code, shall not apply to procedures under this title.

"(3) RIGHTS OF UNITED STATES.—Nothing in this section shall prevent the United States from seeking protective orders and from asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and state secrets privileges.

"(f) INCLUSION OF CERTAIN EVIDENCE.—The Federal Rules of Evidence shall not apply to hearings under this section. Evidence introduced at the special removal hearing, either in open session or in camera and ex parte, may, in the discretion of the Department of Justice, include all or part of the information presented under section 504 used to obtain the order for the hearing under this section.

"(g) ARGUMENTS.—Following the receipt of evidence, the attorneys for the Department of Justice and for the alien shall be given fair opportunity to present argument as to whether the evidence is sufficient to justify the removal of the alien. The attorney for the Department of Justice shall open the argument. The attorney for the alien shall be permitted to reply. The attorney for the Department of Justice shall then be permitted to reply in

rebuttal. The judge may allow any part of the argument that refers to evidence received in camera and ex parte to be heard in camera and ex parte.

"(h) BURDEN OF PROOF.—In the hearing the Department of Justice has the burden of showing by clear and convincing evidence that the alien is subject to removal because the alien is an alien terrorist. If the judge finds that the Department of Justice has met this burden, the judge shall order the alien removed and detained pending removal from the United States. If the alien was released pending the special removal hearing, the judge shall order the Attorney General to take the alien into custody.

"(i) WRITTEN ORDER.—At the time of rendering a decision as to whether the alien shall be removed, the judge shall prepare a written order containing a statement of facts found and conclusions of law. Any portion of the order that would reveal the substance or source of information received in camera and ex parte pursuant to subsection (e) shall not be made available to the alien or the public.

"CONSIDERATION OF CLASSIFIED INFORMATION

"SEC. 506. (a) CONSIDERATION IN CAMERA AND EX PARTE.—In any case in which the application for the order authorizing the special procedures of this title is approved, the judge who granted the order shall consider each item of classified information the Department of Jus-

tice proposes to introduce in camera and ex parte at the special removal hearing and shall order the introduction of such information pursuant to section 505(e) if the judge determines the information to be relevant.

"(b) PREPARATION AND PROVISION OF WRITTEN SUMMARY.—

"(1) PREPARATION.—The Department of Justice shall prepare a written summary of such classified information which does not pose a risk to national security.

"(2) CONDITIONS FOR APPROVAL BY JUDGE AND PROVISION TO ALIEN.—The judge shall approve the summary so long as the judge finds that the summary is sufficient—

"(A) to inform the alien of the general nature of the evidence that the alien is an alien terrorist, and

"(B) to permit the alien to prepare a defense against deportation.

The Department of Justice shall cause to be delivered to the alien a copy of the summary.

"(3) OPPORTUNITY FOR CORRECTION AND RESUBMITTAL.—If the judge does not approve the summary, the judge shall provide the Department a reasonable opportunity to correct the deficiencies

identified by the court and to submit a revised summary.

"(4) CONDITIONS FOR TERMINATION OF PROCEEDINGS IF SUMMARY NOT APPROVED.—

"(A) IN GENERAL.—If, subsequent to the opportunity described in paragraph (3), the judge does not approve the summary, the judge shall terminate the special removal hearing unless the judge makes the findings described in subparagraph (B).

"(B) FINDINGS.—The findings described in this subparagraph are, with respect to an alien, that—

"(i) the continued presence of the alien in the United States, and

"(ii) the provision of the required summary,

would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.

"(5) CONTINUATION OF HEARING WITHOUT SUMMARY.—If a judge makes the findings described in paragraph (4)(B)—

"(A) if the alien involved is an alien lawfully admitted for permanent residence, the pro-

cedures described in subsection (c) shall apply; and

"(B) in all cases the special removal hearing shall continue, the Department of Justice shall cause to be delivered to the alien a statement that no summary is possible, and the classified information submitted in camera and ex parte may be used pursuant to section 505(e).

"(c) SPECIAL PROCEDURES FOR ACCESS AND CHALLENGES TO CLASSIFIED BY SPECIAL ATTORNEYS IN CASE OF LAWFUL PERMANENT ALIENS.—

"(1) IN GENERAL.—The procedures described in this subsection are that the judge (under rules of the special removal court) shall designate a special attorney to assist the alien—

"(A) by reviewing in camera the classified information on behalf of the alien, and

"(B) by challenging through an in camera proceeding the veracity of the evidence contained in the classified information.

"(2) RESTRICTIONS ON DISCLOSURE.—A special attorney receiving classified information under paragraph (1)—

"(A) shall not disclosure the information to the alien or to any other attorney representing the alien, and

"(B) who discloses such information in violation of subparagraph (A) shall be subject to a fine under title 18, United States Code, imprisoned for not less than 10 years or more than 25 years, or both.

"APPEALS

"SEC. 507. (a) APPEALS OF DENIALS OF APPLICATIONS FOR ORDERS.—The Department of Justice may seek a review of the denial of an order sought in an application by the United States Court of Appeals for the District of Columbia Circuit by notice of appeal which must be filed within 20 days. In such a case the entire record of the proceeding shall be transmitted to the Court of Appeals under seal and the Court of Appeals shall hear the matter ex parte. In such a case the Court of Appeals shall review questions of law de novo, but a prior finding on any question of fact shall not be set aside unless such finding was clearly erroneous.

"(b) APPEALS OF DETERMINATIONS ABOUT SUMMARIES OF CLASSIFIED INFORMATION.—Either party may take an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit of—

"(1) any determination by the judge pursuant to section 506(a)—

"(A) concerning whether an item of evidence may be introduced in camera and ex parte, or

"(B) concerning the contents of any summary of evidence to be introduced in camera and ex parte prepared pursuant to section 506(b); or

"(2) the refusal of the court to make the findings permitted by section 506(b)(4)(B).

In any interlocutory appeal taken pursuant to this subsection, the entire record, including any proposed order of the judge or summary of evidence, shall be transmitted to the Court of Appeals under seal and the matter shall be heard ex parte.

"(c) APPEALS OF DECISION IN HEARING.—

"(1) IN GENERAL.—Subject to paragraph (2), the decision of the judge after a special removal hearing may be appealed by either the alien or the Department of Justice to the United States Court of Appeals for the District of Columbia Circuit by notice of appeal.

"(2) AUTOMATIC APPEALS IN CASES OF PERMANENT RESIDENT ALIENS IN WHICH NO SUMMARY PROVIDED.—

"(A) IN GENERAL.—Unless the alien waives the right to a review under this paragraph, in any case involving an alien lawfully admitted for permanent residence who is denied a written summary of classified information under section 506(b)(4) and the procedures of section 506(c) apply, any order issued by the judge shall be reviewed by the Court of Appeals for the District of Columbia Circuit.

"(B) USE OF SPECIAL ATTORNEY.—If any issue relating to classified information arises in such review, the alien shall be represented only by the special attorney designated under section 506(c)(1) on behalf of the alien.

"(d) GENERAL PROVISIONS RELATING TO APPEALS.—

"(1) NOTICE.—A notice of appeal pursuant to subsection (b) or (c) (other than under subsection (c)(2)) must be filed within 20 days, during which time the order for which the appeal is sought shall not be executed.

"(2) TRANSMITTAL OF RECORD.—In an appeal or review to the Court of Appeals pursuant to subsection (b) or (c)—

"(A) the entire record shall be transmitted to the Court of Appeals, and

"(B) information received pursuant to section 505(e), and any portion of the judge's order that would reveal the substance or source of such information, shall be transmitted under seal.

"(3) EXPEDITED APPELLATE PROCEEDING.—In an appeal or review to the Court of Appeals pursuant to subsection (b) or (c):

"(A) REVIEW.—The appeal or review shall be heard as expeditiously as practicable and the Court may dispense with full briefing and hear the matter solely on the record of the judge of the special removal court and on such briefs or motions as the Court may require to be filed by the parties.

"(B) DISPOSITION.—The Court shall uphold or reverse the judge's order within 60 days after the date of the issuance of the judge's final order.

"(4) DE NOVO REVIEW.—In an appeal or review to the Court of Appeals pursuant to subsection (b) or (c):

"(A) QUESTIONS OF LAW.—The Court of Appeals shall review all questions of law de novo.

"(B) QUESTIONS OF FACT.—(i) Subject to clause (ii), a prior finding on any question of fact shall not be set aside unless such finding was clearly erroneous.

"(ii) In the case of a review under subsection (c)(2) in which an alien lawfully admitted for permanent residence was denied a written summary of classified information under section 506(b)(4), the Court of Appeals shall review questions of fact de novo.

"(e) CERTIORARI.—Following a decision by the Court of Appeals pursuant to subsection (b) or (c), either the alien or the Department of Justice may petition the Supreme Court for a writ of certiorari. In any such case, any information transmitted to the Court of Appeals under seal shall, if such information is also submitted to the Supreme Court, be transmitted under seal. Any order of removal shall not be stayed pending disposition of a

writ of certiorari except as provided by the Court of Appeals or a Justice of the Supreme Court.

"(f) APPEALS OF DETENTION ORDERS.—

"(1) IN GENERAL.— The provisions of sections 3145 through 3148 of title 18, United States Code, pertaining to review and appeal of a release or detention order, penalties for failure to appear, penalties for an offense committed while on release, and sanctions for violation of a release condition shall apply to an alien to whom section 508(b)(1) applies. In applying the previous sentence—

"(A) for purposes of section 3145 of such title an appeal shall be taken to the United States Court of Appeals for the District of Columbia Circuit, and

"(B) for purposes of section 3146 of such title the alien shall be considered released in connection with a charge of an offense punishable by life imprisonment.

"(2) NO REVIEW OF CONTINUED DETENTION.— The determinations and actions of the Attorney General pursuant to section 508(c)(2)(D) shall not be subject to judicial review, including application for a writ of habeas corpus, except for a claim by the alien that continued detention violates the alien's

rights under the Constitution. Jurisdiction over any such challenge shall lie exclusively in the United States Court of Appeals for the District of Columbia Circuit.

"DETENTION AND CUSTODY

"SEC. 508. (a) INITIAL CUSTODY.—

"(1) UPON FILING APPLICATION.—Subject to paragraph (2), the Attorney General may take into custody any alien with respect to whom an application under section 503 has been filed and, notwithstanding any other provision of law, may retain such an alien in custody in accordance with the procedures authorized by this title.

"(2) SPECIAL RULES FOR PERMANENT RESIDENT ALIENS.—An alien lawfully admitted for permanent residence shall be entitled to a release hearing before the judge assigned to hear the special removal hearing. Such an alien shall be detained pending the special removal hearing, unless the alien demonstrates to the court that—

"(A) the alien, if released upon such terms and conditions as the court may prescribe (including the posting of any monetary amount), is not likely to flee, and

"(B) the alien's release will not endanger national security or the safety of any person or the community.

The judge may consider classified information submitted in camera and ex parte in making a determination under this paragraph.

"(3) RELEASE IF DENIAL OF ORDER AND NO REVIEW SOUGHT.—

"(A) IN GENERAL.—If a judge of the special removal court denies the order sought in an application with respect to an alien and the Department of Justice does not seek review of such denial, subject to subparagraph (B), the alien shall be released from custody.

"(B) APPLICATION OF REGULAR PROCEDURES.—Subparagraph (A) shall not prevent the arrest and detention of the alien pursuant to title II.

"(b) CONDITIONAL RELEASE IF DENIAL OF ORDER AND REVIEW SOUGHT.—

"(1) IN GENERAL.—If a judge of the special removal court denies the order sought in an application with respect to an alien and the Department of Justice seeks review of such denial, the judge shall release the alien from custody subject to the least re-

strictive condition or combination of conditions of release described in section 3142(b) and clauses (i) through (xiv) of section 3142(c)(1)(B) of title 18, United States Code, that will reasonably assure the appearance of the alien at any future proceeding pursuant to this title and will not endanger the safety of any other person or the community.

"(2) NO RELEASE FOR CERTAIN ALIENS.—If the judge finds no such condition or combination of conditions, the alien shall remain in custody until the completion of any appeal authorized by this title.

"(c) CUSTODY AND RELEASE AFTER HEARING.—

"(1) RELEASE.—

"(A) IN GENERAL.—Subject to subparagraph (B), if the judge decides pursuant to section 505(i) that an alien should not be removed, the alien shall be released from custody.

"(B) CUSTODY PENDING APPEAL.—If the Attorney General takes an appeal from the order, the alien shall remain in custody, subject to the provisions of section 3142 of title 18, United States Code.

"(2) CUSTODY AND REMOVAL.—

"(A) CUSTODY.—If the judge decides pursuant to section 505(i) that an alien shall be re-

moved, the alien shall be detained pending the outcome of any appeal. After the conclusion of any judicial review thereof which affirms the removal order, the Attorney General shall retain the alien in custody or, if the alien was released pursuant to paragraph (1)(A), shall take the alien into custody and remove the alien to a country specified under subparagraph (B).

"(B) REMOVAL.—

"(i) IN GENERAL.—The removal of an alien shall be to any country which the alien shall designate if such designation does not, in the judgment of the Attorney General, in consultation with the Secretary of State, impair the obligation of the United States under any treaty (including a treaty pertaining to extradition) or otherwise adversely affect the foreign policy of the United States.

"(ii) ALTERNATE COUNTRIES.—If the alien refuses to choose a country to which the alien wishes to be transported, or if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so se-

lected would impair a treaty obligation or adversely affect United States foreign policy, the Attorney General shall cause the alien to be transported to any country willing to receive such alien.

"(C) CONTINUED DETENTION.—If no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, retain the alien in custody. The Attorney General, in coordination with the Secretary of State, shall make periodic efforts to reach agreement with other countries to accept such an alien and at least every 6 months shall provide to the attorney representing the alien at the special removal hearing alien a written report on the Attorney General's efforts. Any alien in custody pursuant to this subparagraph shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate.

"(D) FINGERPRINTING.—Before an alien is transported out of the United States pursuant to this subsection, or pursuant to an order of exclusion because such alien is excludable

under section 212(a)(3)(B), the alien shall be photographed and fingerprinted, and shall be advised of the provisions of subsection 276(b).

"(d) CONTINUED DETENTION PENDING TRIAL.—

"(1) DELAY IN REMOVAL.—Notwithstanding the provisions of subsection (c)(2), the Attorney General may hold in abeyance the removal of an alien who has been ordered removed pursuant to this title to allow the trial of such alien on any Federal or State criminal charge and the service of any sentence of confinement resulting from such a trial.

"(2) MAINTENANCE OF CUSTODY.—Pending the commencement of any service of a sentence of confinement by an alien described in paragraph (1), such an alien shall remain in the custody of the Attorney General, unless the Attorney General determines that temporary release of the alien to the custody of State authorities for confinement in a State facility is appropriate and would not endanger national security or public safety.

"(3) SUBSEQUENT REMOVAL.—Following the completion of a sentence of confinement by an alien described in paragraph (1) or following the completion of State criminal proceedings which do not result in a sentence of confinement of an alien released

to the custody of State authorities pursuant to paragraph (2), such an alien shall be returned to the custody of the Attorney General who shall proceed to carry out the provisions of subsection (c)(2) concerning removal of the alien.

"(e) APPLICATION OF CERTAIN PROVISIONS.—For purposes of section 751 and 752 of title 18, United States Code, an alien in the custody of the Attorney General pursuant to this title shall be subject to the penalties provided by those sections in relation to a person committed to the custody of the Attorney General by virtue of an arrest on a charge of felony.

"(f) RIGHTS OF ALIENS IN CUSTODY.—

"(1) FAMILY AND ATTORNEY VISITS.—An alien in the custody of the Attorney General pursuant to this title shall be given reasonable opportunity to communicate with and receive visits from members of the alien's family, and to contact, retain, and communicate with an attorney.

"(2) DIPLOMATIC CONTACT.—An alien in the custody of the Attorney General pursuant to this title shall have the right to contact an appropriate diplomatic or consular official of the alien's country of citizenship or nationality or of any country providing representation services therefore. The Attor-

ney General shall notify the appropriate embassy, mission, or consular office of the alien's detention.".

(b) JURISDICTION OVER EXCLUSION ORDERS FOR ALIEN TERRORISTS.—Subsection 106(b) of the Immigration and Nationality Act (8 U.S.C. 1105a(b)) is amended by adding at the end the following sentence: "Jurisdiction to review an order entered pursuant to the provisions of section 235(c) concerning an alien excludable under section 212(a)(3)(B) shall rest exclusively in the United States Court of Appeals for the District of Columbia Circuit.".

(c) CRIMINAL PENALTY FOR REENTRY OF ALIEN TERRORISTS.—Section 276(b) of such Act (8 U.S.C. 1326(b)) is amended—

(1) by striking "or" at the end of paragraph (1),

(2) by striking the period at the end of paragraph (2) and inserting "; or", and

(3) by inserting after paragraph (2) the following new paragraph:

"(3) who has been excluded from the United States pursuant to subsection 235(c) because the alien was excludable under subsection 212(a)(3)(B) or who has been removed from the United States pursuant to the provisions of title V, and who there-

after, without the permission of the Attorney General, enters the United States or attempts to do so shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.".

(d) ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of such Act (8 U.S.C. 1105a(a)) is amended—

(1) by adding "and" at the end of paragraph (8),

(2) by striking "; and" at the end of paragraph (9) and inserting a period, and

(3) by striking paragraph (10).

(e) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to all aliens without regard to the date of entry or attempted entry into the United States.

SEC. 602. FUNDING FOR DETENTION AND DEPORTATION OF ALIEN TERRORISTS.

In addition to amounts otherwise appropriated, there are authorized to be appropriated for each fiscal year (beginning with fiscal year 1996) $5,000,000 to the Immigra-

tion and Naturalization Service for the purpose of detaining and deporting alien terrorists.

PART 2—EXCLUSION AND DENIAL OF ASYLUM FOR ALIEN TERRORISTS

SEC. 611. MEMBERSHIP IN TERRORIST ORGANIZATION AS GROUND FOR EXCLUSION.

(a) IN GENERAL.—Section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)) is amended—

(1) in clause (i)—

(A) by striking "or" at the end of subclause (I),

(B) in subclause (II), by inserting "engaged in or" after "believe,", and

(C) by inserting after subclause (II) the following:

"(III) is a representative of a terrorist organization, or

"(IV) is a member of a terrorist organization,"; and

(2) by adding at the end the following:

"(iv) TERRORIST ORGANIZATION DEFINED.—

"(I) DESIGNATION BY PRESIDENT.—For purposes of this Act, the

term 'terrorist organization' means a foreign organization designated in the Federal Register as a terrorist organization by the President based upon a finding that the organization engages in, or has engaged in, terrorist activity that threatens the national security of the United States.

"(II) PROCESS.—At least 3 days before designating an organization as a terrorist organization through publication in the Federal Register, the President shall notify the Committees on the Judiciary of the House of Representatives and the Senate of the intent to make such designation and the President's findings and basis for designation.

"(III) CONGRESSIONAL REMOVAL AUTHORITY.—The Congress reserves the authority to remove, by law, the designation of an organization as a terrorist organization for purposes of this Act.

"(IV) SUNSET.—Subject to subclause (III), the designation under this clause of an organization as a terrorist organization shall be effective for a period of 2 years from the date of the initial publication of the terrorist organization designation by the President. At the end of such period (but no sooner than 60 days prior to the termination of the 2-year-designation period), the President may redesignate the organization in conformity with the requirements of this clause for designation of the organization.

"(V) PRESIDENTIAL REMOVAL AUTHORITY.—The President may remove the terrorist organization designation from any organization previously designated as such an organization, at any time, so long as the President publishes notice of the removal in the Federal Register. The President is not required to report to Congress prior to taking such an action.

"(v) REPRESENTATIVE DEFINED.—In this subparagraph, the term 'representative' includes an officer, official, or spokesman of the organization and any person who directs, counsels, commands or induces the organization or its members to engage in terrorist activity. The determination by the Secretary of State or the Attorney General that an alien is a representative of a terrorist organization shall be controlling and shall not be subject to review by any court.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

SEC. 612. DENIAL OF ASYLUM TO ALIEN TERRORISTS.

(a) IN GENERAL.—Section 208(a) of the Immigration and Nationality Act (8 U.S.C. 1158(a)) is amended by adding at the end the following: "The Attorney General may not grant an alien asylum if the Attorney General determines that the alien is excludable under subclause (I), (II), or (III) of section 212(a)(3)(B)(i) or deportable under section 241(a)(4)(B).".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enact-

ment of this Act and apply to asylum determinations made on or after such date.

SEC. 613. DENIAL OF OTHER RELIEF FOR ALIEN TERRORISTS.

(a) WITHHOLDING OF DEPORTATION.—Section 243(h)(2) of the Immigration and Nationality Act (8 U.S.C. 1253(h)(2)) is amended by adding at the end the following new sentence: "For purposes of subparagraph (D), an alien who is described in section 241(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.".

(b) SUSPENSION OF DEPORTATION.—Section 244(a) of such Act (8 U.S.C. 1254(a)) is amended by striking "section 241(a)(4)(D)" and inserting "subparagraph (B) or (D) of section 241(a)(4)".

(c) VOLUNTARY DEPARTURE.—Section 244(e)(2) of such Act (8 U.S.C. 1254(e)(2)) is amended by inserting "under section 241(a)(4)(B) or" after "who is deportable".

(d) ADJUSTMENT OF STATUS.—Section 245(c) of such Act (8 U.S.C. 1255(c)) is amended—

(1) by striking "or" before "(5)", and

(2) by inserting before the period at the end the following: ", or (6) an alien who is deportable under section 241(a)(4)(B)".

(e) REGISTRY.—Section 249(d) of such Act (8 U.S.C. 1259(d)) is amended by inserting "and is not deportable under section 241(a)(4)(B)" after "ineligible to citizenship".

(f) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date.

Subtitle B—Expedited Exclusion

SEC. 621. INSPECTION AND EXCLUSION BY IMMIGRATION OFFICERS.

(a) IN GENERAL.—Subsection (b) of section 235 of the Immigration and Nationality Act (8 U.S.C. 1225) is amended to read as follows:

"(b)(1)(A) If the examining immigration officer determines that an alien seeking entry—

"(i) is excludable under section 212(a)(6)(C) or 212(a)(7), and

"(ii) does not indicate either an intention to apply for asylum under section 208 or a fear of persecution,

the officer shall order the alien excluded from the United States without further hearing or review.

"(B) The examining immigration officer shall refer for an interview by an asylum officer under subparagraph (C) any alien who is excludable under section 212(a)(6)(C) or 212(a)(7) and has indicated an intention to apply for asylum under section 208 or a fear of persecution.

"(C)(i) An asylum officer shall promptly conduct interviews of aliens referred under subparagraph (B).

"(ii) If the officer determines at the time of the interview that an alien has a credible fear of persecution (as defined in clause (v)), the alien shall be detained for an asylum hearing before an asylum officer under section 208.

"(iii)(I) Subject to subclause (II), if the officer determines that the alien does not have a credible fear of persecution, the officer shall order the alien excluded from the United States without further hearing or review.

"(II) The Attorney General shall promulgate regulations to provide for the immediate review by a supervisory asylum officer at the port of entry of a determination under subclause (I).

"(iv) The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligi-

ble for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not delay the process.

"(v) For purposes of this subparagraph, the term 'credible fear of persecution' means (I) that it is more probable than not that the statements made by the alien in support of the alien's claim are true, and (II) that there is a significant possibility, in light of such statements and of such other facts as are known to the officer that the alien could establish eligibility for asylum under section 208.

"(D) As used in this paragraph, the term 'asylum officer' means an immigration officer who—

"(i) has had professional training in country conditions, asylum law, and interview techniques; and

"(ii) is supervised by an officer who meets the condition in clause (i).

"(E)(i) An exclusion order entered in accordance with subparagraph (A) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order against an alien who claims under oath, or as permitted under penalty of

perjury under section 1746 of title 28, United States Code, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence.

"(ii) In any action brought against an alien under section 275(a) or section 276, the court shall not have jurisdiction to hear any claim attacking the validity of an order of exclusion entered under subparagraph (A).

"(2)(A) Except as provided in subparagraph (B), if the examining immigration officer determines that an alien seeking entry is not clearly and beyond a doubt entitled to enter, the alien shall be detained for a hearing before a special inquiry officer.

"(B) The provisions of subparagraph (A) shall not apply—

"(i) to an alien crewman,

"(ii) to an alien described in paragraph (1)(A) or (1)(C)(iii)(I), or

"(iii) if the conditions described in section 273(d) exist.

"(3) The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privi-

lege to enter is so challenged, before a special inquiry officer for a hearing on exclusion of the alien.".

(b) CONFORMING AMENDMENT.—Section 237(a) of such Act (8 U.S.C. 1227(a)) is amended—

(1) in the second sentence of paragraph (1), by striking "Deportation" and inserting "Subject to section 235(b)(1), deportation", and

(2) in the first sentence of paragraph (2), by striking "If" and inserting "Subject to section 235(b)(1), if".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the first day of the first month that begins more than 90 days after the date of the enactment of this Act.

SEC. 622. JUDICIAL REVIEW.

(a) PRECLUSION OF JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a) is amended—

(1) by amending the section heading to read as follows:

"JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION, AND SPECIAL EXCLUSION"; and

(2) by adding at the end the following new subsection:

"(d)(1) Notwithstanding any other provision of law, and except as provided in this subsection, no court shall

have jurisdiction to review any individual determination, or to entertain any other cause or claim, arising from or relating to the implementation or operation of section 235(b)(1). Regardless of the nature of the action or claim, or the party or parties bringing the action, no court shall have jurisdiction or authority to enter declaratory, injunctive, or other equitable relief not specifically authorized in this subsection nor to certify a class under Rule 23 of the Federal Rules of Civil Procedure.

"(2) Judicial review of any cause, claim, or individual determination covered under paragraph (1) shall only be available in habeas corpus proceedings, and shall be limited to determinations of—

"(A) whether the petitioner is an alien, if the petitioner makes a showing that the petitioner's claim of United States nationality is not frivolous;

"(B) whether the petitioner was ordered specially excluded under section 235(b)(1)(A); and

"(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence and is entitled to such review as is provided by the Attorney General pursuant to section 235(b)(1)(E)(i).

"(3) In any case where the court determines that an alien was not ordered specially excluded, or was not prop-

erly subject to special exclusion under the regulations adopted by the Attorney General, the court may order no relief beyond requiring that the alien receive a hearing in accordance with section 236, or a determination in accordance with section 235(c) or 273(d).

"(4) In determining whether an alien has been ordered specially excluded, the court's inquiry shall be limited to whether such an order was in fact issued and whether it relates to the petitioner.".

(b) PRECLUSION OF COLLATERAL ATTACKS.—Section 235 of such Act (8 U.S.C. 1225) is amended by adding at the end the following new subsection:

"(d) In any action brought for the assessment of penalties for improper entry or re-entry of an alien under sections 275 and 276, no court shall have jurisdiction to hear claims collaterally attacking the validity of orders of exclusion, special exclusion, or deportation entered under this section or sections 236 and 242.".

SEC. 623. EXCLUSION OF ALIENS WHO HAVE NOT BEEN INSPECTED AND ADMITTED.

(a) IN GENERAL.—Section 241 of the Immigration and Nationality Act (8 U.S.C. 1251) is amended by adding at the end the following new subsection:

"(d) Notwithstanding any other provision of this title, an alien found in the United States who has not been ad-

mitted to the United States after inspection in accordance with section 235 is deemed for purposes of this Act to be seeking entry and admission to the United States and shall be subject to examination and exclusion by the Attorney General under chapter 4. In the case of such an alien the Attorney General shall provide by regulation an opportunity for the alien to establish that the alien was so admitted.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the first day of the first month beginning more than 90 days after the date of the enactment of this Act.

Subtitle C—Improved Information and Processing

PART 1—IMMIGRATION PROCEDURES

SEC. 631. ACCESS TO CERTAIN CONFIDENTIAL INS FILES THROUGH COURT ORDER.

(a) LEGALIZATION PROGRAM.—Section 245A(c)(5) of the Immigration and Nationality Act (8 U.S.C. 1255a(c)(5) is amended—

(1) by inserting "(i)" after "except the Attorney General"; and

(2) by inserting after "title 13, United States Code" the following: "and (ii) may authorize an application to a Federal court of competent jurisdiction

for, and a judge of such court may grant, an order authorizing disclosure of information contained in the application of the alien to be used—

"(I) for identification of the alien when there is reason to believe that the alien has been killed or severely incapacitated; or

"(II) for criminal law enforcement purposes against the alien whose application is to be disclosed if the alleged criminal activity occurred after the legalization application was filed and such activity involves terrorist activity or poses either an immediate risk to life or to national security, or would be prosecutable as an aggravated felony, but without regard to the length of sentence that could be imposed on the applicant".

(b) SPECIAL AGRICULTURAL WORKER PROGRAM.—Section 210(b) of such Act (8 U.S.C. 1160(b)) is amended—

(1) in paragraph (5), by inserting ", except as allowed by a court order issued pursuant to paragraph (6)" after "consent of the alien", and

(2) in paragraph (6), by inserting after the first sentence the following:

"Notwithstanding the previous sentence, the Attorney General may authorize an application to a Federal court of competent jurisdiction for, and a judge of such court may grant, an order authorizing disclosure of information contained in the application of the alien to be used (i) for identification of the alien when there is reason to believe that the alien has been killed or severely incapacitated, or (ii) for criminal law enforcement purposes against the alien whose application is to be disclosed if the alleged criminal activity occurred after the special agricultural worker application was filed and such activity involves terrorist activity or poses either an immediate risk to life or to national security, or would be prosecutable as an aggravated felony, but without regard to the length of sentence that could be imposed on the applicant.".

SEC. 632. WAIVER AUTHORITY CONCERNING NOTICE OF DENIAL OF APPLICATION FOR VISAS.

Section 212(b) of the Immigration and Nationality Act (8 U.S.C. 1182(b)) is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B);

(2) by striking "If" and inserting "(1) Subject to paragraph (2), if"; and

(3) by inserting at the end the following paragraph:

"(2) With respect to applications for visas, the Secretary of State may waive the application of paragraph (1) in the case of a particular alien or any class or classes of aliens excludable under subsection (a)(2) or (a)(3).".

PART 2—ASSET FORFEITURE FOR PASSPORT AND VISA OFFENSES

SEC. 641. CRIMINAL FORFEITURE FOR PASSPORT AND VISA RELATED OFFENSES.

Section 982 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting after paragraph (5) the following new paragraph:

"(6) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States any property, real or personal, which the person used, or intended to be used, in committing, or facilitating the commission of, the violation, and any property con-

stituting, or derived from, or traceable to, any proceeds the person obtained, directly or indirectly, as a result of such violation.", and

(2) in subsection (b)(1)(B), by inserting "or (a)(6)" after "(a)(2)".

SEC. 642. SUBPOENAS FOR BANK RECORDS.

Section 986(a) of title 18, United States Code, is amended by inserting "1028, 1541, 1542, 1543, 1544, 1546," before "1956".

SEC. 643. EFFECTIVE DATE.

The amendments made by this subtitle shall take effect on the first day of the first month that begins more than 90 days after the date of the enactment of this Act.

TITLE VII—FUNDING

SEC. 701. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to the Federal Bureau of Investigation such sums as are necessary—

(1) to hire additional personnel, and to procure equipment, to support expanded investigations of domestic and international terrorism activities;

(2) to establish a Domestic Counterterrorism Center to coordinate and centralize Federal, State, and local law enforcement efforts in response to major terrorist incidents, and as a clearinghouse for

all domestic and international terrorism information and intelligence; and

(3) to cover costs associated with providing law enforcement coverage of public events offering the potential of being targeted by domestic or international terrorists.

SEC. 702. CIVIL MONETARY PENALTY SURCHARGE AND TELECOMMUNICATIONS CARRIER COMPLIANCE PAYMENTS.

The Communications Assistance for Law Enforcement Act is amended by adding at the end the following:

"TITLE IV—CIVIL MONETARY PENALTY SURCHARGE AND TELECOMMUNICATIONS CARRIER COMPLIANCE PAYMENTS

"SEC. 401. CIVIL MONETARY PENALTY SURCHARGE.

"(a) IMPOSITION.—Notwithstanding any other provision of law, and subject to section 402(c), 40 percent of the principal amount of a civil monetary penalty assessed by the United States or an agency thereof shall be added to the fund established in section 402.

"(b) EFFECTIVE DATES.—(1) Subsection (a) shall apply with respect to all civil monetary penalties assessed

on or after October 1, 1995, or the date of enactment of this title, whichever is later.

"(2) The application of subsection (a) shall terminate on October 1, 1998.

"(d) LIMITATION.—This section does not apply to any civil monetary penalty assessed under the Internal Revenue Code of 1986.

"SEC. 402. DEPARTMENT OF JUSTICE TELECOMMUNICATIONS CARRIER COMPLIANCE FUND.

"(a) ESTABLISHMENT OF FUND.—There is hereby established in the United States Treasury a fund to be known as the Department of Justice Telecommunications Carrier Compliance Fund (hereinafter in this section referred to as the 'Fund'), which shall be available to the Attorney General to the extent and in the amounts authorized by subsection (c) to make payments to telecommunications carriers, as authorized by section 109 of the Communications Assistance for Law Enforcement Act.

"(b) OFFSETTING COLLECTIONS.—Notwithstanding section 3302 of title 31, United States Code, the Attorney General may credit amounts added pursuant to section 401 of this title to the Fund as offsetting collections.

"(c) REQUIREMENTS FOR APPROPRIATIONS OFFSET.—(1) Amounts may be added pursuant to section 401

only to the extent and in the amounts provided for in advance in appropriations Acts.

"(2)(A) Collections credited to the Fund are authorized to be appropriated in such amounts as may be necessary, but not to exceed $100,000,000 in fiscal year 1996, $305,000,000 in fiscal year 1997, and $80,000,000 in fiscal year 1998.

"(B) Amounts described in subparagraph (A) are authorized to be appropriated without fiscal year limitation.

"(d) TERMINATION.—(1) The Attorney General may terminate the Fund at such time as the Attorney General determines that the Fund is no longer necessary, but no later than the end of fiscal year 2000.

"(2) Any balance in the Fund at the time of its termination shall be deposited in the general fund of the Treasury.

"(3) A decision of the Attorney General to terminate the Fund shall not be subject to judicial review.

"SEC. 403. DEFINITIONS.

"For purposes of this title, the terms 'agency' and 'civil monetary penalty' have the meanings given to them by section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note).".

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Mr. HYDE. Does the gentlelady from Colorado wish to make an opening statement?

Mrs. SCHROEDER. I don't, Mr. Chairman. I just want to thank you.

I realize we are a very small group, but I also want to thank our two witnesses for being here. I did want to say that I appreciated your putting in the different comments about the convention on the marking of plastic explosives. I think that is a very interesting part of the bill.

The rest of the bill, I will be interested to hear what other people have to say about that. As I remember, we were pledged to protect and defend the Constitution. And I think we want to defend it rather than amend it with the bill. So I am going to be very interested to see how we work all of that out. And I think these should be interesting hearings.

Mr. HYDE. I thank the gentlelady.

Mr. Scott.

Mr. SCOTT. I don't have an opening statement, Mr. Chairman. I would want to thank you for having the hearing.

We have had, during the last—during this Congress we have had some things that have gone through extremely quickly and I think you have allowed for a very extensive hearing on this issue, and I want to thank you for that opportunity.

Mr. HYDE. I thank the gentleman.

Mr. Bryant.

Mr. BRYANT of Texas. Thank you, Mr. Chairman.

I didn't hear your introductory comments and you may have allayed my fears already when I was not here, but I hope we are not moving into an area that is based on the natural tendency of all political leaders to react to a crisis by proposing a new law.

What happened in Oklahoma City, of course, is terrible, but it is obvious that we all suspected the wrong people in the very beginning and it turned out that it was our own people. And I want to make sure that the bill that we are going to pass is one that serves a real need.

We did catch the people in New York that committed the bombing there, and apparently caught the ones in Oklahoma. I want to pass legislation that is needed.

I don't want to add to the statutes legislation that is really just a reaction to a national anger and outrage over something when it appears, at the outset anyway, that we have managed very well in terms of catching the evildoers. But I will reserve judgment until I hear the testimony.

Mr. HYDE. I thank the gentleman.

Mr. Moorhead, do you have any opening statement?

Mr. MOORHEAD. Mr. Chairman, I want to congratulate you for having these hearings.

I think the American people are deeply concerned about the act of terrorism, not only in our own country but around the world. We do live in a dangerous time and there seems to be a lot of kooks out there that are willing to go about as far as they can.

I agree, though, with the statements that have been made that you don't want to overreact to something like this. We do need to

protect the rights of the American people and not go so far with legislation that we take away rights of law-abiding citizens.

I have been over a great part of this legislation and it sounds like it has a lot of common sense and it does not go to extensive levels. And I will be very interested in the testimony of the witnesses today, and I hope that we can do something that is positive rather than going so far that it does more harm than good.

Thank you.

Mr. HYDE. I thank the gentleman for his contribution.

Mr. Gekas, the gentleman from Pennsylvania.

Mr. GEKAS. I thank the Chair. I, too, appreciate the opportunity to delve even more deeply into the syndrome of terrorism that has been plaguing us for quite some time. I am especially interested in the emphasis that the bill seems to be placing on weapons of mass destruction. It seems that that type of weapon is one that sets aside terrorism most vividly from other serious and deadly crimes, but nevertheless not as explosive—if that is the right word to use—as the mass destruction types of weapons.

And so, as we look into this, we are not going to be able to separate ourselves from thinking about Oklahoma City, even though that might be reacting in a way to a recent mass destruction event. But we owe it to our constituents to do so. The fact that Oklahoma City did occur requires us to look back and see what went wrong, what could have been prevented. What can we do now to prevent another Oklahoma City?

So, with the background that is already in the atmosphere preceding these hearings, I think they will be fruitful.

I thank the Chair.

Mr. HYDE. I thank the gentleman.

The gentleman from New Mexico, Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. I will be brief and echo the two sentiments I think I have heard already expressed here today.

The first is we do not want to pass legislation for the sake of passing legislation. We want to pass legislation that will have a beneficial effect on the problem we are addressing.

And I think there is much in your bill that does that, Mr. Chairman.

I think there are also provisions in the bill the other body passed that deal with additional provisions such as allowing crime victim funds to go to victims of terrorism, to allow the United States to cooperate by providing explosive detection equipment to our allies who are intended victims of the same kind of terrorism, and other provisions.

At the same time I think we don't want to rush so rapidly into this that we neglect the civil liberties protections that are also an important part of our society. In fact, I have to say that I find an interesting political role reversal here in that, allowing for generalities, a number of people on the political left are pushing for intense internal supervision of certain groups, forgetting the fact that the Government was restricted in what it could do in internal surveillance because of harassment and other forms of misuse of government authority against groups also on the political "left" 20 and 30 years ago. I am speaking specifically of antiwar groups and civil

rights groups that were being investigated and the idea that they could be treasonous because they opposed what was then government policy.

I want to conclude that with respect to civil liberties, Congressman Skaggs drafted, and I am pleased to cosponsor with him, a proposed Inspector General for the sole purpose of examining from a civil liberties point of view, the antiterrorism actions that the Government may take in the future.

Thank you, Mr. Chairman. I yield back.

Mr. HYDE. I thank the gentleman from New Mexico.

The gentleman from Florida, who probably should have been called first because he was here first, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

I just want to thank you for your leadership on this issue. The bill that you have introduced presents a thoughtful approach to battling terrorism and will enhance the ability of law enforcement to deal with real threats while ensuring that civil liberties are not threatened. I look forward to the testimony of the witnesses today.

Mr. HYDE. If there ever was a subject where bipartisan cooperation was called for, it is the question of antiterrorism. I don't see any room for partisan advantage here at all. And, I welcome the cooperation of both Democrats and Republicans in fashioning a bill that is responsive, is not overkill, does not bend the Constitution out of shape, but does add to the protections the country deserves from this heinous form of criminal conduct.

Our first witness is Congressman Doug Bereuter. He has been serving the First Congressional District of Nebraska since 1978. He is a vice chairman of the Committee on International Relations and chairman of the Subcommittee on Asia and the Pacific.

From 1989 to 1994, he served with distinction on the House Permanent Select Committee on Intelligence where he worked extensively on the Ames spy case. As a result of those efforts, he has generated many of the ideas that have been incorporated into this legislation, H.R. 1710.

And so, the Chair is pleased to recognize Mr. Bereuter.

STATEMENT OF HON. DOUG BEREUTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. BEREUTER. Thank you, Chairman Hyde, for your kind remarks; Congresswoman Schroeder, members of the committee.

I am pleased to appear before you today to discuss a proposal contained in the antiterrorism bill, which I have held a long and serious interest. That proposal would amend the Fair Credit Reporting Act to provide the FBI with mandatory access to consumer reporting agency information.

The language in your legislation mirrors language of a bill that I introduced several times in the previous Congress, and which I introduced the first day of this Congress in the form of H.R. 68. I will refer to it as the bill but it really parallels, as I said, the language in your legislation.

The bill would provide the FBI with new authority for mandatory access via a national security letter to identify information from consumer reporting agencies on persons who are the subject of foreign counterintelligence or I could say foreign and domestic

counterterrorism investigations without such reports being made known to the subjects.

Once provided with identifying information, the FBI will be able to direct its investigation of financial service records under the Right to Financial Privacy Act. With this change in law, the FBI need not rely exclusively on more costly, time-consuming and intrusive investigations such as surveillance, mail covers and interviews with the associates. The bill stipulates that the FBI may request identifying information under certain circumstances and will be subject to appropriate controls on the use of such information.

The FBI can request full consumer reports through a court order. The legislation also includes a confidentiality clause which prohibits a credit reporting company from disclosing that the FBI has sought or obtained consumer reports or identifying information. In addition, the bill provides that no information be placed in a consumer report that would identify or indicate that the FBI has sought the information.

The bill also provides guidelines for the reimbursement of consumer reporting agencies by the FBI, places limits on the dissemination of this information outside the FBI, and stipulates that semiannual reports of all requests be made to Congress.

Finally, the legislation sets forth parameters for punitive and disciplinary measures to be taken should unlawful disclosure of credit reports, records or information occur. I believe if approved by Congress this section which, as I said, parallels H.R. 68 will add significantly to the FBI's investigative capabilities and I believe it is much needed.

In fact, I am told that senior FBI and Justice Department officials view this proposals the most important element of the antiterrorism package because it will so significantly augment the ability of the United States to combat terrorists and espionage activities. Financial records are needed to track the activities of suspected spies or terrorists.

In the area of counterintelligence there is a growing need in counterintelligence investigation to follow financial transactions as foreign intelligence service are increasingly operating under nonofficial cover. And as the committee is undoubtedly aware, effective detection of the movement of terrorists' funds is essential to detecting terrorists' capabilities, fundraising activities, and criminal activities.

It is true that information on an individual's financial associations can be obtained by other investigatory activities. These activities would include mail covers, surveillance or interviews with associates, as I mentioned. However, these are much more time consuming, and more importantly, they are potentially more invasive of the suspect's individual privacy.

Moreover, due to their invasiveness, there is an increased likelihood of detection by the suspect party. Any hint to the subject that he or she is under investigation will likely cause that individual to cease activity and thus the ability to prosecute the case may be lost through failure to prove the necessary elements.

The Bureau needs other less intrusive and lower risk techniques to obtain the lead material to bring a case to the prosecutive stage and to maximize the intelligence to be gained prior to a case be-

coming public. Granting the FBI mandatory access via national security letter to consumer financial information can lessen the investigatory process and lessen the chance of detection.

This amendment has enjoyed the support of the House. Last year while still a member of the Intelligence Committee and also a member of the Banking Committee largely because of the early information about the Ames espionage case, I introduced the FBI Counterintelligence Act.

This was done as a followup on an agreement made between the Intelligence Committees during the conference of the fiscal year 1995 Intelligence Authorization Act. The Intelligence Committees supported the amendment and were prepared to act on the amendment in their conference.

We had it in the House bill, but Congressman Joe Kennedy, a chairman of the Banking Subcommittee responsible for the Fair Credit Reporting Act, prevailed upon Senate Chairman DeConcini not to proceed with it because he felt it would weaken the chances for an Omnibus Fair Credit Reporting Act bill to pass the Congress. And failing that, they suggested if that didn't pass then we could come back and pass a separate bill.

Those best laid plans, over my objection, did not work out and the result was I introduced another last minute bill to try to give us one more chance. A provision that had the support of both Intelligence Committees failed because of tactical maneuvers to pass an Omnibus Fair Credit Reporting Act. And that is basically where we are today.

I would just say a word or two about the Senate's action if that is appropriate. Is it appropriate to visit about the Senate's action?

Mr. HYDE. Yes, it is appropriate. If you use appropriate language.

Mr. BEREUTER. Mr. Chairman, the Judiciary Committee of the other body elected to do away with the national security letter process, instead relying on a court order to be used to obtain identifying information as well as reports. Apparently they felt time was of the essence at the Senate staff level, although attempts were made to make it aware of the concerns about the court order process. They didn't take the time or didn't have the time to change the language in the mark.

I think the House committee is aware of this and anticipates that the discrepancy could be resolved in conference and from what I understand, there is no great objection on the Senate side.

If access to identifying information or the identity of the official institutions is governed by court order, this is most important, it will not be used according to the Justice Department and the FBI so the national security letter process, which is a part of your bill and which I support is essential and I would hope that the House Judiciary Committee in conference would prevail on what I think would be an easy task to win that issue.

Thank you very much, Mr. Chairman. I would be happy to listen to questions and try to answer them after my colleague has a chance to testify.

Mr. HYDE. I thank the gentleman for his contribution and what I propose is we will hear from Congressman Skaggs and then open the matter up for questions from the committee.

The next witness is Congressman David Skaggs who has been serving the Second Congressional District of Colorado since 1986. In the 103d Congress, he served on the House Permanent Select Committee on Intelligence. In this Congress, he serves on the Appropriations Committee and in Subcommittees on the Interior and Commerce, Justice, State, and the Judiciary. One of the more thoughtful Members of Congress, you are welcome here Congressman Skaggs and please proceed.

STATEMENT OF HON. DAVID E. SKAGGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. SKAGGS. Thank you very much, Mr. Chairman, and members of the committee. I appreciate the chance to testify this morning. I think we all agree that it is important for the Congress to do whatever we can to prevent any repetition of the tragedies most recently in Oklahoma City and a couple of years earlier at the World Trade Center.

At the same time, discussion of stepped up counterterrorism efforts have aroused public concerns that law enforcement might tend to slip over proper constitutional boundaries in their zeal in combating terrorism, and that their actions to keep us safe may sometimes collide with the Constitution's restraints that keep us free.

To address those concerns, I have been pleased to join with your colleague on the committee, Mr. Schiff from New Mexico, in introducing H.R. 1738. I hope copies of the bill have been made available to the committee.

We have called it the Constitutional Rights Oversight Act, and I think that adding its provisions to the chairman's bill, H.R. 1710, would help bring an important balance to antiterrorism legislation.

As with all law enforcement, first in fighting terrorism the Government must balance the need for public safety and security with individual rights and liberties—those of innocent citizens especially.

Sadly, our history provides several examples of the Federal Government's compromising basic constitutional rights to thwart perceived national security threats.

To respond to these concerns, H.R. 1738 would establish an independent and top-level Inspector General for counterterrorism activities to be responsible for ensuring that Federal counterterrorism activities comply with constitutional standards.

The most important feature of this new IG would be the crosscutting scope of the authority of that office, unlike existing IG's of various departments. This new officer would have oversight authority over the counterterrorism work of agencies as diverse as INS, the FBI, ATF, and so on.

In short, this new IG would have the authority not simply to review the actions of one department, but to watch the counterterrorism activities of all agencies, to assure their adherence to the Constitution and their full respect for constitutional rights.

Besides this power of review under the bill that Mr. Schiff and I have introduced, the new IG would have the power to act in three particular ways. First, agencies would be required to keep the new

IG informed of requests for judicial or administrative authorization for searches, wiretaps and similar surveillance activities.

Second, the new IG would be able to receive public complaints about alleged or potential violations of constitutional rights and require agencies to respond; and finally, the IG would be responsible for making periodic reports to both the President and the Congress concerning the observation, or the observance rather, of constitutional requirements and the protection of constitutional rights in the context of counterterrorism investigations.

Just as important, Mr. Chairman, I think would be the restraining effect that would result from the mere existence of such a new independent Inspector General. The requirements for immediate constitutional accountability that that office would impose on counterterrorism investigations I believe would serve to deter any tendency that a government official might have to be somewhat casual about constitutional safeguards. If you will, a chilling effect that is positive under the circumstances.

The American public obviously has a tremendous stake in being protected from terrorism. It also has a high stake in seeing that the Government doesn't cut constitutional corners in providing that protection.

We do not need to trade constitutionally protected rights, including the rights to privacy, free assembly, and free speech for protection from terrorists. If that were to happen, then indeed terrorism would have achieved a real victory.

I believe that something along the lines of H.R. 1738, if incorporated into your legislation, would not only speak to the concerns that many of us have about adherence to constitutional standards and the conduct of government investigations, but might also speak at least to some degree to the real concerns that are held both on the extremes of the right and the left in our political society, concerns about government overreaching and our adherence to the Constitution.

Again, I thank the chairman and the members of the committee very much for the opportunity to testify and would be pleased to try to answer your questions.

[The prepared statement of Mr. Skaggs follows:]

PREPARED STATEMENT OF HON. DAVID E. SKAGGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. Chairman, I appreciate your courtesy in providing me with this opportunity to briefly address one aspect of the very important antiterrorism bill the committee is considering today.

I agree with the President and with members on both sides of the aisle that Congress should take additional steps to prevent terrorism and to make punishment for terrorists swifter and more certain. The tragic bombings in Oklahoma City and two years earlier in New York City awakened all of us to the fact that America is not immune to terrorist acts. It is essential for Congress to see that we are doing all we should do to prevent any repetition of those terrible crimes.

At the same time, discussion of stepped-up counterterrorism efforts has also aroused public concerns that law enforcement agencies may tend to slip over proper Constitutional boundaries in combating terrorism—that their actions to keep us safe may sometimes collide with the Constitution's wise restraints that keep us free.

To address those concerns, I joined with our colleague from New Mexico, Steve Schiff, in introducing H.R. 1738, the "Constitutional Rights Oversight Act." I think that adding the provisions of our bill to H.R. 1710 would help bring an important balance to antiterrorism legislation.

As with all law enforcement efforts, in fighting terrorism the government must balance the need for public safety and security with individual rights and liberties, those of innocent citizens especially. Sadly, our history provides several examples of the federal government compromising basic Constitutional rights to thwart perceived national security threats.

The FBI's clandestine "cointelpro" program provides but one stark example of such governmental arrogance. In the name of national security, then-director J. Edgar Hoover presided over a program of unauthorized surveillance and harassment of those who legitimately protested government policies. Given this history, there are serious concerns in the country about giving expanded investigative powers to federal authorities.

To respond to those concerns, H.R. 1738 would establish a independent and top-level inspector general for counterterrorism activities, to be responsible for ensuring that federal counterterrorism activities comply with Constitutional standards.

The most important feature of this new inspector general would be the cross-cutting scope of the authority of the office. Unlike the existing inspectors general of various departments, this new officer would have oversight authority over the counterterrorism work of agencies as diverse as the Immigration and Naturalization Service, the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco and Firearms.

In short, this new inspector general would have the authority not simply to review the actions of one department, but to watch the counterterrorism activities of all agencies, to assure their adherence to the Constitution and their full respect for Constitutional rights.

Besides the power to review, under our bill the new inspector general would have the power to act, in three significant ways:

First, agencies would be required to keep this new inspector general informed of requests for judicial or administrative authorization for searches, wiretaps, and similar surveillance activities. The new inspector general would be kept similarly informed about deportation actions related to the fight against terrorism. In connection with all these proceedings, the new inspector general could make suggestions, or question the requested surveillance or deportations, to the extent appropriate in order to protect Constitutional rights.

Second, the new inspector general would receive public complaints about alleged or potential violations of constitutional rights. Upon receiving these complaints, the inspector general could require relevant agencies to respond.

Finally, the new inspector general would be responsible for submitting periodic reports to the President and the Congress concerning the observance of Constitutional requirements, and the protection of Constitutional rights, in connection with federal counterterrorism activities, and to make suggestions for improvements.

Just as important as these particular powers, Mr. Chairman, would be the restraining effect of the mere *existence* of such an independent inspector general. The requirements for *immediate* Constitutional accountability that the office would impose on counterterrorism investigations should serve to deter any tendency a government official might have to be casual about Constitutional safeguards.

Mr. Chairman, the American public has a very real stake in being protected from terrorism. It also has a high stake in seeing that the government doesn't cut Constitutional corners in providing that protection.

We do not need to trade our Constitutionally-protected rights, including the rights to privacy, free assembly, and free speech, for enhanced protection from terrorists. If we should make that mistake, terrorism will have achieved a victory.

To avoid that result, Mr. Chairman, I urge the committee to include the provisions of H.R. 1738 in any antiterrorism measure your Committee reports to the House. In that way, the Committee and the House can demonstrate our commitment to protecting both public safety and personal freedom while providing the right response to the public's fears both of violence and of government abuse of civil rights.

A nation which so rightly reveres its constitution deserves no less from its government.

Mr. HYDE. I thank the gentleman for his contribution.

And Mr. Moorhead, do you have any questions?

Mr. MOORHEAD. No.

Mr. HYDE. Mrs. Schroeder, do you have any questions?

Mrs. SCHROEDER. Thank you, Mr. Chairman. And I do want to thank both witnesses.

I think they are both the best of what we really want Congress to be and that they are both very thoughtful people and don't stampede when a gun goes off like buffaloes like we tend to do around here. So I appreciate their thoughts on this issue.

Congressman Skaggs, I am very interested in your bill in that you are right. A lot of the Constitution was written because when Americans settled here they wanted to be sure that they were not going to be terrorized by their government. So you are saying in our fear of terrorism we don't want to create something that once again unleashes government and we all become terrorized by our Government in order to prevent terrorism. It doesn't make sense.

And when we went through that whole fourth amendment debate, we got into this and one of the issues on the fourth amendment debate was they kept saying to us, people are overzealous in their searches because they are judged by how many arrests they make, not how many convictions, so they are more interested in having the arrest records for their career.

Now, the reason I am framing it this way is that when you talk about the Inspector General and looking at this, that is very interesting. And my question is, what is going to make the individual that is carrying out these orders, what kind of incentive is there in this bill that would prevent them from going too far?

Mr. SKAGGS. I think it is the incentive of accountability and, if you will, transparency to some degree. That is any pleading or filing that may be made to obtain appropriate writ or authorization for a surveillance activity is going to be filed pretty much immediately under the proposal that I have put forward with that Inspector General who will be authorized to both superintend the general as well as the specific counterterrorism activities of the Government for constitutional standards.

If I were at all prone as a government agency to overreach in this respect, I think the existence of such an officer, the fact that pleadings would be filed with such a person and that that person would ultimately be able to hold me and my agency to account for any overreaching would have a strong deterrent effect on any inclination to cut corners.

Mrs. SCHROEDER. Well, I hope that that works. I know the *Mapp* v. *Ohio* issues and all of those things, everybody is very zealous about doing away with them until they think they might become one of the people who were the victim of an illegal search. And it is how in every one of these constitutional issues I think that is the very difficult part of how do we make sure the agency doesn't go out overreaching and then say, see, I got a bad guy anyway.

Mr. SKAGGS. This is seen as a complement to, not a replacement for, the other safeguards that we have, including the exclusionary rule.

Mrs. SCHROEDER. I thank you very much, Mr. Chairman. It is very interesting.

Mr. HYDE. Mr. Gekas.

Mr. GEKAS. Yes, Mr. Chairman. I wanted to ask a specific question, not covered by the testimony that was offered by our colleagues, and not specifically mentioned in the bill or even in the general discourse that we have had about Oklahoma City. I would

like to ask the gentleman from Nebraska, first, if I could. Is there a Federal building in your jurisdiction? In your district?

Mr. BEREUTER. There certainly is and in fact it was closed down several times right after the Oklahoma City bombing.

Mr. GEKAS. And what I wanted to ask specifically about it was there or is there on—is there a day care center in that building?

Mr. BEREUTER. Yes, in the Lincoln Federal Building named for our former Congressman Denny, it was one of the first 10 day care centers in the United States located in a Federal building as a demonstration project. It is located immediately on the street.

Mr. GEKAS. On the street level, first floor of that building?

Mr. BEREUTER. Yes. In fact, the playground is on the former street right-of-way.

Mr. GEKAS. I ask the gentleman, Mr. Skaggs, the same question and then I have a question for each of you.

Mr. SKAGGS. There are several Federal buildings in my district, but none that is a general Federal office facility such as was the case in Oklahoma City.

Mr. GEKAS. Well, some of us believe that perhaps this is a time to review the policy that was established by X and Y, I don't know the source of it, whereby day care centers were proposed and implemented for court buildings and other buildings fulfilled by the Federal jurisdiction.

I would like to know the opinion of either of you or both of you on whether or not we should have day care centers in the Federal buildings or at least we should be encouraging a review of that policy in view of what happened in Oklahoma City.

The underlying question is: Is a Federal building, any Federal building, more susceptible to a terrorist intention than is any other kind of building? And if so, should we review the policy of day care centers in those buildings?

Mr. BEREUTER. Well, I would say regrettably, it is appropriate to review the policy and in my judgment, it is clear that a Federal facility such as a Federal office building is a more inviting target to terrorist groups, be they domestic or foreign.

Mr. GEKAS. I thank the gentleman.

Mr. SKAGGS. I don't pretend to have given this careful thought. Clearly a Federal building is not an aircraft carrier in terms of its mission is not to go in harm's way, and so there ought to be some presumption, it seems to me, of safety and security that attaches.

All Federal buildings are not the same. One of the ones that I referred to in responding to your first question happens to be a government laboratory on its own campus. I don't believe there is a day care center there, but if the gentleman's suggestion is that we perhaps consider some prohibition on siting day care centers in Federal buildings, I think we ought to distinguish between those that might offer a target to a crazy terrorist mission and those that remain secure and appropriate sites.

Mr. GEKAS. I have no further questions.

I thank my colleagues and relinquish the balance of my "nontime."

Mr. HYDE. I thank the gentleman. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Bereuter, in your bill you said we passed it last year, is there any difference between the version this year and what was agreed to last year?

Mr. BEREUTER. No. They are exactly the same.

Mr. SCOTT. OK. And you have in here a report to Congress as to the requests. What would be in that report? Would it be a summary?

Mr. BEREUTER. It would be a summary of the number of times.

Mr. SCOTT. Just the number of times, not the individual, actual requests?

Mr. BEREUTER. It would include the requests, the specific requests, but it would also include the numbers used, of course.

Mr. SCOTT. And can you explain briefly how you get the national security letter that would enable you to get the information? I think people are generally familiar with the court order.

Mr. BEREUTER. The national security letter is a request from the Director of the FBI to the Justice Department and is a request for general information to a credit reporting agency about where an individual has financial accounts or transactions, not the nature of those.

Mr. SCOTT. My question is, how do you initiate—what is the threshold for getting a national security letter? There must be some probable cause.

Mr. BEREUTER. The FBI must meet two criteria in its request.

First of all, it must certify that such information is necessary for the conduct of an authorized foreign counterintelligence investigation.

And secondly, that there are specific and articulable facts given reason to believe that the consumer, one of two things, A, is a foreign power or person who is not a U.S. person as defined in the section here, and is an official of a foreign power, or, secondly, that person is an agent of a foreign power and is engaged in international terrorism or clandestine intelligence activities that may involve a violation of a criminal statute of the United States. That certification must show these two criteria are met.

Mr. SCOTT. And that has to be done by the Director?

Mr. BEREUTER. Yes.

Mr. SCOTT. Can that be delegated?

Mr. BEREUTER. Yes. The Director the Federal Bureau of Investigation or the Director's designee.

Mr. SCOTT. And Mr. Skaggs, does the IG have, other than the fact that he can kind of tell what is going on, does he have any enforcement power to stop any abuses?

Mr. SKAGGS. No, not as drafted in our bill. I thought about that and thought that that was probably much more problematic than would be able to pass muster around this place. I am not sure I would agree with it. So, no, it does not include any ability to intercede into a proceeding.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. HYDE. Mr. Schiff, the gentleman from New Mexico.

Mr. SCHIFF. Thank you very much, Mr. Chairman. I didn't say it earlier, but I want to commend you for devoting this amount of time to these hearings. I think they are very worthwhile.

I have a couple of things to raise briefly. First with Congressman Skaggs, I simply want to compliment you and acknowledge that you drafted the bill that is before us now. And I want to emphasize that bill because the far left and far right of our political spectrum both accuse the Federal Government of wishing to ignore people's constitutional rights and we have to point out that the Federal Government is a lot of people, including we, the Members of Congress, and I certainly, and I don't believe any Member of Congress of any party wants to ignore or trample upon people's constitutional rights so I think it is extremely important that we set up internal monitoring devices to try to look for and to reign in excesses which may well occur in a body as large as the Federal Government.

This is not meant to take away anyone's private civil remedy if we get to that point which has been used in the past, but a recognition that the Federal Government itself, under any administration, does not desire excesses to occur and wants to state that if they do, it is through individual error at a particular agency and not something that we condone. And that is why I think this bill is so important.

So I am glad to join you on it. If you want to make any further response, you are welcome to.

Mr. SKAGGS. The gentleman states it very well and I appreciate his collaboration on this.

Mr. SCHIFF. Congressman Bereuter, first, the information that you desire law enforcement to be able to obtain in the bill that you are talking about, is that the same consumer information that different business and creditor groups can get a hold of any time they want, like if you apply for credit and so forth? Is it the identical information?

Mr. BEREUTER. It is not. That is available to them under court order, but what the national security letter would do is simply to go in and find out where all accounts or transactions took place, not necessarily and in fact not the details of those accounts but they want to know where transactions, so that then they can pursue under court order the detailed information once they have met the certifying criteria. But right now, they need to have ability to take a broad brush look at, for example, where Mr. Ames had accounts and then to provide with a court order after that.

Mr. SCHIFF. But wouldn't that information be available as routine consumer transactions? In other words, if I am a consumer reporting agency, wouldn't I normally have the information about where consumers have different bank accounts?

Mr. BEREUTER. Absolutely. But the FBI does not want to register its interest in broadly looking where Mr. Ames has accounts. And once they know, then they can proceed and limit the party's knowledge that he is being investigated.

Mr. SCHIFF. Help me here, because I am not quite following this. Let me back up.

The initial information that the FBI might want under your bill, how is that information different, if at all, from information that is on hand at consumer reporting agencies, credit reporting agencies and is normally available in those transactions?

Do we want more information?

Mr. BEREUTER. No. We don't want more. We need to help the FBI target in on the information that it does wish to seek, and to conceal the fact eventually. That is, it is seeking specific information about the transactions that took place in bank X.

Mr. SCHIFF. You mean identifying the accounts and then going in further and identifying transactions?

Mr. BEREUTER. Correct. To go in further by court order and in detail look at the transactions that took place in bank X.

Mr. SCHIFF. But the initial information is normal consumer information which, whether the public knows it or not, is available on most of us in transactions; is that right?

Mr. BEREUTER. That is correct.

Mr. SCHIFF. Even though such information is widely available on all of us, why, when we are talking about the Government, should we still not get some third party to approve the asking for this information? Why not, even the initial information? Because we are still talking about the Government here, which is still different. The Government looking at us is still different than even different credit agencies looking at us, I think.

Why shouldn't that be done still through a court order or through a grand jury subpoena or some other device where even with the formality surrounding this national security letter it still comes down to the Justice Department saying I want this information so give it to me?

Mr. BEREUTER. When you get the details then that is protected by the normal court order process that is in place now. But you have to have a pretty good case knowing where one goes, first of all, before you proceed with a court order. You need an opportunity to look broadly, and if the gentleman has an idea about some other procedure than certification in the legislation, that the FBI or his designee would make, I would be happy to consider it.

Mr. SCHIFF. What I mean is you are talking about getting initial information, same as a credit bureau, as to where an individual has bank accounts; is that correct?

Mr. BEREUTER. That is correct.

Mr. SCHIFF. So why not get that information through a subpoena where it has to go through a grand jury or even a court order at that point? Why not apply the court order test right at the beginning? Why would you skip that and allow the Justice Department simply to request and obtain the information?

Mr. BEREUTER. I guess I would ask the gentleman in question. How do you know where to go in the United States to request that information about an account that a person has?

Mr. SCHIFF. How do you know which credit bureaus to go with your national security letter?

Mr. HYDE. Will the gentleman yield?

Mr. SCHIFF. Yes, I yield.

Mr. HYDE. This could not have reached the level of a criminal case yet where there is no grand jury to issue a letter, maybe a counterterrorism investigation. It seems to me that if you have to get a subpoena, that you have to have a criminal case pending.

Mr. SCHIFF. You do not—if I may reclaim my time, Mr. Chairman, one doesn't have to have an indictment in place to get a grand jury subpoena for information.

Mr. HYDE. One has to have a criminal or a proposed criminal action pending or about to pend—well, in any event. Have we exhausted that subject for now?

Mr. SCHIFF. With your permission I am going to try once more.

Mr. HYDE. Go ahead, have you my encouragement.

Mr. SCHIFF. I think I may certainly support this idea because a great deal of information is available on all of us anyway. So one can say, well, why should the Government not get whatever any credit bureau can get when they ask for it.

But I don't see the difference to know where to ask for the information as the same test regardless of whether you seek the information through a unusual security letter or through some kind of subpoena and I am wondering why we—the gentleman is proposing to use a national security letter which is an agency accountable only to itself for the use of that request.

Mr. BEREUTER. I am not greatly familiar with the grand jury process. That is for certain. But I know that the Justice Department and the FBI indicates to me that if access to identifying information or the identity of a financial institution is governed by court order, it will not be used.

Mr. SCHIFF. I yield back, Mr. Chairman. I thank both of my colleagues.

Mr. HYDE. Mr. Chabot.

Mr. CHABOT. Thank you.

I want to thank the chairman for devoting the time necessary for this important issue and I yield back the balance of my time.

Mr. HYDE. I thank the gentleman warmly, the gentleman from Georgia, Mr. Barr.

Mr. BARR of Georgia. I have no questions, Mr. Chairman. Thank you.

Mr. HYDE. I thank the gentleman.

Mr. BEREUTER. Mr. Chairman.

Mr. HYDE. The gentleman from Nebraska.

Mr. BEREUTER. May I attempt to supplement the remarks that I made just before.

I said earlier or perhaps the gentleman didn't hear it or didn't find it persuasive, I think in order to make this process usable, to seek the information on financial transactions, you need to keep the investigation as closely held as possible and that the current procedures will not permit that and that is undoubtedly why they say the court order process will not work.

Mr. SCHIFF. That answers my question, Mr. Chairman, I thank the gentleman.

Mr. HYDE. Very well. I want to very briefly and not by way of a question, unless Congressman Skaggs chooses to answer, but I am having trouble accepting the viability, the feasibility, of an Inspector General to determine the constitutionality beforehand of certain activities of the Justice Department. I think you are creating another bureaucratic office with enormous powers.

You are divesting the Attorney General of her responsibility, and the Deputy Attorney General, and the head of the Internal Security or Counterterrorism department. You are making—I think that is what judges are for.

You are hamstringing law enforcement by having what really might be an internal adversarial office, depending on the sensitivity of this IG. If he is an ACLU member, he is going to look at those in one way. If he is a libertarian, he may look at things another way or a conservative—but you are giving enormous power to oversee the law enforcement activities on only one area, counterterrorism; why not over bank robbers and over extortionists—you know, syndicate members and Mafia have civil rights too. Why confine just it to counterterrorism?

You are setting up an office with enormous power that is anticipating the court, whose real function it is, and they go 5 to 4, more than any of us would like to remember, on many of these cases. So, I am just not sold on the concept.

I would think the responsibility of the high officials in the Justice Department, who sit around the table and decide—shall we do this or shall we not—for them to bear in mind the Constitution and the responsibilities if they guess wrong.

But, nonetheless, it is an interesting concept and from two very worthy sources, Mr. Skaggs and Mr. Schiff. So, I just am expressing my concerns and misgivings about the concept.

Mr. SKAGGS. May I respond briefly? I thank the chairman for raising the issues. No one will be divested of authority or responsibility, to use the term that you used a minute ago. The Attorney General, the Secretary of the Treasury, the head of the FBI are not going to be let off any constitutional hooks by this proposal, because counterterrorism, particularly if there should come to be a counterterrorism center as has been part of some of the proposals, will have some agency responsibilities as to which no single agency and Inspector General has existing authority. It seemed to me that that is one legitimate rationale for having someone likely, or in a position to take a look at these issues.

I also would welcome any further thoughts on how not to hamstring—because that is certainly not my intention, nor Mr. Schiff's, I am sure—ongoing investigations. But while one could make the argument, as you do, if in counterterrorism why not the entire laundry list of criminal investigative activities that the Federal Government undertakes, I think again this is a unique area in which there are unique powers being requested that are potentially more at the intrusive end of the spectrum regarding the lives of ordinary citizens and innocent individuals than is the case in most other investigative activities of the Federal Government. It is a line that we are proposing to draw around this particular ambit of investigation, but you could certainly make the case, as you do, that others that come under the scrutiny of investigative agencies are susceptible to the same——

Mr. SCHIFF. Will the gentleman yield?

Mr. SKAGGS. Just a minute. I don't, think I have the time.

The only other point is that we have, sadly, recent history in this country in which high officials of the Justice Department charged with responsibilities in this area chose not to live up to those responsibilities; and I think we are all well advised to make sure that we do what we can to put in prophylactic measures to make sure that that doesn't happen again.

Mr. SCHIFF. Mr. Chairman, may I have additional time?

Mr. HYDE. I thank the gentleman.

The gentleman from New Mexico.

Mr. SCHIFF. I thank the Chair for granting me additional recognition. I had the same reservations the Chair has just expressed, when first approached on this, and I was persuaded—the Chair, of course, may or may not be at the end—but I want to respond briefly on two things.

First, our intention is that the Inspector General not have power other than the power to scream and to let people know something is going wrong in the system. There is no veto power here.

Mr. HYDE. He would be called as a witness in a lawsuit against the Justice Department, right? He or she?

Mr. SCHIFF. I suppose that is possible. I suppose anybody could be within any department. But the reason for a separate identification here, rather than, well, why not have a position for all acts of law enforcement, is that terrorism normally is accompanied by some political goal; and the reverse of that is that when groups are investigated with political motivations, we have unfortunately a history in this country of, at times, political disagreement being confused with seditious or treasonist or dangerous or even terrorist logic, and that is the reason for it.

I yield back.

Mr. HYDE. Well, I thank the gentleman. It is a very interesting concept, and we will certainly chew on it for a while. I want to thank this panel for their contribution. Thank you.

Our next witness is Jamie S. Gorelick, the Deputy Attorney General of the U.S. Department of Justice. We don't have a long bio on you, Ms. Gorelick, unfortunately, but we know your service has been distinguished.

STATEMENT OF JAMIE S. GORELICK, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Ms. GORELICK. Thank you, Mr. Chairman, for the opportunity to testify before you today on your bill, H.R. 1710. As you mentioned at the outset, the tragic bombing of the Murrah Building in Oklahoma City on April 19 underscores the need for swift action by both branches, the executive and legislative branches. At the same time, we must pause to duly consider the implications of the proposals before us to ensure that our law enforcement agencies have the legal tools and resources that they need to investigate, to prosecute, to deter, and to ensure that there are appropriate and adequate protections for our civil liberties.

When I appeared before Mr. McCollum's Subcommittee on Crime on May 3, I stressed that the threat posed by terrorism required the administration and Congress to work together in a bipartisan manner to achieve tough, comprehensive and effective responses; and a bipartisan approach has resulted. It has resulted already in the passage of an impressive antiterrorism package in the Senate, which contains almost every proposal put forth by the President, and Chairman Hyde's bill is, similarly, very much consistent with the administration's proposals.

We are equally committed to working with the House to move effective antiterrorism legislation with broad bipartisan support. We

would like to see that legislation moved to the House floor and then to the President's desk as soon as possible.

As we proceed through the remaining issues that divide us, we must not lose sight of the critical fact that we share a common goal in this effort, and that the matters on which we differ are far, far outweighed by those on which we agree.

Without going through each and every one of our proposals, let me say that of the 38 legislative proposals in the administration's bill, all but 5 are addressed in Chairman Hyde's bill, in either identical or substantially similar forms. Let me list some of the similarities because I think that puts in context our few differences.

The bills are similar in our creation of broad-based Federal criminal jurisdiction for terrorism crimes and for expanded jurisdiction of U.S. courts to cover terrorism outside the United States. They are similar in their ban of financial support to foreign terrorist organizations. They are similar in their requirement in foreign counterterrorism investigations of disclosures of consumer credit reports and other similar information via a national security letter. They are similar in their coverage of "pen register" and "trap and trace" devices in foreign counterintelligence cases under the same standard applicable in criminal cases. Both authorize the use of multipoint wiretaps and permit the use of emergency wiretap authority. Both expand penalties for transferring firearms and explosives knowing that they will be used in a crime of violence. Both allow the military in very narrowly defined circumstances to provide assistance to law enforcement in dealing with chemical and biological weapons, and both require a study of taggants, the addition of taggants to explosive materials to permit postexplosion tracing, and both increase the protection for Federal employees and their families.

As I said at the outset, this is just a partial list of what we have in common.

Let me summarize briefly how we differ. First, there are five provisions in the administration's proposals that are not part of Chairman Hyde's bill. First, the addition of terrorism offenses as predicate acts under the racketeering statute.

Second, the amendment of the Foreign Assistance Act to facilitate antiterrorism training abroad for appropriate personnel of other nations.

Third, in the authority for the Government to seek a court-ordered wiretap in any felony certified by the Attorney General to be related to terrorism. There, for example, if the predicate act under investigation is alien smuggling or customs document fraud, two crimes which we could not now get a wiretap on the basis of, we would like the authority for the Attorney General to certify the relationship of that underlying crime to a potential crime of terrorism in order to further investigate under a court-ordered wiretap with all of the protections that judicial review provides.

Fourth, would be the authority for the Secretary of the Treasury to actually promulgate regulations prohibiting the possession or transfer of explosive materials without taggants; that is, Chairman Hyde's version has the study, but not the regulatory authority, and we would like there to be both.

And finally, an increase in the time period within which we can prosecute a violation of the National Firearms Act. Thus, we would like to have the same statute of limitations for the illegal possession of a machinegun or a bomb as we now have for the misuse of the "Smokey Bear" logo and other crimes in title 18, that is, a 5-year statute.

We believe that each of these provisions is meritorious, and we would encourage this committee to consider adding them to H.R. 1710.

Mr. Chairman, you missed the beginning of my statement where I made it clear that we have a great deal in common in our proposals. But you have returned for the part where I am describing the differences. I hope you will remember that context.

Now I would like to discuss the few legislative provisions in H.R. 1710 that are not in our proposal. The three new provisions in the area of criminal law and procedure relate to enhanced sentencing for explosives offenses, directions to the Sentencing Commission for a guidelines adjustments relating to domestic terrorism and a technical amendment to the pretrial detention statute relating to the computation of time deadlines. I would say that these three additions are ones that we had not thought of, they are very constructive, and we welcome each of these additions; and we join you, Mr. Chairman, in supporting their inclusion.

There are several new provisions relating to immigration law in 1710, and five focus specifically on alien terrorists. They would provide funding for the detention and deportation of such aliens; they would deny asylum to such aliens; they would deny certain other forms of immigration relief to alien terrorists; they would provide special attorneys in alien terrorist deportation proceedings who would serve as an aide to the court in handling and interpreting classified information; and they would provide for the exclusion of those who were merely members, as opposed to representatives, of a designated foreign terrorist organization.

We also join in general support of these provisions, though in some cases we would suggest minor modifications that would be beneficial. For example, the funding for deportation and detention of alien terrorists would more appropriately be made to the Justice Department as a whole rather than just to the Immigration and Naturalization Service, since many of the costs that I know you are trying to get at are in fact costs of the Marshals Service or the Civil Division of the Justice Department, in addition to INS. We think that that would more effectively reach the goal that the chairman and other proponents of 1710 wish to achieve.

The remainder of the new immigration provisions are not terrorism-specific, but rather would relate to immigration matters generally. One would provide expedited exclusion in a manner that is very similar to the administration's proposals. Our approach, under which the Attorney General has discretion to impose expedited exclusion in extraordinary migration situations, addresses the need for the expedited process while limiting the effect on our asylum officer resources.

Another section of the chairman's bill would fundamentally reform the so-called "entry doctrine" which controls the extent of procedural rights that aliens receive in deportation procedures.

We support the notion of amending the entry distinction between deportation and exclusion proceedings, but this is not an easy change. There would have to be conforming amendments in other sections of the Immigration and Nationality Act, some of which raise policy implications. Such an amendment, for example, would eliminate relief from deportation that is currently available to aliens who have developed significant ties to the United States over a long period, and where removal would work a hardship in U.S. citizens or permanent resident relatives, for example, where a person has come to the United States as a child and has developed many ties to the United States.

I would imagine that it would be appropriate to carve out an exception for the most compelling of these circumstances, so there would need to be some adjustment to the language to the proposal.

In addition, some changes should be made regarding judicial review and the permissibility of aliens who would be subject to exclusion to depart voluntarily. I don't think we want to encumber our ability to encourage voluntary departures.

We understand that the Judiciary Committee's Subcommittee on Immigration and Claims is preparing a bill that may address these same issues in a more comprehensive way, and given the difficulty of the issues involved, while we are very supportive of the goals, we would suggest that it might better be addressed in the context of the broader immigration bill, and I am sure that the chairman will be considering which venue to address these questions in.

Finally, I would like to focus on a few areas of real substantive difference between our proposal and H.R. 1710. First, while both Chairman Hyde's bill and the President's proposals criminalize the provision of material support to presidentially designated terrorist organizations, our proposal would also provide a procedure under which a U.S.-based fundraiser for an organization that also provides funding for terrorist organizations could raise funds for certain humanitarian or charitable purposes pursuant to a licensing scheme. An additional benefit of such a provision is that it will assist in monitoring fundraising in the United States by some terrorist organizations. With respect to the designation of terrorist organizations for the purpose of fundraising restrictions, we believe that the designation is better made as part of new fundraising restriction provisions separately rather than as an amendment to the Immigration and Nationality Act.

The chairman's bill and the administration's proposals also provide for authority to access common carrier, public accommodation, storage facility, and other records through the use of a national security letter in foreign counterintelligence cases. The difference between the two bills is that the Hyde bill would add a requirement of notice and public disclosure in 180 days. Typically, a foreign counterintelligence investigation lasts more than 180 days, some of them are quite long, and we would be very concerned about premature disclosure of the pendency of an investigation during that time period which would, I think, undermine the very purpose of the investigation.

And finally, in that regard, H.R. 1710 doesn't have a definition of "national security" or "terrorist." We have provided definitions in the administration's proposal which we commend to your attention.

There are also differences between H.R. 1710 and our proposal with regard to funding. Your proposal, Mr. Chairman, authorizes appropriations for enhanced funding of FBI operations relating to domestic and international terrorism. We have proposed authorizations also for the Criminal Division and for the U.S. attorneys' offices. With respect to Oklahoma City, for example, we have 10 U.S. attorneys' offices and the Criminal Division making an extraordinary commitment of resources. And, I would just like to see the Department's efforts viewed as a whole in this regard.

Similarly, as is reflected in our supplemental appropriation request, we support the establishment of a counterterrorism and counterintelligence fund under the control of the Attorney General rather than one Justice agency. Such a fund would provide her with the authority to reimburse any Justice agency or component that incurs costs in response to terrorist activity here. The FBI, as well as the Marshals, U.S. attorneys' offices, INS, the Criminal Division, all had extraordinary expenses relating to the Oklahoma City bombing; and you could see a similar pattern as a result of the World Trade Center bombing.

I would also like to address the need to provide an assured funding source for the administration's digital telephony initiative. We need to ensure that the law enforcement will continue to have access to court-authorized interceptions of communication. At the urging of the President, Congress last year passed the Communications Assistance for Law Enforcement Act which authorized the Government to cover the cost incurred by telecommunications carriers to retrofit their equipment. In the President's counterterrorism legislation, we proposed a 40-percent surplus against all non-IRS civil monetary penalties to pay for this cost. We believe that this legislation can withstand constitutional challenge, and we urge your support of this funding mechanism.

It is clear, as I said at the outset, from a comparison of the administration's antiterrorism proposals and H.R. 1710 that the overwhelming substance of the respective proposals is consistent and that there is a sound basis for prompt enactment of comprehensive and effective antiterrorism legislation. In my testimony today, I have suggested some potential improvements which we hope you will consider. Other more technical amendments we will submit in writing.

To conclude, Mr. Chairman, I want to thank you for the opportunity you have extended to me to address this issue and the spirit of cooperation which you and the committee have shown throughout this process. We look forward to working with you toward prompt enactment of a comprehensive and effective antiterrorism legislation.

Thank you.

[The prepared statement of Ms. Gorelick follows:]

PREPARED STATEMENT OF JAMIE S. GORELICK, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Committee, appreciate the opportunity to testify before you today on your bill, H.R. 1710, the "Comprehensive Antiterrorism Act of 1995." The tragic bombing of the Murrah Building in Oklahoma City on April 19 underscores the need for swift action by both the Executive and Legislative Branches to ensure that our law enforcement agencies have the legal tools and re-

sources to investigate, prosecute, and deter terrorist activity, both at home and abroad.

When I appeared before Mr. McCollum's Subcommittee on Crime on May 3, I stressed that the threat posed by terrorism required the Administration and the Congress to work together in a bipartisan manner to achieve a tough, comprehensive, and effective response. This bipartisan approach has resulted, already, in the passage of impressive anti-terrorism legislation in the Senate which contained virtually every proposal put forth by the President.

The Administration remains equally committed to working with the House to move effective anti-terrorism legislation, with broad, bipartisan support, to the House floor and to the President's desk as soon as possible. And, as we proceed—through the remaining, sometimes difficult, stages of the legislative process, we must not lose sight of the critical fact that we all share a common goal in this effort, and that the matters on which we differ are far, far outweighed by those upon which we agree.

The Administration's bills contain a total of 38 legislative proposals. All but five of those proposals are addressed in Chairman Hyde's bill, in identical or substantially similar form. Both bills:

Create broad-based Federal criminal jurisdiction for terrorism crimes

Expand jurisdiction of the United States courts to cover terrorism cases outside the United States where the victim or perpetrator is a U.S. national

Ban financial support to foreign organizations which the President has designated as terrorist organizations

Require, in foreign counterintelligence investigations, the disclosure of certain consumer credit reports, as well as access to common carrier, public accommodation, storage rental and vehicle rental records upon the presentation of an administratively obtained National Security Letter

Permit the use of "pen register" and "trap and trace" devices in foreign counterintelligence cases under the same standard as those devices are currently available in routine criminal cases

Authorize the use of "multi-point" wiretaps when the subject of an investigation, by frequently switching phones, avoids surveillance pursuant to a standard, single-point wiretap

Permit the use of existing "emergency wiretap authority" in terrorism cases

Expand penalties for transferring firearms or explosives knowing they will be used in a crime of violence

Allow the military to provide assistance to civilian law enforcement personnel in dealing with chemical and biological weapons,

Require a study of the addition of taggants to explosive materials to permit post-explosion tracing, and

Increase protection for federal employees and their families

And I'm pleased to note that this is only a partial list of the provisions those two bills have in common.

Keeping in mind the overwhelming similarity between our approaches, let me summarize briefly how our bills differ. First, there are five provisions which appeared in the Administration proposals but which are not a part of Chairman Hyde's bill:

(1) The addition of terrorism offenses as predicate acts under the RICO statute;

(2) Amendment of the Foreign Assistance Act of 1961 to facilitate enhanced anti-terrorism training to appropriate personnel of other nations;

(3) Authority for the government to seek a court-ordered wiretap in any felony certified by the Attorney General to be related to terrorism;

(4) Authority for the Secretary of Treasury to promulgate regulations prohibiting the possession or transfer of explosive materials without taggants; and

(5) An increase in the time period within which criminal prosecutions can be initiated under the National Firearms Act, making the statute of limitations for the illegal use of machine guns and bombs as long as the statute of limitations for the misuse of the Smokey the Bear logo.

We believe that each of these provisions is meritorious, and we would encourage the Committee to consider adding them to H.R. 1710.

Second, H.R. 1710 includes a few legislative provisions that were not in the Administration's proposals. Three new provisions in the area of criminal law and procedure relate to enhanced sentencing for certain explosives offenses; directions to the Sentencing Commission for a guidelines adjustment relating to domestic terrorism; and a technical amendment to the existing pretrial detention statute relating to the computation of time deadlines. The Administration welcomes each of these additions and joins with you, Mr. Chairman, in supporting their enactment.

H.R. 1710 also includes several new provisions related to immigration law. Five of those provisions focus specifically on alien terrorists——

Providing funding for the detention and deportation of such aliens;

Denying asylum to such aliens;

Denying certain other forms of immigration relief to alien terrorists; and

Providing "special attorneys" in alien terrorist deportation or exclusion proceedings who will serve as an aid to the court in handling and interpreting classified information when an unclassified summary of the evidence against the alien is not provided to the alien.

Providing for the exclusion of those who are merely members—as opposed to representatives—of designated foreign terrorist organizations, along with Attorney General authority to waive the provision.

The Administration also joins in general support of these provisions, although in some cases, certain minor modifications to these provisions would be beneficial. For example, the funding for detention and deportation of alien terrorists would more appropriately be made available to the Justice Department as a whole, rather than the Immigration and Naturalization Service, since many of the costs of such activity extend to various Justice Department components along with the INS.

The remainder of the new immigration provisions contained in H.R. 1710 are not terrorism-specific, but rather would relate to immigration matters generally. Specifically, one section would provide for an expedited exclusion process that is similar to that proposed by the Administration. We believe our approach, under which the Attorney General has the discretion to impose expedited exclusion for extraordinary migration situations, addresses the need for an expedited process while limiting the effect that a universally applied process would have on INS asylum officer resources.

Another section of the Chairman's bill would fundamentally reform the "entry" doctrine which controls the extent of procedural rights that aliens receive in exclusion and deportation proceedings. We support the notion of amending the"entry" distinction between deportation and exclusion proceedings, but this is not an easy change. It should be accompanied by a number of conforming amendments to other sections of the Immigration and Nationality Act, some of which raise policy implications. Such an amendment would eliminate relief from deportation currently available to aliens who have developed significant ties to the United States over a long period and whose removal would work a hardship in U.S. citizens or permanent resident relatives. It may be appropriate to carve out an exception for the most compelling of those situations, for example, where the alien came to the United States as a child. In addition, some changes should be made regarding judicial review and the permissibility of aliens who would be subject to exclusion to depart the United States voluntarily without the need for a hearing.

We understand that the Subcommittee on Immigration and Claims is preparing a bill that may address this issue in a more comprehensive way. Given the difficulty of the issues involved, we suggest that this amendment is better addressed in the context of a broader immigration reform bill.

Finally, I would like to focus briefly on the few areas of real, substantive difference which exist between the Administration's proposal and H.R. 1710. First, while both Chairman Hyde's bill and the President's proposals criminalize the provision of material support to presidentially designated terrorist organizations, the Administration's proposal also provides a procedure under which U.S.-based fundraisers for foreign terrorist organizations could raise funds for certain humanitarian or charitable purposes pursuant to a licensing scheme. An additional benefit of such a provision is that it will assist in monitoring of fundraising in the United States by some terrorist organizations. With respect to the designation of terrorist organizations for the purpose of fundraising restrictions, the Administration believes that such a designation is better made as part of the new fundraising restriction provisions, rather than as an amendment to the Immigration and Nationality Act.

The Chairman's bill and the Administration proposals also both provide authority to access common carrier, public accommodation, storage facility, and vehicle rental facility records through the use of a National Security Letter in foreign counterintelligence cases. The Hyde bill adds a requirement that these records be publicly disclosed within 180 days. Such a requirement jeopardizes lengthy, ongoing investigations and the Administration strongly urges that it be dropped.

Next, H.R. 1710 lacks a definition of the terms "national security" and "terrorist." We recommend the use of the definitions for these terms contained in the Administration's proposals.

Finally, there are a few areas of difference between H.R. 1710 and the Administration's program with respect to funding. Your proposal, Mr. Chairman, authorizes

appropriations for enhanced funding only of FBI operations relating to domestic and international terrorism. We have proposed additional authorizations for costs which will also be incurred by the Criminal Division and the United States Attorneys offices around the country.

In addition, as is reflected in our supplemental appropriation request, we also support the establishment of a counterterrorism and counterintelligence fund under the direct control of the Attorney General, rather than a particular Justice agency. Such a fund would provide her with the authority to reimburse any Justice agency or component that incurs costs in response to a terrorist activity.

I also would like to address the need to provide an assured funding source for the Administration's digital telephony initiative. We need to ensure that law enforcement will continue to have access to court authorized interceptions of communications. On that front—at the urging of the President—Congress last year passed the Communications Assistance for Law Enforcement Act, which authorized the Government to cover the costs incurred by the telecommunications carriers to retrofit their equipment. In the President's counter terrorism legislation transmitted to Congress we proposed a 40% surcharge against all non-IRS civil monetary penalties to pay for this cost. After a thorough review, we believe this legislation can withstand any constitutional challenges, and we urge your support for this funding mechanism.

It is clear from this brief comparison of the Administration's antiterrorism proposals with H.R. 1710 that the overwhelming substance of the respective proposals is consistent and that there is sound basis for the prompt enactment of comprehensive and effective antiterrorism legislation. In my testimony today, I have suggested some potential improvements to the Hyde bill which we hope you will consider. Other, more technical proposed amendments, will be submitted in writing shortly and in all likelihood can be resolved at the staff level.

To conclude, Mr. Chairman, I want to thank you for this opportunity to address this issue and for the spirit of cooperation you have shown throughout this process. We look forward to working with the Committee and the Congress to achieve the prompt enactment of comprehensive and effective antiterrorism legislation.

Mr. HYDE. Well, I thank the gentlelady for an excellent statement and I want to assure her how welcome her suggestions are. We readily concede borrowing heavily from the President's counterterrorism bill, and by attempting to build on it some additional—what we would like to think are improvements, and we hope the committee thinks are such.

It is worth mentioning that you discussed the way in which this bill addresses funding for various law enforcement agencies within the Department, and you feel it is better if the money were authorized to be appropriated directly to the Department, rather than component parts. But I think it is worthwhile noting that the $16 billion rescissions and supplemental appropriations bill that the President vetoed last week would have provided in excess of $70 million in funds to law enforcement in the manner your testimony prefers; to cover the cost of hiring more agents, more prosecutors, to purchase better technology, all with the specific mission of apprehending and prosecuting terrorists, and that would have been fiscal year 1995, this year.

I have a rather complicated question on tracers, taggants, and I am not sure I want to burden this hearing with this question now, although it is an important one. Perhaps it is something we can discuss later or in writing.

We intend to mark this bill up fairly quickly. I am trying to get a markup Wednesday, and so any language that you have to suggest would be most welcome to us. It can be offered as amendments by various Members, but we are interested in working with you to get a bill that will meet our requirements.

Mr. Moorhead.

We are going to use the 5-minute rule, if the committee agrees, because we do have a lot of witnesses and we want to try to have

some time limits. So if the gentleman doesn't mind, I will impose the 5-minute rule.

Mr. MOORHEAD. Well, thank you, Mr. Chairman. I noted in your bill the things that you suggested were left out include provisions for customs fraud. One of the problems that we have discovered is that when people come in without proper documents to the United States, which could include terrorists, I am sure, if they slipped under the cracks. In New York, for instance, at the airport, they only have facilities for—250 beds for people that can be detained, and so the vast majority of them are turned out into the night and ordered to come back to court a couple of weeks later; 6 percent of them return.

Is there not some kind of a security risk there of terrorists coming in without proper checking or—most of those people that don't have the proper documents claim asylum, and so they are entitled to a court hearing. But if we aren't detaining them pending that court hearing, isn't it possible there that we have a security risk?

Ms. GORELICK. Congressman Moorhead, we have identified and had identified 18 months ago an initiative to address precisely the problem that you have raised. And we have done a number of things.

One, we have enhanced the asylum and document fraud enforcement activities of the INS, as well as the ability to detain, particularly at Kennedy Airport. As a consequence of our enforcement activities, indictments, our new asylum reform regulations and enhanced detention, fraudulent asylum documents have decreased almost by half. We have a very aggressive program in this regard.

Now, the missing piece which you also have identified is the need for expanded detention capability; and in our 1996 appropriation, we have requested a vastly expanded detention capability. But we are moving on this issue, and we would be happy to brief you on the progress that we have made.

Mr. MOORHEAD. One of the things that you have recommended, of course, is expanded wiretap capability. What provisions are you recommending for determining whether a wiretap could be used, and is it up to the Department of Justice, or would you go to the courts to get that approval?

Ms. GORELICK. Let me be very clear about something as to which I think there has been much misunderstanding.

In order to obtain a wiretap, we must prove to an independent judge that there is probable cause to believe that a crime is being committed and that the person whom we seek the wiretap order as to is committing that crime. Nothing that we have proposed in any of our proposals, nothing, would change that standard and that fundamental guarantee of the Constitution.

Mr. MOORHEAD. What is the Department of Justice's view on excluding members of a designated terrorist organization and how do you determine the danger of those organizations? Is that something that we—I think most of us here would feel more secure if you could exclude them, but is there a constitutional problem, or are we going to be able to do that?

Ms. GORELICK. The administration's proposal does not contain a provision directed at mere membership in a terrorist organization,

but rather is directed at representatives or leaders of that organization. Chairman Hyde's proposal goes to mere membership.

There would not, in our view, be a constitutional problem with Chairman Hyde's proposals. We would, however, suggest that there be an opportunity to waive in certain circumstances the prohibition on the person entering the country as a result of mere membership. There may be circumstances in which it is in our interests to have such a person be able to come into the United States.

Mr. MOORHEAD. I only have time for one more question. Can you provide the committee with a profile of the type of security that is available at Federal buildings across the country?

Ms. GORELICK. Yes. By the 20th of this month we will submit to the President of the United States the 60-day review that he requested as a result of the Oklahoma City bombing. It will contain a profile of Federal buildings, a profile of their security and their security needs, as well as their vulnerabilities. And it will contain recommendations for next steps to further assure people who work in and visit those buildings that they have a secure environment.

Mr. MOORHEAD. Thank you very much.

Mr. HYDE. The gentlelady from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman. One of the things that puzzles me that neither bill has is, over the last couple of years, the gentleman from New Mexico and I have been watching a new kind of technology at Sandia which I think is terribly promising, and that is one that detects explosive materials before they blow up. And my concern is, why isn't there not more focus on this?

I thought they were making great progress; what they showed us all seemed to work, and I keep seeing us trying to do the old clumsy thing. I think we haven't looked enough at technology and R&D just because maybe Justice has been more looking at rules and laws. But have people with Justice looked at that?

Ms. GORELICK. Yes, indeed. And we have your letter in that regard and—but let me respond to it here as well.

We have put enormous resources into the transfer of defense and other technologies into the area of law enforcement, and our National Institute of Justice has a very aggressive program in this regard. I would be pleased to give you a briefing on the progress that we have made in transferring that technology and other similar technologies to aid law enforcement. I do believe, and the Attorney General does believe, that there is a lot that we can do with technology.

Mrs. SCHROEDER. We thought that this preblast detection was really very exciting at Sandia, and I would certainly encourage you or the Attorney General or someone to go see it, because it is really even ahead of the NIJ. I mean, they are doing other things in those labs, too, that we need to bring on line faster, because we are kind of catching up all over the place.

Secondly, the things that were not in Chairman Hyde's bill, what do you think is the most important if you had to name one?

Ms. GORELICK. Well, let me go back to my list. If I had to pick one—I really hate to pick one—but if I had to pick one——

Mr. HYDE. Would the gentlelady hold for a second before you pick one? Let me——

Ms. GORELICK. Which one do you like best, Mr. Chairman?

Mr. HYDE. Well, I think it is worth noting that there are reasons for some of the exclusions. I have a note here from staff: addition of terrorism offenses as predicate offenses under RICO. We did not wish to include those provisions because of our concern over the overreach of RICO generally, and it needs a more general treatment. The amendment of the Foreign Assistance Act to enhance antiterrorism training for personnel from foreign nations is within the jurisdiction of the International Relations Committee.

We are concerned about jurisdiction and sequential referral, and some of the things you mentioned are the jurisdiction of other committees. Well, OK.

Ms. GORELICK. Well, let me answer the question this way.

I would say that we would like to see authority to seek a wiretap with respect to any felony that could be related to terrorism. I think that the Secretary of the Treasury should have the authority to promulgate regulations to prohibit the possession or transfer of explosive materials as opposed to just studying it.

Finally, I really don't see why we should have an extraordinarily short statute of limitations for the criminal prosecution under the National Firearms Act.

Mrs. SCHROEDER. Let me ask one more question.

No. 1, I am very troubled by the President having the authority to list groups and select their leaders. I guess only because of our recent experience of the majority leader riding around saying to people that he didn't want them contributing to groups like the American Cancer Society or something. So I guess my question would be, what kind of a check is there on the President that they don't just get to pick whatever group they would like to designate their leaders as terrorists. You know, I would like some measure of balance in there.

And the second part of the question is after—the gentleman from Texas I think made a very good point in his opening statement, and that is that after Oklahoma City and after the World Trade bombing, things looked like they were efficient and moving very rapidly. What were the biggest problems, and if you had to really target what laws were most in your way in moving on that, what would they be?

In other words, is this a direct response to that, or is this just a time where everybody is saying, "oh, these things happen and politicians must run in and do something," in quotes, which we tend to do here without maybe having what we did fit the problem that drove it.

Ms. GORELICK. We did try to ensure that the top proposals that we were making were indeed related to our needs in the domestic and foreign terrorist arena. The most important of those are for resources and for the authority to have a domestic terrorism center where all information could be brought to bear so that we could coordinate as much as possible.

As you know, the proposal for the process by which the President would designate a foreign terrorist organization as such, in order to prohibit U.S. funding of such organizations, was in the bill that preceded the Oklahoma City bombing and was not in any way a response.

In response to your first question on judicial review, I have tried to make it clear that individuals who wish to challenge the President's designation have whatever rights of access to the courts they otherwise would have. We have not asserted, and we have done whatever we can to clarify that we are not asserting, that there is no access to the courts.

What we have said is that someone should not be able to ignore the designation, make the contribution, provide material support to a terrorist organization and then claim that the designation was improper. You cannot—you should not be able to challenge that designation in the context of a criminal proceeding. But we are silent on access to the courts with regard to the designation in the first instance.

Mrs. SCHROEDER. Well, my time is up, Mr. Chairman.

Mr. HYDE. I will give you additional time if you want.

Mrs. SCHROEDER. You are very kind.

I just wanted to say, but what you mean is that, first, they designate and then you would have the right to go to court and challenge the designation, right?

Ms. GORELICK. Someone could go to court and challenge.

Now, I would say——

Mrs. SCHROEDER. But you are already labeled as you go into court as one who has been labeled by the President as a terrorist group?

Ms. GORELICK. That is correct.

I will tell you that that decision would not, in my view, be made without a great deal of thought as it was with respect to the designation that the President made under IEEPA most recently where he went through a very labored and careful process to come up with that designation.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Mr. HYDE. I just want to add to my list of reasons why some of these things are not in our bill. The National Firearms Act is under the jurisdiction of the Ways and Means Committee, so if we trifle with that, we end up sequentially referring our bill. So these technical considerations sometimes interfere.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. Yes. I thank the Chair.

The Senate, I understand, Ms. Gorelick, has added provisions that would help to reform death penalty appeals, habeas corpus structure. Do you agree with those proposals, that that would be a good step forward?

The President, I believe, has indicated his approval of that addition. Is that correct?

Ms. GORELICK. Yes. Let me say this.

Our original concern about the inclusion of the habeas proposals was that it would delay consideration of this bill. As you know, habeas corpus has been a very controversial issue in this body and in the Senate. We—the President is very concerned about the habeas corpus process. He does not want to see delay in the process, but he wants the process to be fair.

He had several concerns about the Senate proposal, and one central concern was the provision to ensure the provision of counsel

to individuals on death row, and that is a change that was made in the Senate bill.

We be happy to work with this committee on those issues to see a resolution of that issue.

Mr. HYDE. Would the gentleman yield?

Mr. GEKAS. Yes.

Mr. HYDE. I just would suggest——

Mr. GEKAS. Just for a short time, Mr. Chairman.

Mr. HYDE. Surely. I appreciate that. The gentleman is very generous.

I would just suggest that we have debated and passed a habeas corpus bill in the House. It is in the Senate bill; it will be an item to be conferenced, and for us to revisit that very emotional, heated debate again on this bill, having once passed a bill—it is in the crime bill over before the Senate, but the Senate's habeas provisions are in the counterterrorism bill. So as I say, we will have to deal with it in conference—I don't see, really, the wisdom of revisiting that whole argument again, in this committee, on this bill. So I would——

Mr. GEKAS. Well, seizing back my time——

Mr. HYDE. I would urge the gentleman to consider tactfully not urging that we have a habeas revisitation in this bill.

Mr. GEKAS. No, no, no. I do not intend, Mr. Chairman, to go into the terminology or the substance of any habeas corpus provisions. I simply want to register for the record that there are many of us who, when this item reaches conference, are going to be looking favorably upon inclusion of the habeas corpus tenets that are now in the Senate.

Mr. HYDE. I would tell the gentleman I would hate to lose all the work we did on that, so I intend to rigorously support the inclusion of a habeas bill.

Mr. GEKAS. I support the chairman's support of this Member's intent not to reinstitute the habeas corpus——

Mr. HYDE. The gentleman is very supportive.

Mr. GEKAS. Yes.

The other question that I wanted to ask simply was whether or not the Deputy Attorney General is aware of any policy with respect to the day care centers which was brought up in his testimony heretofore.

Ms. GORELICK. The issue of day care centers is being looked at as part of the security review, the 60-day review that I mentioned earlier.

Mr. GEKAS. Have any day care centers since Oklahoma City been removed to other sites or shut down, period?

Ms. GORELICK. I don't believe so, and I do believe that the GSA had very early on done a review of the locales and security situations with respect to the other day care centers.

Mr. GEKAS. I have no further questions.

I thank the Chair.

Mr. HYDE. The Chair announces that we will recess at 12 noon to return at 1:30, and so, bearing that in mind, it would be helpful if we could get through with the next panel before noon so they might go about their ways, both of them from out of State, but that

is merely a suggestion. I do not wish to curtail anybody's questioning.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I wanted to follow up a little bit on this listing. As I understand it, the President would put the organization on the list, and it would be up to somebody else to challenge it?

Ms. GORELICK. Yes.

Mr. SCOTT. Where would the burden of proof be?

Ms. GORELICK. I would imagine the burden of proof would be on the challenger.

Mr. SCOTT. To prove their innocence?

Ms. GORELICK. To prove that they are not a terrorist organization.

Mr. SCOTT. Can you put domestic groups on this list?

Ms. GORELICK. No.

Mr. SCOTT. Mr. Bereuter has a provision on credit reporting that I think is in just everybody's version.

Ms. GORELICK. Yes.

Mr. SCOTT. Is your version the same as his version?

Ms. GORELICK. Yes.

Mr. SCOTT. Exactly the same?

Ms. GORELICK. I believe so. If I need to amend my answer, I will. But I am certain that it is substantially similar.

Mr. SCOTT. OK. And finally, you indicated that something about wiretaps, and I thought there was an expansion of wiretap authority in the bill.

Ms. GORELICK. There is. There is a minor difference that we have been discussing between our bill and Chairman Hyde's bill, which goes to whether the Attorney General could certify another offense as related to terrorist activity for the purposes of obtaining a wiretap. Right now, there are certain offenses that can be predicates for wiretaps and others that cannot. And a crime like alien smuggling, which could be the predicate of a terrorist activity, cannot be the basis of a wiretap right now; and we would like its inclusion upon a certification in a particular case by the Attorney General that the matter under investigation is related to terrorism.

Mr. SCOTT. Now, in an emergency wiretap, do these versions have a good-faith exception to the exclusionary rule for the emergency wiretaps?

Ms. GORELICK. I am not sure I understand the question. The emergency wiretap provision that we offered is, similarly, in Chairman Hyde's bill, as is the good-faith exception under the *Leon* case that is extending the current constitutional law to wiretaps. To my knowledge, the two are not intertwined, and maybe I misunderstand your question.

Mr. SCOTT. If you get an emergency wiretap illegally, but in good faith, do you want—are you trying to introduce the evidence?

Ms. GORELICK. No.

Mr. SCOTT. So there is not the good-faith extension to the emergency wiretaps without a warrant?

Ms. GORELICK. No. In order to avail yourself, and I am subject to correction by people behind me, in order to avail yourself of the

emergency wiretap authority, you have to then—after the 48-hour period, you have to have the wiretap approved.

Now, the good-faith standard says that if you have good-faith reliance on a court order, even if the order is flawed, the fruits of that wiretap may be used, since there is no court order in the case of an emergency wiretap until after the 48 hours, there is no good-faith exception for that 48-hour period.

Mr. SCOTT. OK.

Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from New Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman.

Ms. Gorelick, let me be more precise and come down where I am on this issue. First, I do believe that there is legislation this Congress can pass and submit to the President which I think will aid this country and its law enforcement agencies in antiterrorism measures. My concern is, as stated earlier, that since terrorism is normally associated with a political viewpoint of some kind rather than simply some kind of nefarious economic gain like a standard robbery of some kind, I am concerned that law enforcement agencies might use new powers to go on fishing expeditions to look at people who hold unpopular political views, even though there is no direct evidence that they are involved in anything having to do with terrorism. So that is what I am trying to balance here.

And what I am specifically concerned about in fishing expeditions are issues like intercepting telephone conversations and looking for hotel and motel records and examining credit and things like that, which could be misused.

And with that in mind, I would like to ask a few questions. Let me start with telephone.

I was interested in your last remarks, the *Leon* case allows a good-faith exception now to the exclusionary rule when there is a warrant, so since there is a *Leon* case, why do you need to put that in the bill?

Ms. GORELICK. Because the *Leon* case applies to searches under a constitutional rubric, and the wiretap—the authority to wiretap is found in statute. The statute was passed in 1968 before the case law developed to the point of *Leon*, and what we are asking for is for this statutory authority, the wiretap authority to be brought into conformity with the remainder of the law with respect to searches.

Mr. SCHIFF. Because it is based on a different sort of law, right?

Ms. GORELICK. It is statutory rather than constitutional.

Mr. SCHIFF. I understand. The Justice Department desires a multipoint telephone court order, if I am using the term correctly.

Ms. GORELICK. You are.

Mr. SCHIFF. Is that the same as the colloquially called "roving wiretap?"

Ms. GORELICK. Yes, sir.

Mr. SCHIFF. And that means that once you have targeted an individual, the same court order allows you to go to different phones based on the belief that that individual is using different phones, is that correct?

Ms. GORELICK. If we can prove to a court that the actions of the individual either have the—reflect the intent to thwart the wiretap

or have the effect of thwarting the wiretap in the case of the Senate provision, which we like, we would obtain approval from the court for a so-called "multipoint wiretap."

Mr. SCHIFF. Do we already have precedent in law for multifaceted wiretap?

Ms. GORELICK. We do.

Mr. SCHIFF. Is there any difference between what is proposed here when terrorism is the subject matter and the existing precedent for multipoint wiretap?

Ms. GORELICK. No. There is no difference as to subject matter.

Mr. SCHIFF. All right. And we also have emergency wiretaps now? We have provisions allowing for that?

Ms. GORELICK. Yes, we do. But we don't have it in either the domestic or international terrorism area.

Mr. SCHIFF. Is there any difference in what you are proposing for the emergency wiretap procedurally or substantively that is different from where it exists now in the law except the subject matter of terrorism or counterterrorism?

Ms. GORELICK. No.

Mr. SCHIFF. I believe there is a—and by the way, to me, that is supportive, that we are using the same laws that exist now only under somewhat different—for different subjects.

One last question is all I have time for. Isn't there a provision proposed to allow the Justice Department through one of its agencies to secure motel or hotel records upon request?

Ms. GORELICK. Upon a national security letter, much the same as reported in Congressman Bereuter's bill.

Mr. SCHIFF. Why would a court order or grand jury subpoena not be sufficient to get that information? Because a national security letter for all of its—excuse me for saying it this way—but for all of its trumped-up-sounding formality is still the Justice Department answering to nobody but itself. Why not go to some third body for approval to get those records?

Ms. GORELICK. Let me answer the question in two ways.

Just as you find some comfort in the other areas that you have been asking me about that we are doing, we are asking for the same authority that we already have with respect to an analogous subject. We can get via a national security letter and have for a long time had the authority to get via a national security letter, the actual bank records. What we don't have is the ability to know what bank to go to, which is what the access to the credit reporting company would give you. We feel that that is a small change for a rather large benefit.

Second, the criminal process is utterly useless in a foreign counterintelligence context. In a foreign counterintelligence context, there is no ancillary criminal process, there is no grand jury to go to. One could go—make up a court to go to, but the court would have no context in which to evaluate, and you would have the attendant potential for security breaches given that district courts are not normally in a position to hear these kinds of things. For those two reasons, we felt that this was a modest proposal and one in which very few, if any, privacy rights were at issue; and we do feel that the national security letter offers adequate protection.

Mr. SCHIFF. Is the national security letter used now for hotel and motel records?

Ms. GORELICK. It is not.

Mr. SCHIFF. Thank you, Mr. Chairman. I yield back.

Mr. HYDE. I thank the gentleman.

The gentleman from Texas, Mr. Bryant.

Mr. BRYANT of Texas. Thank you.

Ms. Gorelick, the bill in section 611 defines a terrorist organization as an organization designated in the Federal Register as a territorial organization by the President, based upon a finding that the organization engages in or has engaged in terrorist activities that threatens the national security of the United States.

You have left the impression with two of the questioners a moment ago that this was somehow reviewable by the court. But simply put, the bill says if the President finds that an organization is a terrorist organization, that determination is conclusive for purposes of this statute. I don't see any grounds for review of that at all in the statute. Can you point to something?

Ms. GORELICK. We did not, and I did not mean to give the impression that we were providing a special review provision in the statute. What I said was that we are silent on this. The individual who wishes to challenge the designation has access to the courts just like any other American.

Mr. BRYANT of Texas. Everybody has access to the courts, but if you don't have any statutory basis on which to bring your challenge, the statute is of no use, is the point that I am making. The fact is, there would be no way to challenge this unless maybe to say that the whole thing is unconstitutional; isn't that correct?

Ms. GORELICK. I am not sure that that is right.

Mr. BRYANT of Texas. Well, give me a theory on which you can challenge it.

Ms. GORELICK. I am sorry, I can't do that right now.

Mr. BRYANT. As I read it, there is no basis on which to challenge it. So we are left with nothing except for a challenge to the constitutionality. Now, in view of that, which may or may not ever be successful, the President then has, whoever the President might be—I like the current President, but I might not like the next one; and those on the other side don't like the present one, and maybe they are going to like the next one. I don't know what is going to happen, but the fact is, it appears to me that you could designate almost anything as a terrorist organization.

Let me ask you, for example, could the President have designated the Iran contras as a terrorist organization and prohibited people from contributing money to them?

Ms. GORELICK. I don't know enough about the facts of their activities.

Mr. BRYANT. What difference does it make what the facts of their activities are?

Mr. HYDE. Would the gentleman yield?

Mr. BRYANT of Texas. Just a moment. Let me get a response, and I will be happy to yield.

The statute doesn't set any standard, so the facts of their activities don't make any difference.

Ms. GORELICK. Well, I don't quite agree with that. There is a definition of terrorist activities.

Mr. BRYANT of Texas. Would you read it to me?

Ms. GORELICK. I don't actually have it handy. Excuse me just a moment.

Mr. BRYANT of Texas. I have it here, and I can read it for you. The terrorist organization is one that is just designated by the President as one based upon the finding that it engages in or has engaged in terrorist activity that threatens the U.S. interest. That is all it says, and that is the reason for my question. I am speaking rapidly because I am going to quickly run out of time here.

Ms. GORELICK. Well, I would speak rapidly too if I had the——

Mr. BRYANT of Texas. Well, I just read it to you.

Ms. GORELICK. I believe that there is a cross-reference to a definition of terrorist activities, that it is not entirely circular. Your question suggests that the President——

Mr. HYDE. Page 50—page 50 of our bill describes terrorist activities.

Mr. BRYANT of Texas. Ms. Gorelick, the point is that the validity of the President's finding, there is no evidentiary requirement, there is nothing at all; the President can simply make the finding. So a description of terrorism which I suspect has no impact at all, whatsoever, on the portion that I am talking about doesn't help us if there is not some requirement that the President make the finding based upon facts.

Ms. GORELICK. The term "terrorism," I did recall that there was a definition beyond the one that you read. The term "terrorism" means the use of force of violence in violation of the criminal laws of the United States or of any State or that would be in violation of the criminal laws of the United States or any State if committed within the jurisdiction of the United States, and that appears to be intended to achieve political or social ends by intimidating, coercing a segment of the population, influencing——

Mr. BRYANT of Texas. May I interrupt you. I mean, you can make the point——

Ms. GORELICK. It is not without substance.

Mr. BRYANT of Texas. Except that it doesn't relate in any fashion whatsoever to this designation of the president of a terrorist organization, because there are foreign terrorist organizations that are found to be prohibited by the President simply because they happen to do things that are not—that threaten the national security of the United States, not that they have committed terrorist acts in the United States or that they are guilty of terrorism. So what you have just read to me is not relevant to this section that I am questioning you about.

My point is that under the terms of this bill a President would be able to designate anything he chooses as a terrorist organization overseas and therefore prosecute an American citizen for contributing money to that organization. I see no prohibition in here, for example, on the President for, for example, designating Christian activities in China as terrorist organizations because they are upsetting our relationship with China and therefore it is not in our international security interests for them to continue.

Mr. HYDE. The gentleman's time has expired, and I would——

Mr. BRYANT of Texas. Mr. Chairman, could I ask unanimous consent for an additional 2 minutes to get a response from this lady?

Mr. HYDE. You may, but before granting it, I would like to inform the gentleman that section 611 of H.R. 1710 requires the President to report to Congress prior to any designation of any organization as terrorist and Congress can remove the designation if it disagrees with the President's finding.

So there is that safeguard, and I yield the gentleman an additional 2 minutes.

Mr. BRYANT of Texas. I would point out to you that obviously the Congress can pass a law here to do anything it chooses to do. The President can also veto the law. So that is a totally superfluous protection in there.

Second, the point that you made with regard to the definition of terrorism doesn't help us any. I think that the gentleman from Illinois and the Republicans on the committee ought to be equally concerned about this, because this is going to cut a number of different ways.

A President would be able, for example, to designate a family support organization that wanted to just simply provide food and clothing for the families of contras as a terrorist organization and prohibit anyone in America——

Mr. HYDE. Or Sandanistas.

Mr. BRYANT of Texas. That is true. And prohibit anyone from contributing to it.

You would, for example, be able to stop contributions to charities and hospitals that serve the children and families of Palestinians. Well, we went through this a few years ago. The fact of the matter is, Yassir Arafat was an international terrorist a few years ago and now all of a sudden he is a respected statesman. It changes from year to year.

This is going to involve a significant impingement upon the rights of the American people to make contributions abroad to groups that may or may not have anything to do with terrorism, simply because a particular President doesn't like the politics of the group. If we are going to have this in the bill, it seems clear to me that we ought to have some type of a standard in here and not the broad language that exists there.

I would like to have Ms. Gorelick, because you seem to have a response to make and would I like to hear it——

Ms. GORELICK. I apologize for the delay, but this bill is long and not the simplest piece of legislation. There is at page 68 of the bill a cross-reference in discussing the President's authority to designate any foreign organization, based on a finding that the organization engages in terrorism activity as defined in section 212(a)(3)(B) of the Immigration and Nationality Act.

Now, when you look at that cross-reference, what you find is a cross-reference to a fairly lengthy definition, but it is essentially, as seen on page 50, the term "international terrorism" means terrorism that occurs primarily outside the territorial jurisdiction of the United States or transcends national boundaries. In terms of means by which it is accomplished, the person it is intended to intimidate or coerce, or the locale in which its perpetrators or opera-

tors seek asylum, and then terrorism is defined as I earlier read it to you.

Mr. BRYANT of Texas. Where is the cross-reference?

Ms. GORELICK. The cross-reference is at page 68 of H.R. 896.

Mr. BRYANT of Texas. 896?

Ms. GORELICK. Yes. That is the bill——

Mr. HYDE. It is at page 92 of our bill, 1710.

Ms. GORELICK [continuing]. The bill that Congressman Schumer introduced, which was the administration's initial proposal in February.

Mr. BRYANT of Texas. I am looking at page 92; I don't see the cross-reference you are talking about here. I mean, page 92 of our bill, and I assume also of your bill, is simply the language that sets forth the ability of the President to designate a terrorist organization.

Ms. GORELICK. I would be happy to have my copy of our bill brought up to you. But I did want you to know that there is a definition.

Mr. BRYANT of Texas. I am reading it here. I have seen it. My questions are based on the same thing you are reading from. My first question to you was, what is the standard on which somebody would challenge the designation of a particular organization as a terrorist organization; and you basically—you agreed there is no standard in the bill.

Ms. GORELICK. I said that there was no procedure set forth in the bill, a special procedure for——

Mr. BRYANT of Texas. I am not talking about procedure here. Let's talk about substantive law. What could a President fail to do that would cause a court to render null and void his declaration of an organization as a terrorist organization?

Ms. GORELICK. All I have said to you is, the person has——

Mr. BRYANT of Texas. I asked a question. I asked a question.

Ms. GORELICK. I have not researched the answer to that question. I would be happy to provide it.

Mr. BRYANT of Texas. It is not a question of research, Ms. Gorelick; it is a question of the statute that the President sent over here. What could a President under this statute fail to do that would render his designation of an organization as terrorist null and void by a court?

Ms. GORELICK. All I am saying to you is that I am not in a position to answer that now because that is not addressed in our statute. I would be happy to provide it even yet this afternoon.

Mr. BRYANT of Texas. The fact that it is not addressed in the statute is the point of my questions. I don't know what this afternoon could do for us. I have read and you read out loud nearly the entire section. So what else is there to look at?

Ms. GORELICK. Well, what else there is to look at is, you have asked hypothetically if someone wanted to challenge a designation by the President of the United States that an organization is a terrorist organization, what would be the standard review, what would be the theory of the challenge? I don't know the answer to that offhand. All we have said in this bill is that the person has such rights as they may have to go into court to challenge. We have not set up a separate procedure; no, we have not.

Mr. BRYANT of Texas. Well, the fact of the matter is that under this language if you went to court and said it is not fair for him to name XYZ corporation company or group as a terrorist organization because the facts show they are not a terrorist organization, you would not be able to litigate the question of whether or not they are a terrorist organization. The only question would be whether or not the President made a finding that they are a terrorist organization as it is written here.

Ms. GORELICK. That is your conclusion, that is not mine.

Mr. BRYANT of Texas. I would like you to show me in this bill what you base your conclusion on.

Mr. HYDE. I am going to regretfully suggest that the gentleman's time has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. I have only a few questions. Section 701 would authorize appropriation of such sums as are necessary for the FBI to hire more people and establish a counterterrorist center and protect certain public events. Can you give us a ballpark figure as to what sums would be necessary for these purposes?

Ms. GORELICK. I will have for you in a minute the sums that we asked for in our appropriations. I will have that for you in a minute. We have the precise number in our proposed appropriation.

Mr. CHABOT. As you are getting that, let me ask another question. With regards to the counterterrorist center itself, I know that the administration believes that there is a coordination problem among some of the agencies involved in fighting terrorism.

One of the suggestions that some people have made to help with coordination is to merge the BATF, the Bureau of Alcohol, Tobacco and Firearms, which is now in the Treasury Department into the Department of Justice, specifically under the FBI. So as to consolidate Federal law enforcement functions.

A few weeks ago when I asked former Attorney General Barr and former FBI Director Sessions about this idea, they both strongly supported it and said that they had previously recommended it themselves. Are they wrong?

Ms. GORELICK. The administration's position is that no merger is necessary. And, traditionally, I think the Justice Department has, as former Attorney General Barr has indicated, has advocated that. Neither his administration nor mine have supported that.

Mr. CHABOT. Could you expound upon why the administration opposes putting the BATF under the FBI?

Ms. GORELICK. I cannot. I am sorry. I do not know what considerations were brought to bear in that decision. There are obviously pros and cons. Among the cons would be the disruption, I suppose, of merging two law enforcement agencies and I am sure there are other considerations as well.

Mr. CHABOT. As has been discussed, the bill would allow the President to designate any organization as a foreign terrorist organization and make it a crime for anyone to contribute to such an organization. And as Mr. Bryant from Texas has asked and responded with you about, there is some question about exactly what can be done and what a foreign terrorist organization is. Is there

some sort of checklist or some sort of criteria that the administration has considered in this area?

Ms. GORELICK. There were criteria that were used in the IEEPA designation, which I am sure I could get for you. We have not listed the criteria, apart from the definitions that are reasonably detailed in the legislation that would be used to effectuate the designation process.

Mr. CHABOT. Can you give us some examples of organizations that might fall under that criteria either now or in the past?

Ms. GORELICK. Basically, what you are looking at is whether an organization, through its activities, has used violence to affect another government or to affect a civilian population of that government in its political and social activities.

And the underlying information that was used in the IEEPA designation was intelligence information that we have about the organizations listed.

Mr. CHABOT. What are some examples of organizations that would fall into that category?

Ms. GORELICK. Well, I could give you the list of organizations that the President—that the President used in the IEEPA determination. It is found at the Federal Register, vol. 60, No. 16, but we can submit them for the record.

Mr. CHABOT. If you could go through a few of them, ones that might be familiar to people.

Ms. GORELICK. Islamic Gamaat. Hezbollah. Jihad. The Islamic Resistance Movement. The Palestinian Islamic Jihad. The Popular Front for the Liberation of Palestine. I am picking them off of a long list.

Mr. CHABOT. Any outside the Middle East?

Ms. GORELICK. No, and there are several in Israel as well. I am trying to put my fingers on them. The Kahane Chai, I know is on the list and there is at least one other Jewish-based organization. But I think they are all, I believe, that they are all found in the Middle East.

Mr. CHABOT. Thank you. Could I ask unanimous consent for one additional minute, Mr. Chairman?

Mr. HYDE. Without objection. So ordered.

Mr. CHABOT. I would like to get a copy of the list and perhaps other members of the committee would like to have that as well. And I believe you have the figures there on the cost?

Ms. GORELICK. Certainly—yes, the funding total, including the digital telephony is 500 million over 5 years. I do not have the line item for the account that you requested handy and we will get that for you immediately because we do have that.

Mr. CHABOT. Thank you very much. I yield back the balance of my time.

[The information follows:]

EXECUTIVE ORDER

12947

PROHIBITING TRANSACTIONS WITH TERRORISTS WHO THREATEN TO DISRUPT THE MIDDLE EAST PEACE PROCESS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code,

I, WILLIAM J. CLINTON, President of the United States of America, find that grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. Except to the extent provided in section 203(b)(3) and (4) of IEEPA (50 U.S.C. 1702(b)(3) and (4)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date: (a) all property and interests in property of:

(i) the persons listed in the Annex to this order;

(ii) foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, because they are found:

(A) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or

(B) to assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence; and

(iii) persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any of the foregoing persons, that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of United States persons, are blocked;

(b) any transaction or dealing by United States persons or within the United States in property or interests in property of the persons designated in or pursuant to this order is prohibited, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such persons;

(c) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order, is prohibited.

Sec. 2. For the purposes of this order: (a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, corporation, or other organization, group, or subgroup;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States; and

(d) the term "foreign person" means any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States) or any entity not organized solely under the laws of the United States or existing solely in the United States, but does not include a foreign state.

Sec. 3. I hereby determine that the making of donations of the type specified in section 203(b)(2)(A) of IEEPA (50 U.S.C. 1702(b)(2)(A)) by United States persons to persons designated in or pursuant to this order would seriously impair my ability to deal with the national emergency declared in this order, and hereby prohibit such donations as provided by section 1 of this order.

Sec. 4. (a) The Secretary of the Treasury, in consultation with the Secretary of State and, as appropriate, the Attorney General, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by IEEPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

(b) Any investigation emanating from a possible violation of this order, or of any license, order, or regulation issued pursuant to this order, shall first be coordinated with the Federal Bureau of Investigation (FBI), and any matter involving evidence of a criminal violation shall be referred to the FBI for further investigation. The FBI shall timely notify the Department of the Treasury of any action it takes on such referrals.

Sec. 5. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 6. (a) This order is effective at 12:01 a.m., eastern standard time on January 24, 1995.

(b) This order shall be transmitted to the Congress and published in the Federal Register.

William J. Clinton

THE WHITE HOUSE,

January 23, 1995.

ANNEX

TERRORIST ORGANIZATIONS WHICH THREATEN TO DISRUPT THE MIDDLE EAST PEACE PROCESS

Abu Nidal Organization (ANO)

Democratic Front for the Liberation of Palestine (DFLP)

Hizballah

Islamic Gama'at (IG)

Islamic Resistance Movement (HAMAS)

Jihad

Kach

Kahane Chai

Palestinian Islamic Jihad-Shiqaqi faction (PIJ)

Palestine Liberation Front-Abu Abbas faction (PLF-Abu Abbas)

Popular Front for the Liberation of Palestine (PFLP)

Popular Front for the Liberation of Palestine-General Command (PFLP-GC)

Federal Register Publication Date: 1/25/95

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

LIST OF SPECIALLY DESIGNATED TERRORISTS WHO THREATEN TO DISRUPT THE MIDDLE EAST PEACE PROCESS

AGENCY: Office of Foreign Assets Control, Treasury

ACTION: Notice of blocking

SUMMARY: The Treasury Department is issuing a list of blocked persons who have been designated by the President as terrorist organizations threatening the Middle East peace process or have been found to be owned or controlled by, or to be acting for or on behalf of, these terrorist organizations.

EFFECTIVE DATE: January 24, 1995

FOR FURTHER INFORMATION: J. Robert McBrien, Chief, International Programs, Tel.: (202) 622-2420; Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, DC 20220.

SUPPLEMENTARY INFORMATION:

Electronic Availability

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Background

On January 23, 1995, President Clinton signed Executive Order 12947, "Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process" (the "Order"). The Order blocks all property subject to U.S. jurisdiction in which there is any interest of 12 terrorist organizations that threaten the Middle East peace process as identified in an Annex to the Order. The Order also blocks the property and interests in property subject to U.S. jurisdiction of persons designated by the Secretary of State, in coordination with the Secretary of Treasury and the Attorney General, who are found 1) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or 2) to assist in, sponsor or provide financial, material, or technological support for, or services in support of, such acts of violence. In addition, the Order blocks

all property and interests in property subject to U.S. jurisdiction in which there is any interest of persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any other person designated pursuant to the Order (collectively "Specially Designated Terrorists" or "SDTs").

The Order further prohibits any transaction or dealing by a United States person or within the United States in property or interests in property of SDTs, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such persons. This prohibition includes donations that are intended to relieve human suffering.

Designations of persons blocked pursuant to the Order are effective upon the date of determination by the Secretary of State or his delegate, or the Director of the Office of Foreign Assets Control acting under authority delegated by the Secretary of the Treasury. Public notice of blocking is effective upon the date of filing with the Federal Register, or upon prior actual notice.

LIST OF SPECIALLY DESIGNATED TERRORISTS WHO THREATEN THE MIDDLE EAST PEACE PROCESS

Note: The abbreviations used in this list are as follows: "DOB" means "date of birth," "a.k.a." means "also known as," and "POB" means "place of birth."

Entities

ABU NIDAL ORGANIZATION (a.k.a. **ANO**, a.k.a. **BLACK SEPTEMBER**, a.k.a. **FATAH REVOLUTIONARY COUNCIL**, a.k.a. **ARAB REVOLUTIONARY COUNCIL**, a.k.a. **ARAB REVOLUTIONARY BRIGADES**, a.k.a. **REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS**); Libya; Lebanon; Algeria; Sudan; Iraq.

AL-GAMA'A AL-ISLAMIYYA (a.k.a. **ISLAMIC GAMA'AT**, a.k.a. **GAMA'AT**, a.k.a. **GAMA'AT AL-ISLAMIYYA**, a.k.a. **THE ISLAMIC GROUP**); Egypt.

AL-JIHAD (a.k.a. **JIHAD GROUP**, a.k.a. **VANGUARDS OF CONQUEST**, a.k.a. **TALAA'AL AL-FATEH**); Egypt.

ANO (a.k.a. **ABU NIDAL ORGANIZATION**, a.k.a. **BLACK SEPTEMBER**, a.k.a. **FATAH REVOLUTIONARY COUNCIL**, a.k.a. **ARAB REVOLUTIONARY COUNCIL**, a.k.a. **ARAB REVOLUTIONARY BRIGADES**, a.k.a. **REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS**); Libya; Lebanon; Algeria; Sudan; Iraq.

ANSAR ALLAH (a.k.a. **PARTY OF GOD**, a.k.a. **HIZBALLAH**, a.k.a. **ISLAMIC JIHAD**, a.k.a. **REVOLUTIONARY JUSTICE ORGANIZATION**, a.k.a.

ORGANIZATION OF THE OPPRESSED ON EARTH, a.k.a. ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE, a.k.a. FOLLOWERS OF THE PROPHET MUHAMMAD); Lebanon.

ARAB REVOLUTIONARY BRIGADES (a.k.a. ANO, a.k.a. ABU NIDAL ORGANIZATION, a.k.a. BLACK SEPTEMBER, a.k.a. FATAH REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY COUNCIL, a.k.a. REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS); Libya; Lebanon; Algeria; Sudan; Iraq.

ARAB REVOLUTIONARY COUNCIL (a.k.a. ANO, a.k.a. ABU NIDAL ORGANIZATION, a.k.a. BLACK SEPTEMBER, a.k.a. FATAH REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY BRIGADES, a.k.a. REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS); Libya; Lebanon; Algeria; Sudan; Iraq.

BLACK SEPTEMBER (a.k.a. ANO, a.k.a. ABU NIDAL ORGANIZATION, a.k.a. FATAH REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY BRIGADES, a.k.a. REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS); Libya; Lebanon; Algeria; Sudan; Iraq.

DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE (a.k.a. DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION, a.k.a. DFLP); Lebanon; Syria; Israel.

DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION (a.k.a. DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE, a.k.a. DFLP); Lebanon; Syria; Israel.

DFLP (a.k.a. DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION, a.k.a. DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE); Lebanon; Syria; Israel.

FATAH REVOLUTIONARY COUNCIL (a.k.a. ANO, a.k.a. ABU NIDAL ORGANIZATION, a.k.a. BLACK SEPTEMBER, a.k.a. ARAB REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY BRIGADES, a.k.a. REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS); Libya; Lebanon; Algeria; Sudan; Iraq.

FOLLOWERS OF THE PROPHET MUHAMMAD (a.k.a. PARTY OF GOD, a.k.a. HIZBALLAH, a.k.a. ISLAMIC JIHAD, a.k.a. REVOLUTIONARY JUSTICE ORGANIZATION, a.k.a. ORGANIZATION OF THE OPPRESSED ON EARTH, a.k.a. ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE, a.k.a. ANSAR ALLAH); Lebanon.

GAMA'AT (a.k.a. ISLAMIC GAMA'AT, a.k.a. GAMA'AT AL-ISLAMIYYA, a.k.a. THE ISLAMIC GROUP, a.k.a. AL-GAMA'A AL-ISLAMIYYA); Egypt.

GAMA'AT AL-ISLAMIYYA (a.k.a. ISLAMIC GAMA'AT, a.k.a. GAMA'AT, a.k.a. THE ISLAMIC GROUP, a.k.a. AL-GAMA'A AL-ISLAMIYYA); Egypt.

HAMAS (a.k.a. **ISLAMIC RESISTANCE MOVEMENT**); Gaza; West Bank Territories; Jordan.

HIZBALLAH (a.k.a. **PARTY OF GOD**, a.k.a. **ISLAMIC JIHAD**, a.k.a. **REVOLUTIONARY JUSTICE ORGANIZATION**, a.k.a. **ORGANIZATION OF THE OPPRESSED ON EARTH**, a.k.a. **ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE**, a.k.a. **ANSAR ALLAH**, a.k.a. **FOLLOWERS OF THE PROPHET MUHAMMAD**); Lebanon.

ISLAMIC GAMA'AT (a.k.a. **GAMA'AT**, a.k.a. **GAMA'AT AL-ISLAMIYYA**, a.k.a. **THE ISLAMIC GROUP**, a.k.a. **AL-GAMA'A AL-ISLAMIYYA**); Egypt.

ISLAMIC JIHAD (a.k.a. **PARTY OF GOD**, a.k.a. **HIZBALLAH**, a.k.a. **REVOLUTIONARY JUSTICE ORGANIZATION**, a.k.a. **ORGANIZATION OF THE OPPRESSED ON EARTH**, a.k.a. **ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE**, a.k.a. **ANSAR ALLAH**, a.k.a. **FOLLOWERS OF THE PROPHET MUHAMMAD**); Lebanon.

ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE (a.k.a. **PARTY OF GOD**, a.k.a. **HIZBALLAH**, a.k.a. **ISLAMIC JIHAD**, a.k.a. **REVOLUTIONARY JUSTICE ORGANIZATION**, a.k.a. **ORGANIZATION OF THE OPPRESSED ON EARTH**, a.k.a. **ANSAR ALLAH**, a.k.a. **FOLLOWERS OF THE PROPHET MUHAMMAD**); Lebanon.

ISLAMIC JIHAD OF PALESTINE (a.k.a. **PIJ**, a.k.a. **PALESTINIAN ISLAMIC JIHAD - SHIQAQI**, a.k.a. **PIJ SHIQAQI/AWDA FACTION**, a.k.a. **PALESTINIAN ISLAMIC JIHAD**); Israel; Jordan; Lebanon.

ISLAMIC RESISTANCE MOVEMENT (a.k.a. **HAMAS**); Gaza; West Bank Territories; Jordan.

JIHAD GROUP (a.k.a. **AL-JIHAD**, a.k.a. **VANGUARDS OF CONQUEST**, a.k.a. **TALAA'AL AL-FATEH**); Egypt.

KACH; Israel.

KAHANE CHAI; Israel.

ORGANIZATION OF THE OPPRESSED ON EARTH (a.k.a. **PARTY OF GOD**, a.k.a. **HIZBALLAH**, a.k.a. **ISLAMIC JIHAD**, a.k.a. **REVOLUTIONARY JUSTICE ORGANIZATION**, a.k.a. **ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE**, a.k.a. **ANSAR ALLAH**, a.k.a. **FOLLOWERS OF THE PROPHET MUHAMMAD**); Lebanon.

PALESTINE LIBERATION FRONT (a.k.a. **PALESTINE LIBERATION FRONT - ABU ABBAS FACTION**, a.k.a. **PLF-ABU ABBAS**, a.k.a. **PLF**); Iraq.

PALESTINE LIBERATION FRONT - ABU ABBAS FACTION (a.k.a. **PLF-ABU ABBAS**, a.k.a. **PLF**, a.k.a. **PALESTINE LIBERATION FRONT**); Iraq.

PALESTINIAN ISLAMIC JIHAD - SHIQAQI (a.k.a. PIJ, a.k.a. ISLAMIC JIHAD OF PALESTINE, a.k.a. PIJ SHIQAQI/AWDA FACTION, a.k.a. PALESTINIAN ISLAMIC JIHAD); Israel; Jordan; Lebanon.

PARTY OF GOD (a.k.a. HIZBALLAH, a.k.a. ISLAMIC JIHAD, a.k.a. REVOLUTIONARY JUSTICE ORGANIZATION, a.k.a. ORGANIZATION OF THE OPPRESSED ON EARTH, a.k.a. ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE, a.k.a. ANSAR ALLAH, a.k.a. FOLLOWERS OF THE PROPHET MUHAMMAD); Lebanon.

PFLP (a.k.a. POPULAR FRONT FOR THE LIBERATION OF PALESTINE); Lebanon; Syria; Israel.

PFLP-GC (a.k.a. POPULAR FRONT FOR THE LIBERATION OF PALESTINE - GENERAL COMMAND); Lebanon; Syria; Jordan.

PIJ (a.k.a. PALESTINIAN ISLAMIC JIHAD - SHIQAQI, a.k.a. ISLAMIC JIHAD OF PALESTINE, a.k.a. PIJ SHIQAQI/AWDA FACTION, a.k.a. PALESTINIAN ISLAMIC JIHAD); Israel; Jordan; Lebanon.

PIJ SHIQAQI/AWDA FACTION (a.k.a. PIJ, a.k.a. PALESTINIAN ISLAMIC JIHAD - SHIQAQI, a.k.a. ISLAMIC JIHAD OF PALESTINE, a.k.a. PALESTINIAN ISLAMIC JIHAD); Israel; Jordan; Lebanon.

PLF (a.k.a. PLF-ABU ABBAS, a.k.a. PALESTINE LIBERATION FRONT - ABU ABBAS FACTION, a.k.a. PALESTINE LIBERATION FRONT); Iraq.

PLF-ABU ABBAS (a.k.a. PALESTINE LIBERATION FRONT - ABU ABBAS FACTION, a.k.a. PLF, a.k.a. PALESTINE LIBERATION FRONT); Iraq.

POPULAR FRONT FOR THE LIBERATION OF PALESTINE (a.k.a. PFLP); Lebanon; Syria; Israel.

POPULAR FRONT FOR THE LIBERATION OF PALESTINE - GENERAL COMMAND (a.k.a. PFLP-GC); Lebanon; Syria; Jordan.

REVOLUTIONARY JUSTICE ORGANIZATION (a.k.a. PARTY OF GOD, a.k.a. HIZBALLAH, a.k.a. ISLAMIC JIHAD, a.k.a. ORGANIZATION OF THE OPPRESSED ON EARTH, a.k.a. ISLAMIC JIHAD FOR THE LIBERATION OF PALESTINE, a.k.a. ANSAR ALLAH, a.k.a. FOLLOWERS OF THE PROPHET MUHAMMAD); Lebanon.

REVOLUTIONARY ORGANIZATION OF SOCIALIST MUSLIMS (a.k.a. ANO, a.k.a. ABU NIDAL ORGANIZATION, a.k.a. BLACK SEPTEMBER, a.k.a. FATAH REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY COUNCIL, a.k.a. ARAB REVOLUTIONARY BRIGADES); Libya; Lebanon; Algeria; Sudan; Iraq.

TALAA'AL AL-FATEH (a.k.a. JIHAD GROUP, a.k.a. AL-JIHAD, a.k.a. VANGUARDS OF CONQUEST); Egypt.

THE ISLAMIC GROUP (a.k.a. **ISLAMIC GAMA'AT**, a.k.a. **GAMA'AT**, a.k.a. **GAMA'AT AL-ISLAMIYYA**, a.k.a. **AL-GAMA'A AL-ISLAMIYYA**); Egypt.

VANGUARDS OF CONQUEST (a.k.a. **JIHAD GROUP**, a.k.a. **AL-JIHAD**, a.k.a. **TALAA'AL AL-FATEH**); Egypt.

Individuals

ABBAS, Abu (a.k.a. **ZAYDAN, Muhammad**); Director of **PALESTINE LIBERATION FRONT - ABU ABBAS FACTION**; DOB 10 December 1948.

AL BANNA, Sabri Khalil Abd Al Qadir (a.k.a. **NIDAL, Abu**); Founder and Secretary General of **ABU NIDAL ORGANIZATION**; DOB May 1937 or 1940; POB Jaffa, Israel.

AL RAHMAN, Shaykh Umar Abd; Chief Ideological Figure of **ISLAMIC GAMA'AT**; DOB 3 May 1938; POB Egypt.

AL ZAWAHIRI, Dr. Ayman; Operational and Military Leader of **JIHAD GROUP**; DOB 19 June 1951; POB Giza, Egypt; Passport No. 1084010 (Egypt).

AL-ZUMAR, Abbud (a.k.a. **ZUMAR, Colonel Abbud**); Factional Leader of **JIHAD GROUP**; Egypt; POB Egypt.

AWDA, Abd Al Aziz; Chief Ideological Figure of **PALESTINIAN ISLAMIC JIHAD - SHIQAQI**; DOB 1946.

FADLALLAH, Shaykh Muhammad Husayn; Leading Ideological Figure of **HIZBALLAH**; DOB 1938 or 1936; POB Najf Al Ashraf (Najaf), Iraq.

HABASH, George (a.k.a. **HABBASH, George**); Secretary General of **POPULAR FRONT FOR THE LIBERATION OF PALESTINE**.

HABBASH, George (a.k.a. **HABASH, George**); Secretary General of **POPULAR FRONT FOR THE LIBERATION OF PALESTINE**.

HAWATMA, Nayif (a.k.a. **HAWATMEH, Nayif**, a.k.a. **HAWATMAH, Nayif**, a.k.a. **KHALID, Abu**); Secretary General of **DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION**; DOB 1933.

HAWATMAH, Nayif (a.k.a. **HAWATMA, Nayif**; a.k.a. **HAWATMEH, Nayif**, a.k.a. **KHALID, Abu**); Secretary General of **DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION**; DOB 1933.

HAWATMEH, Nayif (a.k.a. **HAWATMA, Nayif**; a.k.a. **HAWATMAH, Nayif**, a.k.a. **KHALID, Abu**); Secretary General of **DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION**; DOB 1933.

ISLAMBOULI, Mohammad Shawqi; Military Leader of **ISLAMIC GAMA'AT**; DOB 15 January 1955; POB Egypt; Passport No. 304555 (Egypt).

JABRIL, Ahmad (a.k.a. **JIBRIL, Ahmad**); Secretary General of **POPULAR FRONT FOR THE LIBERATION OF PALESTINE - GENERAL COMMAND**; DOB 1938; POB Ramleh, Israel.

JIBRIL, Ahmad (a.k.a. **JABRIL, Ahmad**); Secretary General of **POPULAR FRONT FOR THE LIBERATION OF PALESTINE - GENERAL COMMAND**; DOB 1938; POB Ramleh, Israel.

KHALID, Abu (a.k.a. **HAWATMEH, Nayif**, a.k.a. **HAWATMA, Nayif**, a.k.a. **HAWATMAH, Nayif**); Secretary General of **DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE - HAWATMEH FACTION**; DOB 1933.

MUGHNIYAH, Imad Fa'iz (a.k.a. **MUGHNIYAH, Imad Fayiz**); Senior Intelligence Officer of **HIZBALLAH**; DOB 7 December 1962; POB Tayr Dibba, Lebanon; Passport No. 432298 (Lebanon).

MUGHNIYAH, Imad Fayiz (a.k.a. **MUGHNIYAH, Imad Fa'iz**); Senior Intelligence Officer of **HIZBALLAH**; DOB 7 December 1962; POB Tayr Dibba, Lebanon; Passport No. 432298 (Lebanon).

MAJI, Talal Muhammad Rashid; Principal Deputy of **POPULAR FRONT FOR THE LIBERATION OF PALESTINE - GENERAL COMMAND**; DOB 1930; POB Al Nasiria, Palestine.

NASRALLAH, Hasan; Secretary General of **HIZBALLAH**; DOB 31 August 1960 or 1953 or 1955 or 1950; POB Al Basuriyah, Lebanon; Passport No. 042833 (Lebanon).

NIDAL, Abu (a.k.a. **AL BANNA, Sabri Khalil Abd Al Qadir**); Founder and Secretary General of **ABU NIDAL ORGANIZATION**; DOB May 1937 or 1940; POB Jaffa, Israel.

QASEM, Talat Fouad; Propaganda Leader of **ISLAMIC GAMA'AT**; DOB 2 June 1957 or 3 June 1957; POB Al Mina, Egypt.

SHAQAQI, Fathi; Secretary General of **PALESTINIAN ISLAMIC JIHAD - SHIQAQI**.

TUFAYLI, Subhi; Former Secretary General and Current Senior Figure of **HIZBALLAH**; DOB 1947; POB Biqa Valley, Lebanon.

YASIN, Shaykh Ahmad; Founder and Chief Ideological Figure of **HAMAS**; DOB 1931.

ZAYDAN, Muhammad (a.k.a. **ABBAS, Abu**); Director of **PALESTINE LIBERATION FRONT - ABU ABBAS FACTION**; DOB 10 December 1948.

ZUMAR, Colonel Abbud (a.k.a. **AL-ZUMAR, Abbud**); Factional Leader of **JIHAD GROUP**; Egypt; POB Egypt.

Dated: January 23, 1995

R. Richard Newcomb,
Director, Office of Foreign Assets Control

Approved: January 23, 1995

John Berry,
Deputy Assistant Secretary (Enforcement)

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DEPARTMENT OF JUSTICE
FY 1995–1996 OKLAHOMA CITY/COUNTERTERRORISM
SUPPLEMENTAL AND AMENDMENT REQUESTS
(Dollars in thousands)

Item	1995 Supplemental Request		
	Pos.	FTE	Amount
Presidential Initiatives:			
Counterterrorism Center			
Management/Analytical Staff	25	3	$325
FBI Digital Telephony			
Development/Equipment	...	...	$6,500
Development staffing	31	3	$1,975
Counterterrorism and Counterintelligence Fund	...	...	$6,200
Conduct Terrorism Threat Assessment	...	...	$2,500
Subtotal, Presidential Initiatives	56	6	$17,500
Oklahoma City Extraordinary Costs:			
FBI	...	...	$3,000
USAs	...	...	$2,034
USMS	...	...	$2,521
Reestablish DEA Office	...	...	$3,000
Subtotal, Oklahoma City Extraordinary Costs	0	0	$10,555

DEPARTMENT OF JUSTICE
FY 1995–1996 OKLAHOMA CITY/COUNTERTERRORISM
SUPPLEMENTAL AND AMENDMENT REQUESTS
(Dollars in thousands)

Item	1995 Supplemental Request		
	Pos.	FTE	Amount
Enhanced Counterterrorism Efforts:			
FBI Terrorism Investigations:			
Agents	...	...	...
Support	169	17	$800
Special surveillance groups	231	23	$1,300
Counterterrorism reward payments	...	...	$5,000
FBIHQ Command Center	...	...	$10,000
U.S. Attorneys Terrorism/Violent Crime Prosecutions	76	7	$2,000
Criminal Division	...	...	...
FBI Technical/Tactical Operations			
Technical Support Center	...	...	$1,600
Technical Support Center staffing	...	...	...
Tactical Operations	...	...	$6,600
Tactical Operations Staffing	38	4	$2,100
Enhanced Security for USA, USMS Offices/Courthouses	...	...	...

DEPARTMENT OF JUSTICE
FY 1995–1996 OKLAHOMA CITY/COUNTERTERRORISM
SUPPLEMENTAL AND AMENDMENT REQUESTS
(Dollars in thousands)

Item	1995 Supplemental Request		
	Pos.	FTE	Amount
FBI Forensic Services			
Examiners/technicians/support	...	...	...
Evidence Response Teams	...	...	$2,900
Equipment modernization	...	...	$2,100
FBI Laboratory facility design development	...	...	$1,000
FBI Laboratory facility A&E study	...	...	...
FBI Laboratory facility site preparation	...	...	...
FBI Critical Incident Response Group (CIRG)			
CIRG facility	...	...	$3,000
Hostage/Barricade Database	...	...	$1,000
DOJ Emergency Assistance Fund	...	...	$4,000
NCIC 2000 Violent Gang/Terrorist Organization File	...	...	...
Automation for U.S. Attorneys	...	...	...
FBI Aviation Support	...	...	...
Office of Intelligence Policy and Review	...	...	...
U.S. Attorneys Automated Litigation Support	...	...	...
Subtotal, Enhanced Counterterrorism Efforts	514	51	$43,400
Total, DOJ	570	57	$71,455

DEPARTMENT OF JUSTICE
FY 1995–1996 OKLAHOMA CITY/COUNTERTERRORISM
SUPPLEMENTAL AND AMENDMENT REQUESTS
(Dollars in thousands)

Item	1995 Supplemental Request		
	Pos.	FTE	Amount
Total by Organization			
FBI	494	50	$49,200
U.S. Attorneys	76	7	$4,034
Criminal Division	...	...	...
DEA	...	...	$3,000
USMS	...	...	$2,521
General Administration	...	...	$8,700
Office of Justice Programs	...	...	$4,000
Total, DOJ	570	57	$71,455

51 Attorneys
519 Support
570 personnel

Mr. HYDE. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I was very interested in Mrs. Schroeder's question about technology and I note in his presubmitted testimony, Mr. Sofaer discusses technological research and what was once proposed to be a terrorist defense initiative with studies.

I am concerned that there are a number of items in this bill that at least raise serious questions about civil liberties, some of which disturb me a great deal. Yet there is virtually nothing in the bill that really addresses technological solutions to preventing terrorist activity. And I heard your answer about the Department of Justice, and that is fine. But it is not an initiative. It is not a new effort. And I am wondering what comprehensive efforts the Department is taking to solicit emerging technology in the fight to prevent terrorism.

For example, I recently asked some of the high-tech companies in Silicon Valley just to put out the word on the Internet to percolate ideas among the members of their company on things that could be done. They got back about two pages of technologically feasible things that could be done that would prevent explosions or that would identify potential terrorists in ways that would be more respectful of the Bill of Rights.

Can you lay out what systematic efforts the Department is undertaking to pursue and solicit technological solutions?

Ms. GORELICK. Yes, in fact, this is an initiative of this administration. We have consolidated our research and development on behalf of law enforcement in our National Institute of Justice. We have opened around the country technology centers to make use of defense technologies, technologies coming out of the Energy Department, technologies newly available through industry. And I will give you a couple of examples. We have let a contract for the development of a technology to detect concealed weapons. And that is moving along very quickly.

We are now testing devices that disable the computers in automobiles in order to stop an automobile in its tracks. We have in research and development right now several mechanisms for disabling individuals without use of guns and bullets, ranging from——

Ms. LOFGREN. Actually, we saw a demonstration of some of those at a Crime Subcommittee hearing a while back. I am also wondering about identification of aliens. It is now possible to do that with passports upon entry very effectively through fingerprints that are linear. It is also possible to do that with credit cards and with telephones. Are you looking at those sorts of things?

Ms. GORELICK. We have all along the border, starting in California and working east, a new system for identification of aliens coming across the border via fingerprints that are made by putting the finger up against a computer terminal and that serves to check the individual's record to ensure that an individual is not using a false identification.

So, yes, we are looking at ways of using those technologies.

Ms. LOFGREN. Right now there are little wands that can be used to identify the presence of even a few atoms of a chemical. Those could easily be, I understand, utilized to detect explosives.

Ms. GORELICK. Well, in this bill, as you know, there is a mandate for the use of tagging of plastics explosives.

Ms. LOFGREN. I understand that is to catch the guys after they killed everybody.

Ms. GORELICK. No, no, no, I beg to differ with you. That is actually to detect the presence of plastic explosives. There is another, a provision in the bill to study the use of tagging post explosives.

Ms. LOFGREN. But there is technology that is already available. Why is there no funding to acquire that technology, to improve security at Federal buildings or other sensitive sites with the technology that could prevent explosions?

Ms. GORELICK. We know that the technology is available and we are trying to utilize it to the maximum extent that we can.

Ms. LOFGREN. So you have enough money to acquire all the technology you need?

Ms. GORELICK. No, I am not saying that. I am saying that we are trying to use such technologies as we have available to the maximum extent possible. This bears, I think a longer conversation, and I would be pleased to have it with you. Because we very much believe in the use of technology and the help that it can provide to law enforcement and we don't want to turn our backs on any technological solution to a law enforcement challenge.

Ms. LOFGREN. Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentlelady. The gentleman from Georgia, Mr. Barr.

Mr. BARR of Georgia. Thank you, Mr. Chairman. Ms. Gorelick, I am having a little difficulty determining which bill the administration supports. I have three bills that I have been referring to this morning during the course of the testimony and questioning and that is, of course, the chairman's bill, H.R. 1710, in addition H.R. 896, and H.R. 1635.

Which bill do you refer to or is there another bill when you talk about the administration's position?

Ms. GORELICK. Well, there is the original bill, 896, that was submitted by Congressman Schumer in February. Then—that was supplemented after the Oklahoma City bombing by H.R. 1635, which was submitted by Mr. Gephardt.

Mr. BARR of Georgia. OK and both of those reflect the administration's position?

Ms. GORELICK. That is correct.

Mr. BARR of Georgia. OK. Thank you.

I am having some difficulty, and I think some of my colleagues up here on both sides of the aisle may be also, with regard to the scope of all three of these bills. And I keep coming back, for example, to some of the definitional terms involving terrorism in 1710, and, for example, domestic terrorism as defined in 1635, both of which seem to me to vastly expand the potential reach of Federal law enforcement.

Have you looked at the definition, for example, on page 50, of the bill that we are considering today, 1710?

Ms. GORELICK. Yes, I have.

Mr. BARR of Georgia. As well as the definition of domestic terrorism in 1635 on pages 18 and 19.

Ms. GORELICK. I am not sure that I have sat with them side by side.

Mr. BARR of Georgia. Both of them, and this is part of my concern with the legislation and the matters that we are discussing here, seem to be very, very broad definitions of terrorism. Do you agree with that assessment?

Ms. GORELICK. Well, I have to say that I think they are as broad as they need to be and they have antecedents in the criminal law and in the way in which we have utilized them in the past. That is, the domestic terrorism definition is found in our guidelines. And the international terrorism——

Mr. BARR of Georgia. Guidelines that are currently in use?

Ms. GORELICK. Yes, and that have been for 20 years. And the international terrorism definitions are found in the Immigration and Nationality Act. I have to say, Mr. Barr, I have not sat down and compared these two sets of definitions to those. But in general, I think that they do have a root in current law and practice.

Mr. BARR of Georgia. Well, I agree that they do, but what bothers me is codifying them in statute and their potential reach. For example, if I look at the definition on page 50 of 1710, it says that the term "terrorism" means the use of force or violence in violation of the criminal laws of the United States or of any State and then there is some other language. And I am not even sure that the concluding phrase on line 6 and 7, which is "that appears to be intended to achieve political or social ends by," modifies the entire definition or not. I have some real concerns.

And then I turn to 1635, which you say reflects the administration's position, and the term "domestic terrorism" on pages 18 and 19 seems even broader. It would help me to know exactly where the administration stands on these definitions.

Ms. GORELICK. Well, the gravamen of a terrorist offense——

Mr. BARR of Georgia. I know it puts you at a disadvantage as well, but with the time limitations I would appreciate something from the administration specifically addressing these definitional concerns.

Two other questions. With regard to the use of the military in certain areas that these bills deal with, weapons of mass destruction, for example, it isn't the administration's position, is it, that there is no expertise currently that our Government has other than in DOD to investigate properly weapons of mass destructions; i.e., explosives?

Ms. GORELICK. Is that a question you want me to answer now?

Mr. BARR of Georgia. I would like your thoughts on that.

Ms. GORELICK. We have some expertise, but I think Director Freeh would tell you that if we were to experience, for example, what the Japanese experienced with respect to the use of sarin in the metro in Japan, that we would not, within law enforcement, have the capability to disable or disarm such a device ourselves.

Mr. BARR of Georgia. ATF does not possess the capability to do that sort of operation nor the FBI?

Ms. GORELICK. No, we have limited resources in that regard, and it has been these events that have worried us about our resource.

Mr. BARR of Georgia. Mr. Chairman, I do have one other question. Could I pursue that real quick?

Mr. HYDE. Of course.

Mr. BARR of Georgia. Thank you, Mr. Chairman. Looking back in the context which really brings us here today, to some extent it involves two recent cases. One, the World Trade Center bombing, and, secondly, Oklahoma.

In the World Trade Center bombing, Federal law enforcement was able, very quickly to conduct a very thorough investigation of the case, gather a great deal of evidence very quickly and obviously under existing laws and procedures, and the system was able to bring at least several of the perpetrators to justice relatively quickly and I think very efficiently.

Certainly with regard to Oklahoma, we have just really begun that process, but even in the very early stages, the Government, I would have to say, have been very successful utilizing existing laws and procedures to gather a great deal of evidence, probably much more, I would hope much more than we even know about publicly. Has investigated some individuals and has indicated to the court that the Government has a great deal more on which they are proceeding and they have asked for additional time in which to seek indictments.

And I am left with the following question: Is it the administration's position that current laws and procedures, which very successfully led to the investigation, prosecution, and conviction of the perpetrators in the World Trade Center bombing and which seem to be leading us in the same direction in the Oklahoma case are insufficient? Is the administration concerned that they will not be able to bring the perpetrators of the Oklahoma bombing to justice with current laws and procedures?

Ms. GORELICK. Let me answer that question as briefly as I can and with reference to the earlier question about the definition of terrorism. As Director Freeh very ably testified when he was here before Mr. McCollum's subcommittee, there was a fortuity, if you want to call it that, in both the World Trade Center case and in the Oklahoma City case, that the target of the bomb was a building with a Federal office in it. Had there been a building similarly attacked with no Federal nexus, and the tools used to attack——

Mr. BARR of Georgia. You are getting off into hypotheticals.

Ms. GORELICK. No, no, I am answering directly.

Mr. BARR of Georgia. The question was is there some deficiency in current Federal laws, procedures and regulations and policies that lead the administration to have concluded that a successful prosecution of the perpetrators of the Oklahoma bombing would be impossible?

Ms. GORELICK. Obviously not. I am not going to sit here and tell you that there is a deficiency in our prosecution in Oklahoma City. But what I will tell you is that if there had not been Federal employees in that building, if there had not been a Federal office inside the World Trade Center there could have been a problem. And I just don't think that the people of the United States want to have, whether the FBI can come in and investigate, turn on that fortuity for lack of a better word.

Mr. BARR of Georgia. That is rather simplistic and I don't think really is responsive. I am—I really am somewhat concerned that we are getting into an area here that we may not need to get into

just in my experience and certainly in the World Trade Center bombing case, and I commend our Federal law enforcement and the U.S. attorney's office and the Department. We had, and currently have, tools that seem to me and to a lot of people to be very adequate.

Ms. GORELICK. Let me suggest that if you really have concerns in that regard, given your background as a Federal prosecutor, that it would be very worthwhile for to you sit down with me and Director Freeh and discuss those issues because I believe that you, in particular, should see the need for this kind of overarching legislation with all due respect.

Mr. BARR of Georgia. Thank you, Mr. Chairman.

Mr. HYDE. Thank you. Before terminating this morning's hearings, I do have a question.

Mrs. Gorelick, you heard Congressman Skaggs' testimony regarding his bill and the creation of an Inspector General to assure constitutional activities by law enforcement in counterterrorism investigations. I expressed my misgivings about that. Can you give us an off-the-cuff opinion?

Ms. GORELICK. Yes, my off-the-cuff opinion is to share your misgivings.

I would have real concerns about creating an entity accountable to nobody but the President of the United States, replacing the accountability of the Attorney General and the Director of the FBI, to receive huge amounts of information on wiretaps, on searches, on any requests for information in a counterterrorism area, and, quote, unquote, to superintend those investigations. And particularly with what would happen within the Department, where there might be a disagreement between such a person and the person responsible for the carrying out of an investigation.

Given the apparent authority in the legislation, which I have only just had a chance to glance at, to make public the results of a dispute, is essentially to stop an investigation in its tracks. And, if I have learned anything from my tenure in government, it is that there needs to be a system of accountability and particularly in law enforcement, a system of command. And, if you in your oversight, don't like what we are doing, then you have many means to address those concerns I would suggest to you that in lieu of something like this, great oversight, questions about what we are doing, the techniques we are using, are wholly appropriate.

Mr. HYDE. Well, I agree totally with the gentlelady and I would add, and this is very parenthetical, those are some of the real problems with the independent counsel statute, the lack of accountability. And we tried, oh, how we tried to make it a useful statute, but the gentlemen in the other body didn't agree with us. And I intend, before I die, to revisit that and try and have a workable independent counsel statute with some accountability to somebody. And, hopefully, we can do that. But, I thank the gentlelady.

And, it is now about 2 minutes to 12. We have another panel I regret we didn't get to this morning. And I would suggest that we recess until 1 o'clock, which is 1 hour, when we can hear Judge Sofaer and General Barr, and then give them such questions as we can formulate and let them go. So, the committee is in recess until 1 o'clock.

[Recess.]

Mr. HYDE. The committee will come to order.

The next witnesses will be the former Attorney General, William Barr, and former Federal judge and counsel to the State Department and many other important things.

Abraham, we welcome you.

I regret that there are not more Members present. We moved up the time until 1 o'clock, and we do have a working quorum, and your testimony will be carefully reviewed, because you two are very important people and opinions on this very issue.

So William Barr served as 77th Attorney General of the United States from 1991 to 1993. And prior to that, he was Deputy Attorney General and Assistant Attorney General for the Office of Legal Counsel in the Justice Department.

The Assistant Attorney General for the Office of Legal Counsel serves as the chief legal advisor to the Attorney General, the Department of Justice. Mr. Barr has substantial experience with the legal questions associated with national security terrorism and espionage. He has been a partner with the law firm of Shaw, Pittman, Potts & Towbridge in Washington. And is currently senior vice president and general counsel for GTE Corp.

Mr. Barr, if you would proceed.

Mr. SCHIFF. Mr. Chairman.

Mr. HYDE. The gentleman from New Mexico.

Mr. Schiff.

Mr. SCHIFF. Since I am making up the working quorum, may I be recognized for 30 seconds before listening to our distinguished witnesses?

Mr. HYDE. That is the least the Chair can do out of gratitude to Mr. Schiff.

Mr. SCHIFF. I appreciate that.

I will speak fast since someone else has just come in. I just received notice of the intent to mark up this bill on Wednesday. And it is exactly when the subcommittee that I Chair in the Science Committee is marking up legislation. So I may miss a good part of this markup.

With respect to amendments I had mentioned earlier possibly offering, two are already in the bill from the other body and we may just discuss them in conference. And the bill that we discussed at some length, the Skaggs-Schiff bill with respect to the possible Inspector General on Civil Liberties involving counterterrorism investigations, I found out that bill was also referred to the Government Relations Committee. Because I would not want to see a sequential referral of this bill, I will not offer it but make a point that I do believe in it and perhaps separately we could take it up.

Mr. HYDE. I thank the gentleman for his announcement. So you are not going to push the IG amendment here?

Mr. SCHIFF. No, it is my understanding, Mr. Chairman, that if it is incorporated in your bill, that would force a sequential referral since our bill was also referred to Government Relations.

Mr. HYDE. That is fine.

Mr. SCHIFF. And I think none of us here wants sequential referrals. I noticed in your other comments, you are doing your best to avoid it, and I want to cooperate in that.

Mr. HYDE. Thank you, I appreciate that. Very good.
Mr. Barr.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND GENERAL COUNSEL, GTE CORP.

Mr. WILLIAM BARR. Thank you, Mr. Chairman and distinguished Members of the committee.

I am honored that you invited me here today to discuss terrorism and H.R. 1710.

I think it is possible to exaggerate the terrorist threat we face. I do feel that there are a number of factors today that do mean that we are going to find that terrorism, both from foreign and domestic groups and individuals, is a persistent challenge that we face, and while we have substantial resources and authorities now to combat it, I do think that there are some measured and reasonable steps that we can take that will markedly increase the FBI's ability to deal with terrorists, to detect them, to interdict them and ultimately to perhaps deter them.

And I know that there are some who believe that you cannot deter terrorist groups, and I know from my own firsthand experience at the Department of Justice, that there are some groups in the world that have decided that it is not best to carry out terrorism in the United States because of their perception of the vigor and effectiveness of the FBI here at home. And, therefore, I think it is critical for all of us to ensure that we are doing whatever can be done to keep our guard up consistent with our constitutional principles and our cherished freedoms.

I think 1710 is a superb piece of legislation. I think it is balanced and reasonable. I think it will substantially enhance our ability to deal with terrorism. But at the same time, it does preserve our free traditions and our constitutional liberties.

It draws upon some important proposals that were made as early as the Bush administration as well as proposals made by this administration. It has some new provisions, and in several cases, I think it significantly improves upon previous proposals.

Two broad points I would like to make at the outset, and one is sort of echoing you, Mr. Chairman, I don't think this is—as it is sometimes presented in the media—a rush to judgment or knee-jerk reaction precipitated by recent events. These ideas have been around for years and carefully considered, and this bill reflects the collective judgment of successive Republican and Democratic administrations and the people in the Department of Justice and other law enforcement agencies about improvements that can be made that will assist us.

The second overarching point is there is no diminution that I can see of our constitutional liberties in this legislation.

When American citizens or domestic targets are involved, the fourth amendment requirement of probable cause remains in effect and there is no effort here to circumvent that standard. Most of the investigative tools, the new investigative tools that are dealt with in this legislation are directed at foreign groups, foreign agents, foreign counterintelligence—foreign intelligence and terrorist activities.

I would like to just run over a few specifics. Resources are provided for in this legislation. I think that that is critical. I think that the FBI has been sorely treated on the resources front over the past few years, and would have been in very bad shape indeed had it not been for the bipartisan effort here in Congress last year to increase the FBI's budget. And I think what we need is a sustained commitment to ensure that the FBI has the resources it needs.

I was shocked during Desert Storm when I had responsibility for conducting the counterterrorist activities here in the United States, that it would take us longer to get a response team to a hostage crisis occurring here in the United States, far longer, than it would to get the Delta Force any place in the world.

Up until last year, or a little over a year ago, we did not have the capacity here in the United States to rescue hostages on a 747 in the proper manner because we did not have sufficient resources. Now that has been made up for recently and we do have the capacity today.

But I think what this points out is—and that was a situation that existed during Desert Storm, what that points out is we can't allow this to be a one-shot deal. We have to make sure that we have the resources. It is important that we are providing for the digital telephony aspect here and ensuring that we will still have the ability to conduct electronic surveillance in a digital environment.

I think it is still important for this committee to look at the whole technology areas, as a number of Members have mentioned. Right now, I think it is sort of a mess inside the executive branch. You have all of the law enforcement agencies with their budgets doing duplicative systems, and so forth. There is a need to create some kind of a mechanism where the technology, the R&D budget are reviewed and coordinated so that we are putting our money and our resources into some of these very promising technologies, and that is not being done within the executive branch today.

On the investigative techniques, I would just like to mention two of them. As I say, most of them, the ones relating to the common carrier records, the consumer records, and what is the third there—well, there is a third one, all relate to foreign counterintelligence reviews.

The ones that relate to wiretapping of domestic entities or individuals are really nothing more than the application of existing law with respect to other criminal activity and ensuring that it applies to counterterrorist activity; namely, the emergency wiretap authority for 48 hours. If there is an area where the emergency wiretap is appropriate, it should be from the counterterrorist environment where the activity is directed at inflicting substantial damage to property or human life.

And also the roving, the so-called roving wiretap authority, which is perfectly consistent with the fourth amendment protections, and just recognizes the way technology behaves nowadays and recognizes that it is not a telephone, an inanimate object, that has the privacy right. It is an individual that has the privacy right, and once you have the probable cause to believe that an individual

is engaged in criminal activity, you should be able to intercept that individual's communications.

I think the way posse comitatus is dealt with in this legislation is excellent. As you know, Mr. Chairman, I feel that the existing law would cover the kind of technical support we are talking about. But I also believe that the Defense Department would require some kind of specific explication of that in statute, and I think this statute does a good job of limiting the military involvement which we all think is an important thing to do, but, at the same time, making it clear that the resources of the military should be available in that kind of catastrophic risk environment.

A few words about the immigration provisions. Again, I think the provision in this bill are very balanced and sound, and very much needed. I think that if the American people knew how the immigration laws tie the hands of law enforcement officials in dealing with foreign terrorism, they would be shocked and dismayed.

The provision that draws the most fire is the special court provision. I do think it is necessary. As you know, a variant of this was proposed under the Bush administration. I think this bill improves upon that and contains some additional protections for permanent resident aliens and I think that is an improvement.

I would like to suggest to the committee that one area that might be profitable to look at that could be a good programmatic way of dealing with foreign terrorism that wouldn't require really changes in the law—just in the way we operate—has to do with screening people overseas.

One of the screens that we have traditionally had was granting of visas. For someone to come to the United States, they had to go into a State Department consular office and get a visa with somebody eyeballing and checking out an individual before they came to the United States.

Now, as you know, for most of the large countries in the world and the industrialized countries in the world, we waive visas through the visa waiver program. So people coming from those countries do not have to get a visa.

Over 70 percent of the people who arrive by air to this country come from just six airports in the world, and if we put some INS presence in those airports to do prescreening of passengers, which those countries would love to see because it is considered a boon to tourism. And we have this now from Canada. You know that you don't have to go through the full-blown immigration and customs in the United States because you are screened right there in Toronto or Montreal.

If we did that in those six airports, then we could as a substitute for the visa process and checking people against computer data banks, we could greatly cut down on the number of people that show up in this country that have to be excluded and deported and detained, and so forth, because they shouldn't be coming into this country.

The main obstacle to this, and I hope Abe Sofaer doesn't jump at me for this, has been the State Department who doesn't like to have a bunch of people from other agencies stationed overseas. That is the bureaucratic impediment to it. But it would be a very cost-efficient way and save a lot of costs, because you wouldn't need

detention space, but would also add to our security, and I would encourage the committee to look at that.

With that, let me conclude and just say that I think, echoing you, Mr. Chairman, this is a bill that really should enjoy wide bipartisan support. This is not an area for politics. This is a very measured, carefully drawn bill that strikes the right balance.

Mr. HYDE. Well, I certainly thank you, Mr. Barr, for those excellent words.

[The prepared statement of Mr. William Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND GENERAL COUNSEL, GTE CORP.

Dear Mr. Chairman and distinguished members of the House Judiciary Committee, it is an honor to have been invited here to testify about the critical topic of terrorism and to express my strong support for H.R. 1710, the "Comprehensive Antiterrorism Act of 1995." The legislation, in my view, should enjoy wide bipartisan support.

Recent events have dramatized a fact that the American people, I think, have intuitively understood and law enforcement has known for a long time: the United States is not immune from terrorist attack. I agree with these experts who foresee a continuing, and probably heightened, threat of terrorist attacks by both foreign and domestic individuals and groups. Of course, we should be careful not to exaggerate or sensationalize the risk; I think it is unlikely we will undergo a sudden wave of large-scale attacks. But, a number of factors have coalesced in recant years which do presage that terrorism will be a persistent danger. These will run the gamut from isolated fanatics who plant a crude pipe bomb to well-organized groups capable of carrying out catastrophic attacks.

There is no doubt that American law enforcement and intelligence agencies have substantial resources and capabilities to deal with the terrorist threat today. Indeed, American agencies, particularly the FBI, have an enviable record to date in addressing terrorist threats. Nevertheless, in my view, existing resources and authority are not fully adequate. While I see no need for sweeping changes, there are clearly additional reasonable steps that should be taken to enhance our ability to deal with terrorism. Obviously, we cannot provide absolute security. But I think there are prudent steps we can take today that will markedly increase the FBI's ability to detect and interdict terrorist plans before they are carried out. Ensuring that our anti-terrorist capabilities are robust will also help deter some terrorist activity. From my own experience at the Department of Justice, it was clear to me that there are foreign groups who, until now, have chosen not to carry out attacks in the United States, but have focused elsewhere, because of their perception of the FBI's vigorous and effective anti-terrorist capabilities. I believe it is critical that whatever can be done to keep our guard up should be done, consistent with our constitutional principles and our free traditions.

In this regard, I believe H.R. 1710 is an excellent bill. It is a balanced and reasonable proposal that will substantially enhance our ability to counter terrorism, while at the same time preserving our cherished liberties. The bill draws upon some important proposals made under the Bush Administration, as well as proposals made by the current Administration, and in several cases significantly improves upon them.

Before I get into some specifics, I would like to make a few overarching points.

First, this is not, as some suggest, a knee-jerk or ill considered overreaction to a specific event. Most of these proposals were not thought of overnight. By-and-large most of them have been on the table for some time and reflect the combined wisdom and experience of both Republican and Democratic Administrations who have had to grapple with these problems. Consequently, the proposals are not sweeping changes, but measured and modest steps.

Second, the proposals do *not* involve any erosion of constitutional liberties. On the contrary, they are designed to ensure that the government carries out its constitutional obligations to protect Americans in the exercise of their freedoms and to preserve the structure of our free government. There is *no* change in the constitutional standards that protect citizens from improper government intrusion into their private affairs.

And *third,* having worked closely with the FBI and the personnel at the Department of Justice, I have the utmost confidence that law enforcement agencies today will carry out these responsibilities with integrity and with sensitivity for constitu-

tional liberties. I think the leadership and the rank and file are men and women who are deeply dedicated and committed to our Constitution and to protecting and serving the citizens of this country, and they have no desire to harass or to intrude into the private affairs of law-abiding and nonviolent political groups.

Now let me turn to some specifics of H.R. 1710.

Title III of H.R. 1710 ensures that certain appropriate investigative tools are available to law enforcement in terrorism cases. In my view, none of these provisions involve an erosion of privacy rights. For the most part, these provisions simply ensure that perfectly constitutional and sensible investigative techniques that are authorized in various other types of cases are equally applicable to terrorism cases. In all cases, these proposed authorities conform to constitutional guarantees.

I have noticed, for example, criticism of the proposal in section 308 to allow temporary emergency wiretaps in terrorism cases—with the suggestion made that this represents a wide expansion of powers. These criticisms are unjustified. Emergency wiretap authority exists under current law with respect to a range of criminal activity, including "conspiratorial activities characteristic of organized crime." 18 U.S.C. § 2518 (7)(a)(iii). This existing authority is subject to substantial safeguards, including the requirement that the government must promptly establish "probable cause" and obtain a court order. Existing emergency authority has been sparingly used and I am not aware of any indication of abuse. It is clearly appropriate that the same emergency authority that applies with respect to Mafia conspiracies also applies to terrorist conspiracies which, by their nature, are directed at the destruction of life and property.

Similarly, section 309's authorization of "roving" wiretaps is reasonable and fully in accord with constitutional safeguards. While this concept sounds sinister, it is really quite sensible and in many cases essential. In earlier days when the wiretap statute was first enacted, wiretaps were targeted at a specific telephone. Today, however, with increased mobility, cases arise where the government clearly has "probable cause" to believe that a particular individual is involved in criminal activity (and therefore as a constitutional matter, has the right to intercept the individual's communications) but cannot establish in advance the particular phones that individual may use. Section 309 simply allows the government to obtain a warrant that authorizes following the targeted individuals' communications rather than staying anchored to a particular telephone. Still, section 309 imposes safeguards by requiring pre-approval by a top Justice Department official and a showing that it is impractical to identify a particular phone. This is perfectly in line with constitutional protections. After all, the right to privacy guaranteed under the Fourth Amendment is an *individual's* right to privacy; it is not an inanimate object's (a telephone's) right to privacy. Section 309's concept of roving wiretaps targeted at particular suspects rather than specific phones should not cause alarm.

There has been much comment on the proposal to amend the Posse Comitatus Act to allow military assistance in terrorism cases involving chemical or biological weapons. On the one hand, the tradition that the army should not directly carry out law enforcement actions is one we all treasure; on the other hand, I can tell you, based on my own direct experience, that the threat of biological or chemical terrorism is a real one and that law enforcement would likely need to call on the technical and logistical assistance of the military to deal with any future attempted attack. Section 312 of H.R. 1710 is a wise and carefully crafted provision that strikes the right balance. It continues to prohibit direct law enforcement actions by the military, while still allowing "technical and logistical assistance." It is thus faithful to the principles of the Posse Comitatus Act, while recognizing the reality of our obligation to take every practical step to prevent a biological/chemical catastrophe. My own view is that this provision really only clarifies existing law; it reflects how the Posse Comitatus Act would be interpreted today in the event of an attack. Moreover, it is comparable to other existing exceptions to the Posse Comitatus Act that Congress has already authorized for counter narcotics activities. 10 U.S.C. §§ 371–375.

Title V of H.R. 1710 contains a number of important provisions relating to the immigration laws. Existing law simply does not give law enforcement the tools to deal effectively with alien terrorists who are either present in or entering the United States. I learned this first hand during Desert Storm and several other episodes while I was at the Department of Justice. The reforms proposed in H.R. 1710 are similar to ones initially proposed under the Bush Administration and now by the Clinton Administration.

The provision that has drawn the most fire is the special court for removing alien terrorists. This proposal grew out of actual cases. It is imperative we deal with the Hobson's choice that exists where we have clear evidence that a particular alien in the country is a dangerous terrorist and, yet, we are relying on information that we cannot disclose without creating equal danger to the American people and dis-

closing sources that we may need to continue to monitor these terrorist groups. Section 601 of H.R. 1710 sets forth a very balanced and reasonable way of dealing with that Hobson's choice. Indeed, Section 601 adopts safeguards beyond those proposed by the Administration and well beyond what is required by the Constitution. In the case of a permanent resident alien, an attorney for the alien would be permitted access to the classified information upon which the Government's decision was based. This should remove any objection to this removal procedure.

In sum, H.R. 1710 would significantly enhance the ability of law enforcement to deal with both foreign and domestic terrorism. It does this without undermining our cherished constitutional liberties. It deserves the bipartisan support of this Congress.

Mr. HYDE. Our next witness is Abraham Sofaer who served as legal adviser to the Department of State from 1985 to 1990, and previous to that, he was U.S. district judge for the Southern District of New York.

He was a professor of law at Columbia University Law School and currently he is a George P. Shultz Distinguished Scholar and Senior Fellow at Stanford University's Hoover Institution

Welcome, Judge Sofaer.

STATEMENT OF ABRAHAM D. SOFAER, GEORGE P. SHULTZ DISTINGUISHED SCHOLAR AND SENIOR FELLOW, THE HOOVER INSTITUTE, STANFORD UNIVERSITY

Mr. SOFAER. Thank you, Mr. Chairman.

It is a privilege to be here to testify before you and this distinguished committee.

I have submitted written testimony in advance of my testimony here today. So I will try not to repeat what I have said there, but merely summarize it and perhaps stress the two points that I consider to be the most important points that I, at least, feel I can contribute.

Law reform is critical in the fight against terrorism and Bill Barr has been the leader of the Nation, in effect, in reforming the law, both domestic and international, along with Congress.

My own efforts in the State Department were focused on working to change international law, or to at least fight for interpretations of international law that made sense to States that believed that people should not be using violence to bring about political objectives.

Violence, it turns out, has in the last 30 or 40 years, or perhaps even longer, Mr. Chairman, been treated as permissible, almost, in many international legal circles. As long as the purposes of the violence were political.

There was almost a willingness to tolerate violence, to understand it, because of the causes of misery, et cetera, in the world, that led to violence according to many people who spoke in the U.N. on this subject, particularly during the 1960's and 1970's.

As a bipartisan matter, we have fought those notions. Senator Moynihan and Ambassador Kirkpatrick, for example, were leading fighters against this idea. And during my time in the State Department, I was spurred on, I might add, by the story I give in my testimony about how Secretary Shultz almost threw me out of his office physically when I informed him that piracy, the concept of piracy in international law might not cover the *Achille Lauro* incident because it was politically motivated, as opposed to financially motivated, according to a Harvard Law School study in the 1930's,

which many contended was adopted and implemented and read into the international conventions on the subject.

So, we worked for change, and we got the Maritime Convention passed, with Egypt's and Italy's help, which makes illegal all maritime acts of violence, regardless of purpose. We also changed the laws of extradition materially in many treaties to eliminate or narrow the political offense exception.

We did a number of things that gave us the ability to bring the U.N., even, to the point where last December in a little noted fact in the world, but nonetheless for us who participated so vigorously in this effort, a significant fact, the U.N. General Assembly voted to outlaw all forms of terrorism, regardless of cause. And, obviously, we are not relying on the U.N. to tell us that is the right thing to do, but it is nice to see the U.N. come around to our point of view on that subject.

The appalling pattern relating to terrorism is now, I think, corrected in most respects, but not with regard to the use of force. There is still out there, Mr. Chairman, a large number of nations and scholars—particularly scholars, less so political leaders—who take the view that the self-defense power of a nation is very limited, and we in the Reagan administration addressed this issue, because we were primarily concerned in connection with terrorism with prevention above all else.

The key point I suppose of my testimony, in fact, Mr. Chairman, is that with acts of terror of the dimension that we have experienced recently in the World Trade Center bombing and in the Oklahoma bombing, prevention is what we should be seeking above all else.

It is important, but not necessarily significant that we have caught the perpetrators of the World Trade Center bombing. I know I say that with some expectation of being clobbered by people who think that it is a great story that we run them down and by fine investigation we found out who did it and we put them in prison.

But the fact of the matter is they almost blew the World Trade Center building down into the streets of Manhattan. First of all, it was a catastrophe, as it was. But could you imagine the catastrophe that could have been caused and could still be caused by these kinds of people?

So, the most wonderful things about this bill—and, in fact, I think it is a quality that permeates this bill, are the elements that are preventive. I noted that Congressman Barr was concerned about some of the provisions in the bill because they seem to be unnecessary. I agree that most of these provisions probably are technically unnecessary in the sense that existing law could be read, might be read, probably would be read in differing degrees of certainty, to cover the conduct.

But why take the chance? Surely we can have investigations and prosecutions in many situations where we don't have jurisdiction to prosecute. But how about prevention? Surveillance: the reason the FBI engages in surveillance is not just to make cases, it is to keep cases from happening. It is to capture people before they kill Americans and destroy our property.

The same thing is true of immigration. And I can only tell you, Mr. Chairman, and I have to remind you that the leader of the group, the alleged leader of the group that planned the World Trade Center bombing, that planned the bombing of the United Nations in New York, was in this country because of the failure to enforce our immigration laws efficiently.

And, so, there was a failure to prevent in that instance. And I also read in the press that when people were arrested for the Kahane murder, there were documents in Arabic that referred to some of these schemes before they occurred. And that there weren't Arabic translators available to the FBI to translate these documents.

I don't know what the story is on that, Mr. Chairman, I have only seen it in the newspapers and I know the unreliability of such stories. But the fact is that that is a key area in which I would recommend the committee look, perhaps not in passing this bill, because you don't have the time. But certainly at some point to determine how well is the FBI conducting its primary mission of prevention?

And that is why, Mr. Chairman and members of the committee, I mention at the end of my testimony the need for looking at this technology dimension, which Congresswoman Lofgren also mentioned while she was here. When I was in the State Department, I was amazed that we seemed to be very primitive in our approach to preventing terrorist acts.

And I got briefed on what was going on in the scientific area, and frankly, Mr. Chairman, I have not seen publicly discussed some of the things I was told about in 1986, told about as being really there. And I must say, Mr. Chairman, in all honesty, I found a lot of resistance to my inquiries. I was sort of pushed away from the subject. Not because I was not trusted, but because there was a sense I had that this is none of your business, this is being done in a military arena and we are taking care of it and it is being—well, I haven't seen any evidence of it.

Mr. HYDE. Judge, would you permit a comment?

Mr. SOFAER. Yes, sir.

Mr. HYDE. I hate to interrupt you, but you are on a very important point. We all feel uncomfortable when we tread where angels fear to go, and some of these areas are very sensitive. But I was just looking at correspondence from the Justice Department. Today, there are 433,414—that is my recollection—cases pending in a backlog on refugees.

Now, in an era of computers, supercomputers, and technological advancement, to have a—and that backlog has been standard for years. About 400,000-plus cases undealt with, pending, backlog: that is crazy. And I just want you to know this committee is going to exercise oversight in a vigorous way and we welcome suggestions from you.

Mr. SOFAER. I think General Barr has just made a suggestion that is brilliant. He says that we should, in the seven major airports around the world, out of which we get 70 percent of all the people that come to America, put in a technologically up-to-date system for screening people so we don't have literally thousands of people coming to America who don't belong here. And then we have

to build facilities to put them in and spend all kinds of money that we would not have to spend by having an up-to-date system. I would think, Mr. Chairman, just one or two major changes like that could have a huge impact.

Mr. HYDE. Professor or Judge Sofaer, that bill, as it will be drawn, will be known as the Barr initiative.

Mr. SOFAER. Good, I approve. So I won't go further in that. But you would say that I particularly urge you to read the portion—switching now from the notion of prevention through technology and law changes, to the notion of prevention through deterrence. I would like you to look at my testimony with regard to a hypothetical bombing of the World Trade Center dimension.

The people who bombed the World Trade Center are irrelevant. They are totally irrelevant, Mr. Chairman. There are people willing to be blown up in bombings for causes all over the world, just as there are soldiers willing to run up a hill and get killed for their countries.

I am not comparing them to honorable soldiers doing honorable work, but the fact is people can be motivated by patriotism, by religious zealotry, or whatever, to let themselves be killed, let alone let themselves fall into the tender trap of the U.S. Immigration Service, or the U.S. Department of Justice where we haven't been able to execute anybody for so many years. But even the death penalty is not a deterrent for this kind of thing, Mr. Chairman. We have to go back and get the people who send people here to kill Americans or kill Americans abroad.

It is not enough to consider terrorist acts in the United States as being the only thing that Americans are concerned about. The FBI is concerned about killing hundreds of Americans in a plane abroad or in an ambassadorial facility.

And we need to get every level of participant in the terrorism against America all the way up to the Nation itself. And this principle is not a partisan principle.

I was very happy to see President Clinton bomb Iraq, and the rationale that he gave when he bombed Iraq precisely tracked the five principles that we had laid out in the Reagan and Bush administrations for the exercise of self-defense, in situations where we have state-sponsored terrorism.

You have civilians running around acting in accordance with the wishes of an intelligence service, acting in accordance with the wishes of head of state, and they try to kill an American because he is an American.

He happened to be a former President, but it was an attack on America because of that, and that is what President Clinton said. And he was right. And we have the right to use force that is necessary and proportionate in those situations to be able to feel confident that those acts will be deterred.

And the reason I say this, Mr. Chairman—and I will end with this point—the criminal law is not a suitable vehicle for achieving the end of deterrence in state-sponsored terrorism.

We should not—we cannot use a criminal court to prove that a state has attacked us. The kinds of evidence that we get about state-sponsored terrorism is often not usable in a criminal court.

And even if it were usable, the President of the United States might not want to use it for countless reasons. Does that mean that we should be left without any capacity to deter that kind of criminal conduct?

I would say, sure, it is criminal to attack America and Americans. But it is much more than criminal. It is war. And it is a violation of the U.N. Charter, and it is something that we have to do much more to counter than merely prosecute people. And what scares me, what scares me about the FBI is not that the FBI is not competent. They are. Or vigorous or great patriots. They are.

What scares me is that they have historically done their work in the context of criminal cases, making criminal cases.

It is only recently, and Bill will confirm this, that they became involved in international affairs as a routine matter, I supported Attorney General Meese's effort to establish a DOJ office in Rome. That was the first DOJ office.

We need to get the Department of Justice thinking much more along the lines of performing a national security service and focusing, as I have said, above all on prevention.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sofaer follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER, GEORGE P. SHULTZ DISTINGUISHED SCHOLAR AND SENIOR FELLOW, THE HOOVER INSTITUTION, STANFORD UNIVERSITY

Chairman Hyde, and members of this distinguished committee. It is a privilege to testify before you on the Comprehensive Antiterrorism Act of 1995.

My prior experience, relevant to this subject, began with my service as a Federal prosecutor under Robert Morgenthau in the Southern District of New York, between 1967 and 1969. Terrorism was a substantial problem at the time, both internationally and domestically. As a district judge between 1979 and 1985, I often passed upon the sufficiency of requests for wiretaps and other forms of intrusions. From 1985 to 1990, I served as legal adviser to the Department of State, in which capacity I gave legal advice to the Secretary of State and others about terrorism, and also testified before Congress, wrote articles, and gave speeches on the subject.

The relationship between law and terrorism is a subject that has long been one of my abiding concerns. I joined George Shultz in the State Department on June 10, 1985. Only four days later, TWA 847 was hijacked. We all worked hard to try to get our people back safely, without compromising our principles. I'm sure your hearts still ache, as mine does, for young Robert Stetham, who was murdered in cold blood. We faced other horrible assaults as well—among them, the seizure of the *Achille Lauro,* attacks at the Rome and Vienna Airports and at the La Belle Discotheque in Berlin, hostage-taking in Lebanon, and the bombing of Pan Am 103. Many innocents were killed in each of these attacks.

I vividly remember being called up to Secretary Shultz's office after the *Achille Lauro* was seized. He asked me what laws were available on which we could rely to try to get the culprits arrested, extradited and prosecuted. I told him then that it was uncertain that the seizure would be considered "piracy," because a Harvard study in the 1930s had suggested that "politically" motivated seizures of vessels should not be treated as piracy, a suggestion that some claimed had found its way into governing international conventions.

Secretary Shultz was outraged. "What good is the law?" he exclaimed, almost throwing me out of his office. His reaction worsened when the Italians helped Abu Abbas escape, instead of extraditing or prosecuting him. The Secretary was right, of course, and his outburst led me to examine the manner in which international law treated terrorism.

I found an appalling pattern in international legal doctrine of inordinate tolerance towards political violence. I described this pattern in an article published in *Foreign Affairs,* and spent the next four years working to reverse these rules and attitudes.

We accomplished a great deal. with the leadership of Italy and Egypt, we developed a new treaty that made criminal all forms of maritime violence. We reversed the "political offense" doctrine in many of our extradition treaties with foreign states. We developed understandings with our allies that rejected the most objec-

tionable aspects of the protocols additional to the Geneva Protocols on the Laws of War. Perhaps most significantly, we appear to have succeeded to some extent in delegitimizing the abhorrent view that acts of terror can be justified by their causes. After years of fighting this notion, going back to the articulate leadership in the United Nations of Senator Moynihan, Ambassador Kirkpatrick and others, the General Assembly, in December 1994, adopted a resolution condemning all acts of terrorism, regardless of cause. While little that the UN does is unambiguous, this resolution lays to rest some thoroughly disreputable notions.

Improvements in international law relating to terrorism have had positive consequences. Terrorists are more frequently arrested, extradited, and prosecuted than ever before. Thanks to the work of Ed Meese and his successors, the Department of Justice has played an increasingly effective role in combating international terrorism. I worked with Attorney General Meese in getting the Department of State to support the first DOJ office abroad, in order to regularize and make more efficient its routine international operations. I strongly support the continuation of this process, and of the stationing of FBI personnel in key locations. Congress has also played an important role, providing a jurisdictional basis for arrests and prosecutions in connection with many forms of terrorist activity.

Law reform is also needed domestically. The pending legislation contains many useful and some essential provisions. It has my enthusiastic support. In general, moreover, I support the committee's version of provisions suggested in the Department of Justice bill. This should not be surprising. The draft will improve as it moves toward adoption, and I would expect the department to cooperate fully with this committee.

I will avoid covering the obvious, and focus instead on my few, but real, concerns with the proposed legislation. Then, I will discuss briefly what I regard as the most serious national security issue facing America today: the threat of state-sponsored attacks, and particularly the use of weapons of mass destruction, against American nationals and property.

My principal concerns with the proposed legislation relate to its expansion of Federal criminal jurisdiction and its investigatory provisions. First, it would be entirely appropriate to extend Federal jurisdiction to all serious attacks on Federal employees if the need for such a law is established. As far as I can tell, however, the need for such a law is purely theoretical. Our states are doing a good job of prosecuting murders and attempted murders. Congress should add to the burden of the Federal courts and prosecutors, and to the number of Federal prisoners, only where a need exists to do so. Most of the extraterritorial provisions conferring jurisdiction are sound, and needed. I doubt, however, that the mere fact that a U.S. national was or "would have been" aboard an aircraft that is attacked is a sufficient basis for jurisdiction. Even if it is technically sufficient, it would seem preferable as a matter of comity and practicality to restrict the cases in which the U.S. asserts jurisdiction to those in which the American national is actually targeted because he or she is an American.

In sections 301, 308 and 309 the bill enhances the potential use of wiretaps in terrorism investigations. I frankly doubt that these provisions are necessary, but the committee should accept the Government's request for these clarifying amendments. The bill's modification of the exclusionary rule is also warranted as a general principle. The use of illegally seized evidence would still be precluded, but only where the seizure involved bad faith. Any deliberate violation of a persons rights should be considered as bad faith.

Even if the committee agrees to adopt the provisions proposed by the Government to enhance their investigative capacities, an inquiry should nonetheless be made into whether the new authority could have helped prevent the recent bombings. I frankly doubt it. My experience as a prosecutor and Federal judge often exposed me to the process by which Federal investigators obtain approval for wiretaps and other forms of searches. Among the most memorable of these experiences was serving as the judge who reviewed the warrant and wiretap requests of the government in a major terrorist investigation involving three different organizations. The operation was, in fact, supervised by then-assistant U.S. Attorney Louis Freeh. Director Freeh undoubtedly recalls that he had ample authority in that investigation to pursue and prove and prevent criminal activity, without any of the new powers now being sought.

In this regard, the committee should check on the types of activities the FBI was in fact conducting, even before the tragic Oklahoma City bombing. My guess is that you will determine that the FBI has been able all along to infiltrate and surveil groups which can reasonably be suspected of supporting violent acts against Federal officials and/or facilities. In connection with the bombing of the World Trade Center, the press contains some discussion of certain documents which the FBI seized but

failed to translate which could have provided important information before the bombing occurred. The committee should form a judgment on that matter, based if necessary on evidence received in closed session. Such an inquiry might well reveal, in fact, that the Bureau has for some time actively investigated "hate groups" and "militias," and that the additional powers conferred in the committee's bill may be desirable, but are insufficient in that they do not address deficiencies in the Bureau's handling of the information it obtains.

The most important contribution of the pending legislation is its focus on the prevention, not merely the prosecution and punishment, of terrorist acts. As terrorist attacks become more deadly and costly, the need to prevent them from occurring becomes critical. And the threat from such attacks is growing, as the means for making and delivering weapons of mass destruction proliferate. Experts have been predicting for about two decades that states that sponsor terrorism, and groups capable of financing such acts, would enhance their capacity to cause destruction. that in fact has happened.

The primary task of our Government, in such a context, is prevention. Every such attack that occurs must be regarded as a failure, for which all who are responsible are held responsible. We are captivated by and admire the efforts made to find and punish those responsible for such attacks, especially since every move of each of the players is now on television throughout the world. But let us face the fact that government has failed in its primary responsibility once such acts occur. The damage the perpetrators inflict far surpasses the damage we can thereafter inflict upon them through the legal system. Criminal punishment, even the death penalty, cannot be considered a significant deterrence. Those who plan and implement such acts are often crazed people, who commit suicide in the process, or accept any punishment imposed upon them with equanimity. The sponsors and facilitators of such acts—those who develop the polices, who hire the terrorists, who smuggle the devices and explosives—are often legally immune from criminal punishment, or remain safe as a practical matter by taking refuge in sympathetic countries.

These attacks must be stopped, not merely punished. And while it may be impossible to stop them all, we must try to stop them all in order that we fail only where we could not possibly have succeeded.

This committee should make sure that the FBI, and all other agencies responsible for dealing with terror, within the U.S. and abroad, understand their overriding obligation to prevent, not merely prosecute and punish, acts of terror. The committee should pursue the lines of inquiry I have suggested in order to be sure that they are in fact performing this duty at the highest possible level of competence and urgency.

Fighting terrorism effectively is not merely an issue of criminal justice. It is often also—indeed primarily—an issue of strategic concern. Consider for a moment the World Trade Center bombing. No one would question the need to prosecute the perpetrators of such a criminal outrage. Let us assume, however, that the culprits in such a bombing include: a driver who is killed in the blast; his immediate supporters, who are arrested through excellent police work; those who suppled them with explosives, devices, passports, weapons, money, and other means to commit the act, some of whom are diplomats stationed in New York or Washington, D.C.; and those who planned, ordered, and paid for the operation, including members of a national secret service, ministers, and perhaps even the head of a state.

The driver is gone, but is dispensable. Others are available to take his (or her) place in future attacks.

The immediate supporters may be arrested and punished, but they will probably be uncooperative, and in any event are unlikely to know the ultimate sources of their support. They, too, are replaceable.

The suppliers may be tracked down, but they will plan to avoid being caught in the U.S. or any nation likely to cooperate with the U.S., or they will have diplomatic immunity, which will prevent their prosecution and even their interrogation.

The ultimate planners are likely to remain forever beyond the reach of criminal law enforcement, either because they have head of state or other forms of immunity, or because the information we obtain about their involvement would not be usable or sufficient in a criminal prosecution, or extradition request.

Viewed in this perspective, which I believe is realistic, you can see how insignificant it may be that the actual perpetrators of a terrorist act are captured and prosecuted successfully. Of course such prosecutions must be pursued, and may lead back to some of the more responsible people involved. But it is always going to be highly unlikely that the criminal law will operate satisfactorily as a means of deterring such conduct. States sponsor such terrorist attacks because they fear our capacity to defeat them if they act openly, through the use of their Armed Forces. They

also rely, here as elsewhere, on interpretations of international law to protect them from being held responsible for the consequences of their conduct. Dealing with state-sponsored terrorists thus may often require governmental action that goes beyond enforcement of the criminal law.

During the Reagan administration, we thought these issues through rather carefully, and we reached, announced, and acted upon certain conclusions which bear repeating. First, we made clear our intent to exercise the "inherent right of self defense" preserved in article 51 of the U.N. Charter, which provides that "nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the security council has taken measures necessary to maintain international peace and security."

Second, relying on customary practice, including the consistent behavior of U.S. Presidents, we insisted that an attack on an American outside the territory of the U.S., undertaken because the victim is an American, could be considered an attack on the U.S. under article 51.

Third, we also insisted that the right of self defense included the right to take all measures necessary to stop attacks on Americans, even if the measures taken were more serious or continued for a longer period than those of the aggressor.

Fourth, and with regard to responsibility, we took the view that terrorist organizations and states could be held responsible for the acts of individuals where appropriate proof is present. We concluded that "the U.S. should apply to terrorist organizations the same standards of responsibility that are applied in any legal system that deals with such issues." President Reagan warned after the killing by terrorists of Americans in Rome and Vienna: "by providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he [Qadhafi] had used its own forces." And that is precisely how President Reagan treated the next attack, at the disco in Berlin.

Fifth, the strict requirements of proof applied in criminal trials have no place when dealing with issues of national security. The U.S. may learn something about a terrorist group that is authoritative, but which it could not, or would not, use in a public proceeding. An act of self defense is not a tactic in a legal dispute. It is a measure that a state takes in order to protect interests more fundamental than anything that is litigated in any court. A nation's national security interests cannot be abandoned merely because of evidentiary or jurisdictional limitations.

These principles, Mr. Chairman, are not partisan. They have been consistently applied by Presidents of both parties, including President Clinton. Once President Clinton became convinced that Iraq had attempted to assassinate former President Bush during a private visit to Kuwait in April 1993, he ordered a strike by 23 precision-guided Tomahawk missiles on the Iraqi Intelligence Control Center in Baghdad. He pointedly stated that he had acted under article 51 of the U.N. Charter, exercising the Nation's inherent right of self defense. He referred to the plot as "an attack by the government of Iraq against the United States," even though it had been planned to occur in Kuwait and therefore did not threaten U.S. territory. He also treated this planned attack on President Bush as an act of revenge, "because of actions he took as President." The attack was therefore "an attack against our country and against all Americans." The President held Iraq responsible for the attack, even though it was to be conducted by civilians, some 14 of 16 of whom were not even Iraqi nationals. It was enough that "there is compelling evidence" that Iraq was responsible, even though some of the evidence could not be revealed. Any lesser measure, he found, would be futile, and the target was proper because the secret service had participated in planning the attack.

In principle, therefore, the scope and propriety of self defense are matters on which our leaders agree. But these principles have seldom been acted upon in recent years. We have tended increasingly to treat terrorist bombings—even when we believe them to have been state-sponsored—as crimes, requiring painstaking investigation, and (where possible) prosecution. This committee should recognize the limits to which the U.S. can rely on criminal law as an effective weapon against terrorism. No amount of legislation, no new power or authority, can substitute for force in situations calling for the Nation's defense.

Even with regard to random acts of terror which have no state sponsor, reliance on criminal law may be of questionable value. Certainly we should support the speedy trial and punishment of the culprits. But who in his right mind would not give up the chance to convict and punish those involved in some devastating act of terror in order to prevent the tragedy from occurring in the first place? Measures such as the tagging of explosives, and the exclusion or deportation of aliens who support terrorist groups, may well enable the Government to prevent tragedies.

I have two suggestions in this regard. First, the time may have come for the U.S. to press for narrow but important limitations on diplomatic immunity. We should be able to devise rules and procedures on which the entire world can agree to prevent and punish abuses of the privileges afforded diplomats and their pouches.

Second, the most effective measures for preventing acts of terror are usually technological. Metal detectors have saved countless lives. More sophisticated detectors for explosives will continue to make airline travel and other important industries viable. When I served as legal adviser, I urged the administration to undertake a "terrorist defense initiative" to develop devices that would enable civiled nations to return to relative normalcy. Secretary Shultz authorized me to be briefed on the research projects then underway, and I was impressed with some of the ideas that were being pursued. Perhaps this committee should seek to be briefed on those ideas, and to determine whether they have been adequately supported and exploited.

Mr. HYDE. Well, thank you very much, Judge Sofaer, and Mr. Barr, General Barr. Those were two very excellent commentaries on this important legislation and most welcome.

The gentlelady from Colorado, do you have any questions?

Mrs. SCHROEDER. I just got here, Mr. Chairman, I apologize and I will read the testimony.

I appreciate both of you being here.

Mr. HYDE. The gentleman from New Mexico, Mr. Schiff.

Mr. SCHIFF. I would like to ask both gentlemen—and I think you have testified very strongly, both of you, on behalf of H.R. 1710, which we mark up Wednesday—is there anything that leaps out at you, though, first, that we should be taking out of that bill; and second, separately leaps out at you that is not there and should be in the bill? And I now yield to both of you or either of you to respond.

Attorney General Barr.

Mr. WILLIAM BARR. Nothing leaped out at me of the substantive provisions that I think should be deleted from the bill. There are some things that perhaps I would put in the bill, but I understand the question of jurisdiction of different committees and so forth that might not make that timely or appropriate.

Mr. SCHIFF. Thank you.

Judge Sofaer.

Mr. SOFAER. I have made some comments in my written testimony, and I will stand by those; but I would say generally the most important thing I would do if I were editing this bill is, I would narrow the jurisdictional provisions so that the Federal courts are not continuously encouraged and U.S. attorneys are not continuously encouraged to do things that our State prosecutors and State courts are doing very, very well.

I just think some of these definitions are too broad, such as including all Federal employees in the definition of what would be considered a terrorist act. It includes millions of people potentially, and I would try to narrow those provisions and leave criminal law enforcement in its ordinary sense to the States.

Mr. SCHIFF. I have no other questions. Thank you, gentlemen.

I yield back, Mr. Chairman.

Mr. HYDE. Thank you.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Barr, you were here earlier when Mr. Skaggs was testifying. Were you here earlier when Mr. Skaggs was testifying?

Mr. WILLIAM BARR. Yes.

Mr. SCOTT. Do you have any comments on his IG proposal?

Mr. WILLIAM BARR. Yes. I would oppose the special IG proposal and it is difficult for me to do that, because I have such great respect for Congressman Schiff, who I usually agree with on things. But I think it would be a bad proposal.

First, I am concerned about its constitutionality and really what it implies for how we conduct business in the executive branch. If—I notice the bill says that this is an independent office and that this office is going to enforce constitutional standards against the Attorney General. In my view, you can—you know, that really means having a second Attorney General who is not subject to the President of the United States.

I think there can be one standard of what the—one standard applied in the executive branch, ultimately one judgment reached within the executive branch, ultimately by the President, as to what is constitutional; and you can't have another person in real time monitoring investigations and raising their own view of what the Constitution may or may not require.

I think it is impractical—also, as to American citizens or domestic persons in the United States, nothing in this bill gets us away from a warrant requirement. We are still going to article III judges who are independent of the executive branch, and getting them to approve ahead of time warrants to conduct intrusive investigations. And so you do have that check upfront when domestic persons are involved.

I also think, as a practical matter and given my experience with Inspectors General—and I have intensive and extensive experience with Inspectors General—I think this would be a bureaucratic nightmare and would have a very adverse, chilling effect on conducting perfectly appropriate, but sensitive investigations and reviews by the Department of Justice and the FBI.

Mr. SCHIFF. Would the gentleman yield on that?

Mr. SCOTT. Yes.

Mr. SCHIFF. I just want to say that if there is—and I appreciate your remarks, too—and it isn't often I don't think, Attorney General Barr, that we don't agree, but that happens on any issue.

Mr. SCOTT. Congressman Schiff, let me reclaim my time and make a general statement and then yield all my time.

I just wanted to point out that we have the national defense letter, the emergency wiretaps and the listing of organizations that aren't subject to the article III judges.

I yield the balance of my time to the gentleman.

Mr. WILLIAM BARR. But the listing is done by the President of the United States. It is not an investigative technique; it is very analogous to IEEPA. The emergency wiretap, you have to go to court and get a warrant within 48 hours, so you are going to an article III judge and telling the judge what you have, and that is where the constitutional protection comes in. And the other one you mentioned in here is targeted on agents of a foreign power. It is a foreign—it is a foreign counterintelligence review where you don't have a criminal investigation going on necessarily. I am not saying that there shouldn't be a review, but it is subordinate of the President, or isn't it? If it is subordinate of the President, you al-

ready have someone. That is the Attorney General. If it is not subordinate of the President, then you have war going on in the executive branch. I think that is unconstitutional, as well as being inefficient.

Mr. SCHIFF. If the gentleman will yield, let me say, first, it is of course intended to be subordinate to the President. Further, it is not intended to create a position with the specific power to stop anything or to—or whose approval is required. It is intended to be a monitoring official because, after all, when there is an emergency wiretap provision, you can do them over and over and over again for 48 hours and you don't have to account to anybody for them, if I understand that power.

And the purpose here—and I would appreciate your advice on the matter; I am not glued to the wording of this one bill. The purpose is to set up an official whose sole purpose is to monitor where is the direction of Federal antiterrorism investigations going, to be sure, as best we can internally, that they are aimed at terrorists, not simply at political dissidents.

Mr. WILLIAM BARR. I think, first, as to citizens, you have ongoing monitoring of all intrusive techniques that implicate the Constitution by article III judges. You have to continue to go before an article III judge who monitors the investigation in a specific district court ahead of time.

In addition, I think—as to foreign programs, I don't think there would be any objection. I think it is done now, but if it isn't, it should be, and that is the Oversight Committees, the Intelligence Committees can delve very deeply, and they have the security means to do it, into the investigation of foreign persons and foreign groups and the number of wiretaps authorized and so forth, and that can be done by the Intelligence Committees here in Congress.

And, finally, to the extent someone in the executive branch has that responsibility, I do believe they should be subordinate—the Attorney General is the responsible person to ensure that the Constitution is complied with and the other laws of the United States are complied with and the Attorney General has investigative arms like the Office of Professional Responsibility.

There is an Inspector General within the Justice Department, but there is also the Criminal Division and the Civil Division. And I think, rather than create a pan-executive branch official and another layer of watchdog, that the thing to do is to give the Attorney General broader jurisdiction, cutting into other agencies as well.

Mr. SCHIFF. Well, I just want to reiterate that certain things are not subject for an article III judge—this national security letter, which for the first time, according to Deputy Attorney General Gorelick, would be used to look for motel and hotel records, for example.

Mr. WILLIAM BARR. Of agents of a foreign power.

Mr. SCHIFF. Well, of people you accuse mentally of being agents of a foreign power. They may or may not be agents of a foreign power. That is the point here.

Let me just conclude, because the time is up. I accept your reservations, and I don't feel that there is one way to do this; and certainly I don't want to create, and neither does Congressman Skaggs, a bureaucratic nightmare, to use your view; but I feel very

strongly that before we go back and bring internal surveillance back to where it was before we pushed it away in the 1970's, because of abuses, we should have some way of closer monitoring it. Really, that is all our bill is about.

I yield back, Mr. Chairman. I thank the gentleman for yielding.

Mr. HYDE. I thank the gentleman. The gentleman is recognized—have we recognized him? All right.

The gentlelady from California.

Ms. LOFGREN. No questions, Mr. Chairman.

Mr. HYDE. The gentlelady has no questions.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Gentlemen, I appreciate your assisting us today.

Judge, your name is pronounced "So-fair"? I have read it many times, but never heard it pronounced.

Mr. HYDE. It is a critique of the service on the bench, "So fair."

Mr. SOFAER. I have got a lot of good print on that, Mr. Chairman.

Mr. GOODLATTE. Judge, I was interested in your comments about the need to recognize that in dealing with international terrorism, the judicial system may not at all be well suited to handling many aspects of that in terms of the appropriate response by this Government and that many times a military response in taking it back to the source of the act is appropriate.

Do you conclude from that that a non-U.S. citizen is entitled to—leaving the Government aside, but the actors on behalf of that Government are entitled to not the same due process that a U.S. citizen is entitled to?

Mr. SOFAER. Well, they would be entitled to due process to the extent that they were brought to court to answer to charges. But that doesn't mean we couldn't kill them outright, just as we kill people on the streets of America, rather than allow them to kill an American citizen who is an innocent person.

Mr. GOODLATTE. I am not disagreeing with you.

Mr. SOFAER. I am just making the analogy. I am not afraid of the analogy at all. I believe in killing people who are about to kill innocent people.

Mr. GOODLATTE. Fair enough.

Now, do you—with all of the discussion about—let me take that to the next step—about some groups and organizations in the United States and in relation to the Oklahoma City bombing, or I guess no group has been established, but obviously there were some conspirators. Do you see anything about the current set of affairs in the country and the activities of any groups that would cause us to find it necessary to apply that same standard to these activities of U.S. citizens, or do you think that there is no need for anything——

Mr. SOFAER. Well, thinking back a little ways to the Symbionese Liberation Army in California, I remember a group that went around shooting people at bus stops deliberately. Now, I would think that the Government of the United States could take pretty strong action with regard to a group like that if that action was designed to prevent them from killing more people. Obviously, you don't use killing as a substitute for trying people, if you can cap-

ture them; but if you can't capture them, which is more often true of foreigners than of Americans, you have to do what you can.

Mr. GOODLATTE. But if you—I mean, obviously if somebody is in the act or about to engage in the act of killing somebody, as you say, you are going to act with whatever force is necessary to prevent that.

Mr. SOFAER. Right.

Mr. GOODLATTE. On the other hand, if you are responding to a foreign terrorist act with a deliberate decision to respond sometime later with a retaliatory act, that is a quite different set of circumstances. Do you see any need for that type of activity on the part of the U.S. Government with regard to any activity by any groups in this country?

Mr. SOFAER. No. I think in that case you would use probable cause; you would have all the judicial standards applicable.

But, you know, I want to say, Mr. Congressman, that the emergency power is a reality. It is part of our constitutional history. If an Attorney General were faced with the problem of doing something that was in fact not consistent with existing legislation—perhaps even questionable, constitutionally—and genuinely believed that the action was necessary to save, say, 100,000 American lives in a major subway or a building or something of that sort, I would be surprised if the Attorney General failed to act in that way, because I think ultimately he or she would respond to you, and that you would be the ultimate judge of this as to that Attorney General's good faith in acting in that manner.

You can't totally divorce the domestic from the foreign in that regard. I mean, our ultimate aim in all of this—when you are talking about killing of this dimension, our ultimate aim has to be prevention.

Mr. GOODLATTE. I take it you would be speaking in those terms in terms of something like what has been happening recently in Japan——

Mr. SOFAER. Yes.

Mr. GOODLATTE [continuing]. Where you have widespread and apparently well-organized terrorist activities going on of an unpredictable dimension that might require that type of activity?

My question is, do you see anything in the current set of affairs when we talk about different militias and other groups around the country that would be in any way analogous, that would call upon the Attorney General or anyone else that would take that type of activity in the country today?

Mr. SOFAER. Well, no. But I would say that it is very, very important to infiltrate these groups to know what they are doing, what they are planning, because they talk mean, they talk about doing things that are ugly and hateful; and I think that if they talk so badly that it amounts to probable cause, then they ought to be surveilled, they ought to be—I mean a roaming wiretap is a way to keep track of someone who is smart enough to run from phone to phone when he is planning something illegal. This is a Presidential idea that is to give this power and it is supported by the chairman and the rest of this committee, so I don't understand why this idea has come into so much criticism. It is a perfectly reasonable, rational thing to do.

Mr. GOODLATTE. Well, I——

Mr. HYDE. The gentleman's time has expired.

Mr. GOODLATTE. I agree with you.

Mr. HYDE. I thank the gentleman.

The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman. Let me add my welcome also to the two of you.

General Barr, section 312 is somewhat of an expansion of the use of military in providing assistance in the biological and chemical areas. I know this is—you don't have to convince me, but I do hear concerns from some people that they are scared of this type of expansion. But this is a very limited expansion, is it not?

Mr. WILLIAM BARR. That is right, Congressman. This is extremely limited, and I think concern about this particular provision, as drafted, is completely unjustified. In fact, today—under existing law, Congress has already provided very limited areas where the Defense Department could support law enforcement activities in the counternarcotics area. And I cite those in my testimony; they are in title X. But the involvement that the military has there in supporting our counternarcotics efforts are very analogous to this very limited window.

Now, as I said, I think this really just sort of recognizes what—how the statute would be construed in extremis if we were faced with a biological catastrophe. And I do not think that this is unrealistic; I do think that biological and chemical attacks are a very real threat. They were very definitely during the Desert Storm war, that we were faced with massive catastrophe, and we needed clean-up crews and we needed people with the proper suits on to deal with disarmament of weapons and so forth.

Does anybody really think that American officials would sit around and allow hundreds of thousands of casualties to occur because—arguing about whether that constituted technical support or law enforcement activity? They would save lives. And what this does is makes sure that everyone would be on sound ground.

Mr. BRYANT of Tennessee. It also has a provision in it, does it not, that clearly says that this will—military forces will not be used to directly apprehend or arrest actual law enforcement activities?

Mr. WILLIAM BARR. That is right. This bill, I think, contains some helpful language that makes it clear what the intent is.

Mr. BRYANT of Tennessee. Judge, do you have any comments on that particular aspect of this proposed bill?

Mr. SOFAER. I concur with Mr. Barr.

Mr. BRYANT of Tennessee. Thank you.

I yield back the balance of my time.

Mr. HYDE. Thank you, Mr. Bryant.

The gentleman from Georgia, Mr. Barr.

Mr. BARR of Georgia. Thank you, Mr. Chairman.

I apologize to both witnesses. I was running a little bit late. I had to testify before a base realignment and closing commission; otherwise, I definitely would have been here. But I have read the written materials and, as usual from both gentlemen, they are outstanding, and I appreciate the background they have provided.

If I could, General Barr, follow on Mr. Bryant's line of questioning with regard to section 312 involving military assistance, I had

a meeting one day last week with another Member of Congress and we were talking a little bit about the Senate bill. Are you familiar with the bill that the Senate passed just last week? That touches on posse comitatus?

Mr. WILLIAM BARR. No, I am not, Congressman.

Mr. BARR of Georgia. OK. The one thing that worried me a little bit, and I don't have the language, but the way this other Member of Congress was explaining it, the military would have the ability or the authority, I think he was saying, under the bill that was passed by the Senate last week to shoot somebody if it became necessary in the course of their carrying out the limited authority to provide technical and logistical assistance.

Would your reading of the language in the chairman's bill here provide for such authority?

Mr. WILLIAM BARR. Not as law enforcement officials, but on the other hand, if a military soldier, you know, if a soldier is carrying out an act of technical support and comes under fire, someone comes up to them and tries to shoot them, then obviously they could protect themselves, and also could protect other innocent—like any citizen, could protect any innocent person who is in extreme danger of life and limb.

Mr. BARR of Georgia. OK.

Mr. WILLIAM BARR. Their mission would not be to do that, their mission would be to provide technical support. Just like, for example, apprehension. I mean, any citizen can apprehend an individual as a citizen. You know, tackling someone who has seen the person run by them, and the fact that these people wear a uniform doesn't mean that if the guy is walking right next to them they couldn't tackle them and hold them for law enforcement officials to make the arrest.

Mr. BARR of Georgia. But what you are saying, and you may be right, that perhaps the existing authority that our military has in that sense is actually broader than what is in the language of section 312, which specifically excludes arrest or apprehension authority.

Mr. WILLIAM BARR. Well, no, I think what that says is that their mission cannot be apprehending and they cannot execute an arrest.

Mr. HYDE. Would the gentleman yield to me for one second?

Mr. BARR of Georgia. Certainly, Mr. Chairman.

Mr. HYDE. Quoting from section 908, subsection 4—this is the Senate bill—"the Attorney General and the Secretary of Defense shall jointly issue regulations concerning the types of assistance that may be provided under this subsection. Such regulations should also describe the actions that the Department—the actions that Department of Defense personnel may take in circumstances incident to the provision of assistance under this subsection." And here is the relevant language, "such regulation shall not authorize arrest or any assistance in conducting searches and seizures that seek evidence related to violations of this section, except for the immediate protection of human life."

Mr. BARR of Georgia. OK. That sounds like the language that this other Member was referring to.

Mr. HYDE. Right.

Mr. BARR of Georgia. Thank you, Mr. Chairman.

Mr. Barr, you were also here I know earlier today and listening to the comments of Deputy Attorney General Gorelick and some of the questioning that we had surrounding her testimony. And one of the questions that was posed to her is, is there any concern on the part of the administration, or have they reached any conclusion, that investigating and apprehending and prosecuting and convicting whoever is responsible for the bombing in Oklahoma—whether the existing laws and procedures and regulations would impair their ability. And I think she said, no. I think she said, no, that they feel confident that under existing laws, rules, regulations and policies, et cetera, that it would be possible and they certainly anticipate doing that.

Does it basically boil down to—and I know you pretty much addressed this throughout your written testimony—does it boil down to the fact that while there may not be anything that is absolutely essential for the Government to have the ability to investigate and bring to justice individuals who commit acts of terrorism, this will simply strengthen and make it easier and somewhat more efficient for the Government to do that, or are we getting into some new authorities here?

Mr. WILLIAM BARR. Well, I would say that my ability to deal with foreign terrorist threats in the United States that were very real were definitely hampered, particularly during Desert Storm, by the absence of some of the provisions that are in this bill today—in specific, very real cases. So while the Oklahoma City case might not have given rise to these provisions, I think our experience dealing with foreign terrorists, real experience, has given rise to these measures—has made us see these gaps have to be filled.

I also think that we have to remember that we can't always sit—we don't have the luxury of sitting back and saying that we have to directly experience a shortfall in our legal authority before we do anything about it. I think if we can reasonably expect a particular area or a particular threat and understand that our laws may not be adequate, we have to act with that kind of foresight rather than say, gee, we should have had a law that says X, Y, or Z, because I think that is the way we can stay ahead of the terrorist threat; and as long as we stay within our constitutional bounds, and I think this bill does, I think that is what our job is, really.

Mr. BARR of Georgia. Do you have any concern, as you look through some of the—and there were three that I have before me here and three different bills' definition of terrorist or terrorism, actually, I think. Do you have any problem with what seem to be, I think, fairly broad definitions? Are those necessary? Do you have any problems with the definitions that we see in all three of the bills, 896, 1635, and 1710?

Mr. WILLIAM BARR. I personally do not have difficulty with these definitions because these are the definitions used throughout the law, and I think it would create greater mischief to define it differently here than we have in a number of other contexts in the law. The one that you specifically pointed to which—is that on page 50—that mentions the State law violation in addition to Federal law violation.

Terrorism is a very difficult thing to define and any definition is going to have some give in it; and it is conceivable that someone

would take an act that was violative of State law that we would not ordinarily think of as terrorism, or feel is the kind of offense that should be treated as the local level and be able to fit it into this definition in a very aggressive stretch of the law. I think there is that possibility under that definition. However, I haven't seen that done.

I think we have had these definitions out there for a while and I think that, absent one that is too confining, this is an adequate definition. In other words, I am not—I would have to see some language of an alternative, but my concern would be that it would be too restrictive also.

Mr. BARR of Georgia. OK. Thank you. I appreciate the chairman's indulgence for some additional time.

Mr. HYDE. Well, I thank the gentleman very much for his contribution.

Gentlemen, before we release you, I might—I would like to ask one question collectively to both of you.

Critics of this bill have argued that membership in a presidentially designated terrorist organization should not be a ground for excluding anyone from the United States. Do you see any constitutional infirmity in the policy decision to exclude from entry into the United States any foreign national who is a known member of a known and designated terrorist organization? Membership alone?

Mr. SOFAER. No. I see no——

Mr. HYDE. You see no——

Mr. SOFAER. Absolutely not.

Mr. HYDE. How about you, General Barr?

Mr. WILLIAM BARR. I think it depends upon the alien's prior contacts and relationship with the United States. You know, on one extreme, there is clearly—I think there would be a problem if you have a permanent resident alien who goes over to visit his grandma in another country, tries to come back in, and is excluded. I think that would raise a constitutional question.

On the other hand, somebody who has no nexus with the United States, tries to come in, I don't think there would be a constitutional issue raised.

Mr. SOFAER. I thought it was the latter group that you were speaking of.

Mr. HYDE. So did I.

Well, thanks, both of you, for outstanding contribution. As always, you have been most generous and helpful with your time. Thanks again.

Mr. HYDE. We have one more panel of distinguished witnesses, James P. Fleissner, professor at Mercer University School of Law in Macon, GA; Bruce Fein, Esq., former Associate Deputy Attorney General; and Gregory Nojeim, Esq., who is legislative counsel for the American Civil Liberties Union.

Bruce Fein is a legal scholar specializing in constitutional issues. He has authored approximately 1,000 articles on the law and public policy, and is currently a weekly columnist for the Washington Times. He is a syndicated columnist for the Legal Times, and a frequent guest columnist for USA Today. He has written on the constitutions of over 10 foreign nations and has testified before many

different committees of Congress; and I remember Mr. Fein very well from his service on the Iran-contra investigating committee.

So welcome, Bruce Fein.

STATEMENT OF BRUCE FEIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. FEIN. Thank you, Mr. Chairman. I was asked to address primarily the due process concerns that are raised by the provisions in H.R. 1710 relating to the deportation of aliens. And that is, I think, bifurcated in part in the provisions that distinguish between who are permanent resident aliens and those who are just in the country, but have not been given permanent resident status.

Generally speaking, I think the provisions are beyond constitutional reproach. There are a couple of exceptions that I would like to make.

The Supreme Court has held for over 50 years that almost nowhere in the law is there more discretion within the executive and the legislative branches than over the issues of deportation and exclusion of aliens. When the Supreme Court wrote those words, we were in the midst of a very cold war that was verging on hot war. Indeed, there was a hot war at the time, namely in Korea. And of course the Communist threat there, which was the specific issue addressed by the Supreme Court, was exceptionally acute, I think, and well recognized.

We had recently overcome the Berlin blockade, their coup attempts and coup successes in Czechoslovakia. This was at the time of the Rosenberg trial, the Alger Hiss trial, Klaus Fuchs. There was clearly a background of congressional and political recognition, something which the Supreme Court took judicial notice of, of a very severe problem with aliens in the country attempting to subvert our form of government.

Now, one thing that differentiates this bill from those declarations of the Supreme Court is the absence, at least at present, in H.R. 1710 that make findings that would be pertinent to the danger created to U.S. citizens, to the national security of the United States by the threat of terrorism committed by aliens.

Just as an outside observer, there seems not to be a self-evident conclusion that the nature of the problem was on a par with the Communist threat many years ago. The FBI has reported over the last 11 years that there has been one incident of international terrorism in the United States. That is not a large number.

There may be the kinds of cases that Attorney General Barr referred to where he felt there was a clear and present danger of a terrorist act that he felt was handicapping him in dealing with it. But those certainly aren't on the record at present and aren't made part of the findings of the bill.

The reason why I raise this at least apparent discrepancy being the danger of the Communists that led to the Supreme Court decisions on deportation many years ago and the alien problem in the United States is because it may well be constitutionally different when the Supreme Court addresses the current problem with aliens, suggesting that maybe the language in those old cases was written too broadly. That is the one caveat I have about my general statement concerning the authority that is given to the United

States through special removal court procedures to deport resident aliens.

The primary principle that the Supreme Court announced that in the context of deportation there must be fair notice of the charge to the alien with a reasonable fair opportunity to defend. Now, the language of H.R. 10 does not clearly parallel the general phraseology of the Supreme Court.

There are circumstances where it is thought that even providing a summary of classified information to the suspect alien could jeopardize the national security of the United States, that he is given no notice at all of what he is confronting. Now, that is very, very stark and contrary to the basic notions of due process, when someone isn't even told how they might defend against the accusation.

On the other hand, that kind of proceeding can occur only if the special removal judge makes a finding that the disclosure of any information would create an imminent danger to the safety of particular individuals or a clear and present, imminent danger to the national security of the United States.

Well, those are tough findings to make. On the other hand, you have to remember at that stage of the proceedings under this bill, the special removal judge is only hearing from the executive branch, which, in the history of the United States, doesn't have an unblemished record of I think at one point of almost hallucinating a harm. And here I would like to refer to a page of history which, as Justice Holmes told us, oftentimes is worth volumes of logic.

There was an affidavit that a Lieutenant General DeWitt submitted to the President and to courts as well shortly after World War II began with Pearl Harbor. And he was sent to the west coast to identify the potential threat to the United States by American citizens and permanent resident aliens of Japanese ancestry. And General DeWitt had discovered not a single act of sabotage, but he wrote in his affidavit, and I am almost, I think, quoting from the affidavit he submitted to the court, "the absence of sabotage," he says, "is disturbing confirmation of the likelihood of future sabotage." "Disturbing confirmation." Those were his words.

It was about like the king of hearts in "Alice in Wonderland." If they were truly disloyal, they would have committed acts so we could have pinned something on them. You know, just like the nave should have signed his name to the incriminating letter, that would have showed that he wasn't a scoundrel, because withholding his name showed he must have been guilty.

Now, this was a time—I don't mean to be frivolous toward General DeWitt. He was an honorable man and everyone was frightened of the security threat created after Pearl Harbor, yet those kinds of overreactions can occur within the executive branch, and indeed, I think the Congresses, not very long ago in the 1988 Civil Liberties Act, recognized that and apologized to the overreaction.

That is why I make this reference, simply to underscore what I think would be an enormously constructive addition to this bill which gives us some reasonably hard factual findings. I would agree that you don't need defined in my judgment additional world trade bombing centers that are about to occur. You don't have to go right up to the abyss before you act. But there ought to be something more than just speculation out of the sky or even statements

of a former Attorney General where this committee doesn't in a responsible way have clear access to those cases where it has been said, absent these powers we are confronting, you know, a repros of the Pan Am bombing or something of that sort.

It is just human nature when we see something as hideous as the World Trade Center or the Oklahoma City bombing to want to focus all of our attention and focus on one side of the equation in any democratic society the need for domestic tranquillity. But the other side of the equation is also an equally important and compelling need for some openness in society.

We don't want to live in a society where we fear a Gestapo or an oppressive police state. We recognize in making that tradeoff that we are going to sacrifice some persons. We don't, even though we know that perhaps we could prevent some murders if we had policemen on every block—on every street and decided to do away with probable cause. But no, that is too high a price to pay.

Even when we recognize perhaps one or two human lives could be saved, we don't want that kind of police state. It is a matter of prudence and judgment here, and I think in order for this committee to make this kind of prudential decision, you need a little bit more hard facts on what the scope and nature of the danger is before you necessarily buy off on these provisions that certainly skirt close to some due process problems.

On the other hand, I think that in general, these provisions largely emulate those in the Classified Information Procedures Act in dealing with very sensitive material and evidence that in some sense revealing it to the suspect would destroy perhaps an important intelligence-gathering activity, or power, by providing for a summary when it can be given, give reasonable notice to the accused, the suspect here and the accused has a right to present exonerating evidence in the typical case, and he has a right to counsel, a right to counsel that in some cases has access to classified information that the suspect does not have.

Those things are scathing, as I say, probably within the Constitution, but it is a close question, and that close question could be answered the other way if it is thought by the Court that there is an exaggerated fear of the nature of the danger, and these provisions are too harsh with regard to the opportunity of a suspect being tried on secret information ex parte, in camera, to defend.

Now, if we had a history, I suppose, of not recognizing, you know, the danger of misperceptions and fears, perhaps my hesitation would be less acute. But what comes to my mind is the immediate reaction to the Oklahoma City bombing was to focus on Arab-Americans, Jordanian, in fact, because we said gee, some of the earmarks of this bombing shared an affinity with that of the World Trade Center.

And I think the initial speculation and belief was, well, this must be another fundamentalist Muslim terrorist act, but it proved wrong. It does not mean that the suspicions necessarily were just conjured up out of thin air, but it shows the natural inclination, I think, when you are involved in terrorism that evokes so many passions to perhaps reach judgments too fast, and the whole purpose of due process is to prevent judgments from being reached too quickly.

So I just have, I have some qualms with regard to the provision that in some circumstances would enable a resident alien to be deported and he never even knew what the nature of the charges were.

The second aspect of the bill that I have some reservations about is the authority to detain prior to any decision as to whether or not someone should be tried by a special removal court resident aliens without any time limit on how long that detention can occur before a genuine independent magistrate determines whether or not you have sufficient evidence that has been submitted under affidavit that would justify special removal court procedures.

The Supreme Court has held in the context of criminal cases that if you arrest someone, the police must obtain a judgment by an article III court within 48 hours that there is probable cause to go forward. Otherwise, detaining past that 48-hour period is unconstitutional.

I think this bill ought to have some kind of outside limit on how long a resident alien can be detained without any charge before he must be released because there is an absence of some kind of magistrate finding that there is reasonable cause to go forward with a special removal court.

Other than—those are the provisions in the bill in which I have most acute concern. As I say, generally speaking, I think they emulate much of the trial procedures and the Classified Information Procedures Act, which seem to have worked pretty well. There is one difference, however, that I want to underscore for you, and I think it is a difference that probably passes constitutional muster, because deportation is a civil proceeding. It is not one that imposes criminal penalties.

In the Classified Information Procedures Act, if there is a summary to be provided to the defendant, it is instructed under the law that the summary provide the accused as good an opportunity to defend against the charge as if he were provided the information itself.

In H.R. 1710, the summary isn't held to such a strict standard. It simply says, "if a summary would enable the suspect to defend." Well, that is a pretty broad approach, because you know, other than excluding the suspect from the proceeding, I suppose he would always have a chance to defend against the accusation.

I would tighten up the language in H.R. 10 and stipulate maybe some middle ground between requiring that the summary give the would-be deportee the identical opportunity to defend as if he were provided the classified information and the rather lax provision at present which just says, as long as there is some opportunity to defend; whether you would use the word, "substantially equivalent opportunity," or something like that, I don't know, but that is one option for tightening the language.

Just in conclusion, I want to alert the committee against moving too fast in setting due process precedents. Just as Jackson once said about judicial decisions that perhaps go too far, but seem to be justified by urgent necessity, and remember, this is the Justice Jackson who had been tempered by Nuremberg, is that one of the difficulties is that the principle of those seem to be used for a benign purpose. It lies around like a loaded gun, and he used those

words, it lies around like a loaded gun, to be used at any future date whenever a President claims an urgent need.

I think that for that reason we need to move with some scrupulousness here and don't cut back too much on our trusted due process principles in an effort to get at these folks who are genuine scoundrels, and are—you know, deserve the greatest kind of repugnance by any civilized society. But it is just—it is just an inevitable feature of any democratic society that we do restrict law enforcement, we prevent them from doing certain things that could prevent evil conduct because we do not want to risk also the abuses of too much power that can take away our cherished spontaneity and freedom that we have thrived with throughout the centuries. Thank you, Mr. Chairman.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, I am grateful for the opportunity to testify on the constitutionality of the procedures that would be employed in deportation hearings for suspected alien terrorists under Title VI of the Comprehensive Antiterrorism Act of 1995. I believe the procedures would probably pass due process muster as a reasonable compromise between the security needs of the nation and fairness to alien suspects, although the case would be strengthened by factual findings that would corroborate that alien terrorists represent a significant danger to the country.

The special removal procedures for alien terrorists—generally defined as an alien who has either committed or contemplates the use of violence or espionage threatening the lives or property of many typically inspired by a political objective—that raise due process questions concern fair notice and opportunity to rebut the government's allegations. Under Title VI, a special removal court consisting of independent federal judges may be sought at the discretion of the Attorney General whenever she possesses classified information that an alien is a terrorist and desires to seek deportation. The request may be sought ex parte and in camera, and must be granted if the presiding judge finds probable cause to believe that the alien has been correctly identified and that the use of ordinary deportation procedures would pose a risk to the national security of the United States. Since everything in life holds some risk, I would suggest the word "serious" or "material" or "non-frivolous" be used to describe the level of national security risk needed to invoke the special removal procedures.

The alien must be given "reasonable notice" of the government's accusations and a "general account" of their factual foundation. Those general due process norms, however, are substantially qualified. The alien is denied access to adverse classified information; to safeguard national security and intelligence sources and methods, either a summary or a statement that no summary is possible without jeopardizing security interests must be accepted as a substitute, which handicaps the presentation of a defense. The alien, however, is not helpless on that score. He enjoys the right to counsel and the opportunity to present exonerating evidence, and the heavy burden of persuasion by clear and convincing evidence is saddled on the government.

The alien is also denied access to foreign intelligence information acquired pursuant to the Foreign Intelligence Surveillance Act of 1978 (which would seen invariably classified in any event), and the Federal Rules of evidence, such as Rules relating to hearsay, are inapplicable.

Permanent resident aliens fare marginally better than others. They are entitled to special attorneys with security clearances to review classified information in camera in the special removal court on behalf of the suspect and to challenge in camera the truthfulness of the incriminating evidence. The special attorney, however, is handicapped by an inability to communicate with either the alien or others regarding the classified information; it will thus be difficult to insure that the attorney pursues the most promising avenues of impeachment or rebuttal.

Standards for detaining alien suspects pending a final deportation judgment also raises constitutional concerns. Title VI authorizes detention upon the mere filing of a special removal court application, which is tantamount to detention without charge or judicial review. The special removal judge is not required to act on the

application within any specified time limit, and during such delay the alien remains in detention. A permanent resident alien is entitled to obtain release in a hearing before the removal judge by showing the improbability of flight and a lack of national security or community or personal endangerment if release is ordered. The removal judge may consider ex parte and in camera classified information in making release decisions.

A suspect alien may obtain release if the removal judge denies the Attorney General's application pending appeal, but with conditions that will reasonably assure future court appearances and safeguard against personal or community danger. The same general rule obtains is the removal judge decides against deportation on the merits and the Attorney General takes an appeal from that judgment.

The Supreme Court has held that deportation proceedings are civil, not criminal, for purposes of assessing constitutionally required procedural protections. Moreover, the High Court in *Harisiades* v. *Shaughnessy* (1952), proclaimed an enormously deferential standard of constitutional review over deportation standards established by Congress and the President. Writing for a 6–2 majority, Justice Robert Jackson explained: "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it." Justice Jackson also declared that the courts were not to second guess the political branches regarding the need for harsh deportation laws: "We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers."

It speaks volumes, however, that Justice Jackson wrote at a time when alien Communist and the worldwide Communist threat was clear and present: the American Communist Party was an appendage of the Soviet Union and Communists had attempted to undercut President Franklin Roosevelt's war preparations until Hitler attacked the U.S.S.R. on June 22, 1941; the atomic spy cases, including the Rosenbergs and Klaus Fuchs, Alger Hiss's conviction for perjury, the Soviet coup in Czechoslovakia in 1948 and the Berlin Blockade all demonstrated a Communist danger was more than a figment; and, the United States was then at war with North Korea, a conflict that began when Stalin gave the green light to Kim Il Sung to attack South Korea in 1950.

International terrorism addressed by H.R. 1710, in contrast to Communism in 1952, seems vastly less menacing to the security interests of the Nation and American citizens. The FBI has identified but one incident of international terrorism in the last 11 years: the World Trade Center Bombing. That is a stupendous success story in light of the general incidence of international terrorism in Western Europe, such as Germany, France, or Italy. In other words, it would be difficult for the Supreme Court to take judicial notice of an international terrorism threat as it did of a Communist threat in Harisiades, and the comprehensive terrorism bill makes no finding that alien terrorists in the United States are a clear and present danger. It is thus possible that the High Court would apply a stricter standard of constitutional scrutiny, but I think the probability is against that conclusion. It seems clear, nevertheless, that the constitutionality of H.R. 1710 would be bolstered by a finding regarding the seriousness of alien terrorists in the United States.

In *Kwang Hai Chew* v. *Golding* (1953), the Supreme Court generally concluded that an alien confronting deportation is entitled notice of the nature of the charge and a fair opportunity to be heard before an impartial tribunal. The anti-terrorism bill probably satisfies that those standards: the suspect alien is entitled to reasonable notice of the nature of the charges and an opportunity to present exonerating evidence before an impartial judicial tribunal. Classified information may be summarized or withheld entirely from the suspect alien, but deportation cannot proceed if the presiding judge concludes that the summary is insufficient to enable the preparation of a defense. An exception to that rule is created if the judge also finds based on classified information that the continued presence of the alien and the provision of any summary "would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person."

These deportation procedures generally echo those governing criminal cases in which the government uses classified information under the Classified Information Procedures Act. The CIPA standards have survived constitutional scrutiny by lower

federal courts. Further, constitutional review of CIPA is more rigorous than would obtain regarding H.R. 1710 because the latter governs civil deportation in which the consequences are less severe than a criminal conviction. There are differences between CIPA and the pending bill that could be constitutionally significant. CIPA authorizes summary statements of classified information only if it provides the defendant with "substantially the same ability to make his defense as would disclosure of the specific classified information." In contrast, the "substantially same ability" standard does not govern summaries under H.R. 1710. The latter is satisfied by any summary that permits the alien "to prepare a defense." But since deportations command less procedural protections than criminal prosecutions, the latter standard of fairness probably still satisfies due process.

A more troublesome issue is raised by the authority to deport when no summary at all is provided because of a risk to national security. That would seem a blatant denial of an opportunity for a fair opportunity to defend. On the other hand, this exception if very narrow; it applies only when the alien is a suspected terrorist, and when an impartial judge finds that both continued presence and a summary would likely cause serious and irreparable harm to the national security or death or serious injury to any person. These latter interests stand at the apex of government urgencies, and deportation, although harsh, is not a criminal punishment. Moreover, when the alien is a permanent resident, his attorney is entitled to access to the classified information in mounting a defense. In light of the deferential standard of review announced in Harisiades, I believe the narrow exception would pass constitutional scrutiny. But to reiterate, the case would be fortified by findings that international terrorism is a genuine plague in the United States.

The provisions regarding detention seem unproblematic except on one count. The Supreme Court in *Carlson* v. *Landon* (1952) generally upheld the constitutionality of detention pending a deportation final judgement so long as there is reasonable cause to believe that release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. Title VI in the pending bill, however, may be flawed under that standard. It authorizes detention whenever the Attorney General files an application; there is no requirement of reasonable cause to believe release would thwart the public interest or precipitate flight. Additionally, detention is indefinite at that stage, and even a permanent resident alien is not guaranteed a prompt release hearing before a special removal judge to demonstrate that release would not threaten any legitimate public interest.

I believe that under Carlson, non-permanent aliens are constitutionally entitled to release pending a hearing absent a showing by the Attorney General of reasonable cause to believe release would be inimical to the public welfare or would unduly risk flight by the alien. I further believe that permanent resident aliens are constitutionally entitled to a prompt release hearing before a special removal judge, probably within 48 hours of initial detention in light of the Supreme Court's ruling that an arrestee must be released within that time frame unless a probable cause determination to believe the individual has committed a crime has been made by an impartial and independent magistrate.

These comments are confined to constitutional issues, and do not address the wisdom of H.R. 1710 as public policy.

Mr. HYDE. I thank the gentleman very much. James P. Fleissner was an assistant U.S. attorney for the Northern District of Illinois—that is one of the great districts in our country, may I add—from 1986 to 1994.

During his tenure with the U.S. attorney's office, he was Chief of the General Crimes Section of the Criminal Division, and Deputy Chief of the Criminal Receiving and Appellate Division. He was the 1992 recipient of the Gregory C. Jones Award for highest service to the U.S. attorney's office. Currently, Mr.—Professor Fleissner is an assistant professor of law at the Mercer University, Walter F. George School of Law.

Professor Fleissner.

STATEMENT OF JAMES P. FLEISSNER, ASSISTANT PROFESSOR OF LAW, MERCER UNIVERSITY SCHOOL OF LAW

Mr. FLEISSNER. Thank you, Mr. Chairman. I appreciate the invitation to come to the committee to talk about the portions of H.R.

1710 that amend a very important statute to law enforcement; namely, the portion of the U.S. Code commonly referred to as title III. Title III gets its name because it originated as title III of the comprehensive 1968 anticrime legislation, and, of course, title III is the principal statutory framework that regulates the use of electronic surveillance by law enforcement.

I know that the members of this committee understand the need to enact legislation that strikes the appropriate balance between the constitutional rights of Americans and the need to provide law enforcement with effective tools to combat crime, including crimes of terrorism. This was the issue facing Congress when it first enacted title III and each time amendments have been considered.

I believe that there is substantial agreement, not universal, but substantial agreement that in crafting title III, the Congress got it right, that the proper balance was struck. Congress codified in title III a comprehensive set of procedures for obtaining court-ordered surveillance. Those procedures meet or exceed the protections of the fourth amendment.

The Supreme Court has decided a number of cases involving title III and has not to date expressed any doubt as to its constitutionality. In addition, every U.S. court of appeals that has addressed the issue has found that title III complies with the fourth amendment.

Now, while protecting rights, title III has also assisted law enforcement in protecting our citizens. Title III has been enormously valuable in the investigation of crime, particularly concerted activity by groups of offenders such as organized crime syndicates and narcotics distribution organizations, and as General Barr said a few minutes ago, there is no area where it would likely come into play with more value than in the area of combating terrorism.

Now, while the use of title III has had a major impact, it is not a routine procedure. For example, in 1992, throughout the entire country, Federal prosecutors obtained about 340 title III court order intercepts. I believe that the Government's use of the statute has been marked by discretion and caution.

As Congress considers new amendments to title III, the critical question is whether those amendments will disrupt the balance struck by the statute.

My conclusion, after reviewing the amendments in 1710 is that the bill would make improvements in title III, improvements that have the potential to assist law enforcement in combating crime, including crimes of terrorism, without infringing the rights of citizens. I believe the adjustments made to title III by H.R. 1710 are prudent. I believe they are sensible. And I believe that they comply completely with the requirements of the Constitution.

I would like to comment briefly on four specific sections in H.R. 1710. First of all, section 301 would amend the part of title III that lists the specific offenses which may be investigated using title III interceptions. Several provisions are added.

All of the crimes added in H.R. 1710 are the types of crimes that could easily be involved in terrorist action. My simple view is that adding to the list of crimes, filling these gaps, is just a good idea.

The second provision I would like to remark about is section 306, which modifies the statutory exclusionary rule of title III. Title III,

by its terms, excludes from use in court evidence that is seized in violation of the various procedures in title III.

The Supreme Court has interpreted the statutory exclusionary rule in a flexible manner. Exclusion of evidence is only required where the provision of title III that was violated during a seizure of conversations was a provision meant by Congress to play a central role in the statutory scheme of title III. This interpretation, in my view, is sound, because it limits the remedy of suppression of evidence to serious breaches of the law.

H.R. 1710 would add language to the statutory exclusionary rule stating that evidence seized in violation of title III would be excluded only where the violation involved bad faith by law enforcement.

The Supreme Court has held that the fourth amendment exclusionary rule does not require the suppression of evidence seized by police who relied in good faith on a search warrant that subsequently was found by another court not to be supported by probable cause. That is the *Leon* case. This good-faith exception to the fourth amendment exclusionary rule makes very good sense. The central idea behind an exclusionary rule is to deter intentional breaches of the law. Suppressing evidence seized in good faith is an inappropriate sanction that keeps important evidence from the trier of fact while contributing little to deterring misconduct.

H.R. 1710 would codify the good-faith exception in the exclusionary rule of title III. As I read H.R. 1710, this would make the exclusionary rule of title III, the statutory exclusionary rule, coterminous with the exclusionary rule of the fourth amendment as interpreted by the Supreme Court.

A third provision I would like to mention is a little-used portion of title III, and it has been mentioned today several times. That is the emergency surveillance provision. As it exists, that provision allows electronic surveillance without a court order for up to 48 hours in certain emergency circumstances such as a danger to life or limb.

The emergency surveillance provision is a codification of a well-established doctrine of the fourth amendment law, and that is that exigent circumstances may render the obtaining of a warrant before a search impractical. H.R. 1710 would add to the short list of circumstances in which the emergency wiretap provision could be invoked.

Under the amendment, if ongoing conspiratorial activities involving terrorism are afoot, in circumstances where a warrant cannot be obtained with due diligence, surveillance would be allowed for a brief period subject to the restrictions of the statute. I do not view this amendment as problematic.

Section 308 merely makes clear that imminent acts of terrorism may give rise to exigent circumstances allowing the seizure of evidence before a warrant is obtained, a result that I believe the fourth amendment allows. And I remember that Representative Scott this morning asked an excellent question about the intersection of the good-faith exception and this provision of the bill, which I will address later if you would like me.

The final section of H.R. 1710 I would like to mention is section 309, which amends the part of title III often referred to as the "rov-

ing surveillance provision." The Deputy Attorney General Gorelick referred to it as a "multiple point interception" which I assume the Department thinks sounds somewhat less menacing.

This provision addresses the situation where the subject of an investigation moves from place to place or telephone to telephone making it impossible to specify in a title III application the place or the phone to be monitored.

The current roving surveillance provision which has been held to be constitutional by several courts, relaxes the normal requirement that an application for surveillance specify the place to be bugged or the phone to be tapped. However, the current provision requires a different showing by the Government for roving surveillance of face-to-face conversations as opposed to surveillance of telephone conversations.

For face-to-face conversations, what the law refers to as oral communications, the applicant must identify the person, the precise person to be intercepted and obtain a judicial finding that the mobility of the suspect make specification of the place of interception impractical.

For telephone calls, what are called wire communications under the law, the applicant has to make a different, special showing, and that is, the applicant has to show that the suspect moves from phone to phone for the purpose, with the intent, of thwarting interception.

This requirement of a showing of intent to thwart interception is both constitutionally unnecessary and I believe unwise. It may be that the suspect moves from phone to phone for reasons not directly related to avoiding electronic surveillance, such as avoiding capture or carrying on an active narcotics business.

I favor the amendment in H.R. 1710, which would require the same showing for roving telephone surveillance as is currently required for roving interception of face-to-face conversations. I believe this change would be fully consistent with the requirements of the fourth amendment as it has been interpreted by the Court.

I thank the committee for this opportunity.

[The prepared statement of Mr. Fleissner follows:]

PREPARED STATEMENT OF JAMES P. FLEISSNER, ASSISTANT PROFESSOR OF LAW, MERCER UNIVERSITY SCHOOL OF LAW

I appreciate the invitation of the Committee to provide testimony concerning the portions of H.R. 1710 amending Title 18, United States Code, Sections 2510–2521. This part of the United States Coded, which commonly is referred to as "Title III" because of its origin in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, is the principal federal statutory scheme governing the use of electronic surveillance by law enforcement agencies. My testimony will focus on the provisions of H.R. 1710 setting forth amendments to Title III, namely sections 301 and 306 through 309.

I joined the faculty of Mercer Law School Last fall, after prosecuting criminal cases for almost eight years as an Assistant United States Attorney for the Northern District of Illinois. During about half of my time with the U.S. Attorney's Office, I worked as a supervisor, last serving as Chief of the General Crimes section. I had the opportunity to work on many investigations and prosecutions utilizing court ordered electronic surveillance under Title III. I hope my perspective as a former prosecutor with hands-on experience with Title III investigations and prosecutions will be of some help to the Committee.

My testimony to the committee has two parts. First, I will provide some background information regarding Title III and its use by federal prosecutors. This is to put the proposed amendments contained in H.R. 1710 into perspective. Second,

I will provide my assessment of the amendments to Title III proposed in H.R. 1710, including a discussion of each of the specific changes to Title III called for in the bill. My conclusion, after reviewing the amendments, is that H.R. 1710 would make significant improvements in Title III, improvements that have the potential of assisting law enforcement in combatting crimes, especially crimes of terrorism, without infringing on the rights of citizens. I believe that the adjustments made to Title III by H.R. 1710 are prudent and sensible changes that are in conformity with the requirements of the Constitution.

Background Concerning Title III

The members of this Committee understand the need to enact legislation that strikes a balance protecting the Constitutional rights of Americans while providing law enforcement the tools needed to investigate and prosecute crimes, including crimes of terrorism. The Congress faced the same issue when first enacting Title III in 1968: How can legislation be crafted to ensure that fourth amendment rights are preserved while permitting law enforcement to conduct useful electronic surveillance?

I believe there is substantial agreement that Congress struck the proper balance in enacting Title III. The Congress intended to codify in Title III rules meeting or exceeding the protections required by the fourth amendment, which prohibits unreasonable searches and seizures and requires, except for emergency circumstances, that searches be done pursuant to a warrant issued by a judge. As amended over time, Title III regulates the interceptions of several categories of communications: private face-to-face conversations ("oral communications"), communications over the telephone network ("wire communications") and certain data transmissions ("electronic communications"). Title III established detailed, comprehensive procedures governing electronic surveillance, including the followings:

The Attorney General (or her designate) must approve every application for a court ordered intercept.

Applications may only be made to investigate certain offenses set forth in Title III.

The application must provide sufficient facts for the court to make a three-tiered finding of probable cause regarding the commission of crimes by certain persons, the use of facilities or premises to be monitored by those persons, and the use of those facilities or premises by the persons in connection with the crimes under investigation.

The application must state that other investigative procedures have been tried and failed, or are impractical or dangerous.

The agents executing the Title III warrant must minimize the interception of communications not pertinent to the investigation and privileged communications.

Court orders for electronic surveillance are to be only for the time needed to achieve the objective for the search, and in no event longer than 30 days. Extensions beyond 30 days can be granted upon submission of a new application meeting all of the requirements of the initial application.

Records and recordings from the surveillance must be properly sealed and stored.

Evidence seized in violation of Title III may be challenged and suppressed.

These procedures were meant to codify the protections of the fourth amendment as it had been interpreted by the Supreme Court. Since the adoption of Title III, the Supreme Court has decided a number of cases involving Title III and has not expressed any doubt as to its constitutionality.[1] Furthermore, every United States Court of Appeals addressing the issue has affirmed the constitutionality of Title III.[2]

While Title III serves to protect fourth amendment rights, it allows for electronic surveillance consistent with the Constitution. The federal government has utilized Title III in many investigations with great success. The statute has been of significant value, especially during investigations of concerted activity by groups of offenders, such as organized crime syndicates and narcotics distribution rings. I worked on the investigation and prosecution of cases that are testament to the value of Title III to law enforcement.

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[1] *See e.g., Scott* v. *United States*, 436 U.S. 128 (1978); *United States* v. *Donovan*, 429 U.S. 413, (1977); *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States v.* Kahn, 415 U.S. 143 (1974).

[2] *See, United States* v. *Petti*, 973 F.2d 1441, 1443 (9th Cir. 1992); *United States* v. *Turner*, 528 F.2d 143, 158–59 (9th Cir. 1975) (collecting cases).

Although the use of Title III in federal criminal investigations has had a major impact, the government's use of the statute has been marked by discretion and caution. In 1992 there were 340 court orders for interception obtained by the federal government under Title III.[3] Of those, 226 were issued in narcotics cases and 38 were issued in racketeering cases. These figures are put in perspective when one considers that in 1992 over 51,000 defendants were convicted in federal courts.

Not only has the federal government's use of Title III been limited in scope, it has also been deliberate and careful. Deliberation and care regarding obtaining and executing Title III orders are institutionalized in the Department of Justice. Applications are exhaustively reviewed by local U.S. Attorney's, Main Justice, and the investigative agencies. The Department's internal guidelines often exceed the requirements of Title III. My experience is that government attorneys and law enforcement agents work diligently in Title III investigations to do everything properly. Certainly mistakes are made, but my experience tells me the quality of work by those responsible for obtaining and executing Title III orders is done in a professional manner.

The background information I have provided was summarized by a leading commentator on Title III, Professor Michael Goldsmith: "[E]lectronic surveillance is not a routine investigative technique. Even so, Title III has been enormously valuable in complex criminal cases, particularly organized crime and narcotics investigations. Moreover, the statute increased privacy protection and won uniform constitutional approval. Thus, as originally enacted, Title III effected an appropriate balance between law enforcement and privacy interests."[4]

Assessment of the Proposed Amendments to Title III

The critical question concerning the amendments to Title III contained in H.R. 1710 is whether those amendments will disrupt the balance between Constitutional rights and the interest in effective law enforcement that Title III currently achieves. My assessment is that the amendments to Title III contained in H.R. 1710 are prudent adjustments, which, by and large, have the potential to help combat crime, including crimes of terrorism, without creating new risks that the fourth amendment rights of Americans will be infringed. H.R. 1710 contains several specific amendments to Title III. Each will be addressed in turn.

Section 301(a)

This provision of H.R. 1710 would amend the part of Title III listing the specific offenses which may be investigated using Title III interceptions. 18 U.S.C. § 2516. Section 301(a) of H.R. 1710 would add several types of criminal violations to the list of those in the statute. This amendment would allow Title III interception orders to be obtained in the investigation of several offenses for which orders could not now be obtained.

Each of the offenses to be added under H.R. 1710 is the sort of offense that could be committed as part of terrorist activity. Each of the offenses, if committed "to achieve political or social ends," could, depending on the facts of the case, fit squarely within the definition of "terrorism" in Section 315 of H.R. 1710. The offenses added by the bill include certain offenses involving explosives (18 U.S.C. § 842), actions against foreign nations from within U.S. jurisdiction (18 U.S.C. §§ 956 and 960), attacks against U.S. officials and employees and foreign officials (18 U.S.C. §§ 1114, 1116, and 1751), several sorts of terrorist activity defined in recently enacted statutes (18 U.S.C. §§ 2332, 2332a, and 2339A), and violence involving air transportation (18 U.S.C. § 37 and 49 U.S.C. § 46502).[5]

Adding these crimes to the list of crimes that can be investigated under Title III is a good idea. While other crimes currently on the list may cover terrorist activities under investigation, H.R. 1710 would ensure that conduct constituting these serious offenses could be investigated under Title III. Of course, any such investigation would have to comply with all of the procedures of Title III.

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[3] The statistics in this paragraph are derived from *Sourcebook of Criminal Justice Statistics 1993*, U.S. Department of Justice, Bureau of Justice Statistics, Tables 5.2 and 5.3 at 475 and Table 5.18 at 490.

[4] Michael Goldsmith, *Eavesdropping Reform: The Legality of Roving Surveillance*, 1987 U. Ill. L. Rev. 401, 408–409 (1987) (footnotes omitted).

[5] My research indicated that two of the crimes set forth in H.R. 1710 to be added to the list in 18 U.S.C. § 2516 were added by prior legislation. It appears that 18 U.S.C. § 1751 (relating to presidential assassination) and 49 U.S.C. § 46502 (relating to air piracy) already are listed in Section 2516. *See* 18 U.S.C.A. §§ 2516(c) and 2516(j) (West 1995).

SECTION 301(b)

This provision would make an amendment to the procedure in Title III concerning when the prosecutor must file progress reports on an authorized interception to the court which ordered the interception.

Under current law, whether to require reports during the period of interception is left up the judge issuing the court order. 18 U.S.C. §2518(6). H.R. 1710 would require a single report 15 days after the interception has begun. This amendment would require a report and standardize the number of reports. I am unaware of data on the number of reports required, but it was the practice in my former office to include 2 ten day reports in the draft orders submitted to the court. The single report after 15 days would, in my judgment, be sufficient. It is important to note that the court may limit surveillance to any period less than the 30 day maximum and that surveillance is always limited to the period "necessary to achieve the objective of the authorization." 18 U.S.C. §2518(5). H.R. 1710 would not make any change in these provisions in Title III.

SECTION 306

Title III prohibits the use of evidence seized by electronic surveillance if the disclosure of the evidence would be in violation of the provisions of Title III. 18 U.S.C. §2515. This is the statutory "exclusionary rule" of Title III. The Supreme Court has interpreted this exclusionary rule to require exclusion of evidence only where the provision of Title III violated during the seizure "was intended to play a central role in the statutory scheme."[6] This interpretation of the rule is, in my view, sound because it limits the remedy of suppression of evidence to serious breaches of the procedures of Title III. For example, suppose a prosecutor, through oversight, fails to have the court seal the original tapes from a wiretap in a timely manner as required by 18 U.S.C. §2518(8)(a). In circumstances indicating that the evidence was not tampered with, suppression of the evidence would be an extreme sanction for a breach of a provision that is not central to the statutory scheme.[7] The Supreme Court appropriately has taken a flexible approach to the statutory exclusionary rule of Title III.

H.R. 1710 would amend the exclusionary rule in Section 2515 to exclude evidence seized in violation of Title III only where the violation "involved bad faith by law enforcement." Section 306. This amendment would bring the exclusionary rule for violations of the various procedures in Title III into conformity with the exclusionary rule articulated by the Supreme Court for violations of the fourth amendment. The Supreme Court has held that the fourth amendment exclusionary rule does not require the suppression of evidence seized by police who relied in good faith on a search warrant subsequently found not to be supported by probable cause.[8] This "good faith exception" to the fourth amendment exclusionary rule makes sense: The central idea behind an exclusionary rule is to deter intentional breaches of the law. Suppressing evidence seized in good faith is an inappropriate sanction that keeps important evidence from the trier of fact while contributing little to deterring misconduct.

H.R. 1710 would codify the good faith exception in the exclusionary rule of Title III. This would make the exclusionary rule of Title III coterminous with the exclusionary rule of the fourth amendment.[9]

This amendment would also make the standard for exclusion the same for all the categories of communications regulated by Title III. In 1986, through an amendment to Section 2518(10)(c), the Congress limited exclusions of improperly seized "electronic communications" to those seized in bad faith.[10] The amendment in H.R. 1710 would put "oral communications" and "wire communications" under the same standard as "electronic communications," namely, the standard require by the fourth amendment.[11]

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[6] *United States* v. *Giordano*, 416 U.S. 505, 528 (1974). *See also United States* v. *Chavez*, 416 U.S. 563 (1974).

[7] *See, e.g., United States* v. *Acon*, 513 F.3d 513, 518 (3d Cir. 1975).

[8] *United States* v. *Leon*, 468 U.S. 897 (1984). *See also Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984).

[9] At least one court has held that the good faith exception in *Leon* applies to exclusions under Title III, even without the proposed amendment. *United States* v. *Gambino*, 741 F.Supp. 412, 415 (S.D.N.Y. 1990).

[10] *See* House Report No. 99–647 at 48.

[11] One related issue that would be settled by the amendment is whether communications seized by private individuals in violation of Title III could be introduced by the government in a criminal prosecution. Since such an illegal seizure would not involve bad faith by *law enforcement*, the amendment would appear to allow admission of the evidence. I support this result.

H.R. 1710 would not alter the potential criminal and civil sanctions available for persons violating Title III's procedures.

SECTION 307

This provision makes two technical amendments to operating definitions in Title III. Section 307(a) amends the definition of "electronic communication" to exclude "information stored in a communications system used for the electronic storage and transfer of funds." Section 307(b) amends the definition of radio communications "readily accessible to the general public" in Section 2510(b) by striking subsection (F), which excluded all "electronic communications" from the definition. My research did not disclose the impetus behind these two technical amendments.

SECTION 308

H.R. 1710 amends a little utilized portion of Title III: the emergency surveillance provision.[12] 18 U.S.C. 2518(7). As it exists, that provision allows electronic surveillance without a court order for a 48 hour period in certain emergency circumstances, such as immediate danger of death or serious bodily physical injury to persons. The provision requires involvement by the highest ranking members of the Department of Justice. It also requires that a warrant fulfilling all of Title III's requirements be presented to a court within 48 hours, and that surveillance cease if the warrant is found insufficient. The emergency surveillance provision is a codification of a well established doctrine of fourth amendment jurisprudence: Exigent circumstances may render the obtaining of a warrant before a search impractical.[13]

H.R. 1710 would add to the short list of circumstances in which the emergency wiretap provision could be invoked. Under the amendment, a reasonable determination that ongoing conspiratorial activities involving domestic terrorism or international terrorism were afoot, in circumstances where a warrant could not be obtained with due diligence, would allow surveillance under the emergency provision. Sections 308(b) and 315 of H.R. 1710, which incorporate the definition of terrorism, make clear that the new provision contemplates the use of force or violence. I do not view the amendment as problematic. Section 308 merely makes clear that imminent acts of terrorism may give rise to exigent circumstances allowing the seizure of evidence before a warrant is obtained, a result that the current emergency provision and, I believe, the fourth amendment allow.

SECTION 309

H.R. 1710 would amend the part of Title III often referred to as the "roving surveillance provision." 18 U.S.C. §2518(11). This provision allows, in certain circumstances, for a warrant to issue allowing electronic surveillance without the applicant specifying the facilities from which, or the place where, the communication is to be intercepted. The provision requires that the application for a roving surveillance of "oral communications" name the person to be intercepted and explain why the mobility of the suspect makes specification of the facility or place of interception impractical. In order for the warrant to issue, a judge must make the finding that specification is not practical. 18 U.S.C. 2518(11)(a).

For "wire communications" and "electronic communications," the test is slightly different. 18 U.S.C. §2518(11)(b). For these categories of communication, the applicant for an order must show that the person to be intercepted has a purpose "to thwart interception by changing facilities." H.R. 1710 would eliminate this different standard for wire and electronic communications and bring all categories of communications under the same standard. Under Section 309, all applications for roving surveillance would have to name the person to be intercepted and establish that specification of the facility or place is impractical, the current requirements for interceptions of oral communications.

I favor this amendment. Requiring proof that the person to be intercepted has an intent to thwart interception is unwise. It may be that a subject moves from phone to phone because he is attempting to avoid capture or because of constant movement

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Of course, the illegal seizure could still be punished by criminal or civil sanctions. *See generally,* Clifford S. Fishman, *Wiretapping and Eavesdropping* 42 (1978).

[12] I was unable to find statistics concerning the use of the emergency surveillance section. The evidence available suggests that the provision is rarely invoked and that the Department of Justice limits use of the provision to life threatening situations. *See* Clifford S. Fishman, *Interception of Communications in Exigent circumstances: The Fourth Amendment, Federal Legislation, and The United States Department of Justice,* 22 Ga. L. Rev. 1, 9, n.20 (1987).

[13] *See e.g., Schmerber* v. *California,* 384 U.S. 757 (1966), *United States* v. *Karo,* 468 U.S. 705 (1984).

to distribute narcotics. It makes no sense that under such circumstances a roving surveillance order may be obtained for the subjects oral communications but not for the subjects telephone calls.

It should be noted that the roving surveillance provision, as currently constituted and with the amendment proposed in H.R. 1710, comports with the requirements of the fourth amendment. The current provision has been held to be constitutional.[14] Some have expressed concern that the concept of the roving wiretap is inconsistent with the fourth amendment's requirement that warrants state with particularity the *place* to be researched. However, the courts have not interpreted the fourth amendment literally in the context of the modern issue of the seizure of intangible communications. One court put it this way: "In essence, the roving intercept provision replaces the usual practice that the place to be searched be identified in a warrant by an address with a description of that place as the location at which an identified person is engaging in identified criminal conversation."[15] Professor Goldsmith concluded that in light of the interpretation of the fourth amendment by the Supreme Court and the other procedural safeguards in Title III, "roving surveillance is clearly constitutional."[16]

H.R. 1710's charge in the showing required to obtain a roving surveillance warrant for wire and electronic communications would not change the constitutional validity of Section 2518(11). The fourth amendment's particularity requirement would be met by the specification of the person to be intercepted and the showing that specification of the facility or place is impractical, the very showing now required for intercepting an oral communication.

I thank the Committee for this opportunity to share my views on the proposed amendments to Title III contained in H.R. 1710.

Mr. HYDE. Thank you, Professor Fleissner. Gregory T. Nojeim, who is the legislative counsel for the American Civil Liberties Union in its Washington legislative office is responsible at the ACLU for analyzing the civil liberties implications for Federal legislation relating to national security and immigration.

Prior to his position with the ACLU, Mr. Nojeim was the director of legal services for the American-Arab Anti-Discrimination Committee, the ADC, a position he held for 4 years. While with the ADC, Mr. Nojeim spearheaded its responses to hate crimes against Arab-Americans during the Persian Gulf War. We certainly welcome you here, Mr. Nojeim.

STATEMENT OF GREGORY T. NOJEIM, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. NOJEIM. Thank you, Mr. Chairman. I appreciate the opportunity to testify today on behalf of the ACLU. The ACLU is a nationwide, nonpartisan organization of 275,000 members dedicated to preserving the freedoms set forth in the Bill of Rights. My compliments to you, Mr. Chairman. You always give us a voice here at these hearings, and sometimes we disagree, but we appreciate being heard and speaking to you about the civil liberties implications of these bills.

We have a number of concerns about the legislation, and in fact, as we look at the legislation, we can see that its breadth is sweeping.

In some ways, H.R. 1710 is an improvement from a civil liberties point of view over previous terrorism bills that this committee has considered. But in other ways, it is a step backward, from our point of view. We do not consider H.R. 1710 or the other terrorism bills

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[14] *United States* v. *Bianco*, 998 F.2d 1112 (2d Cir. 1993); *United States* v. *Silberman*, 732 F.Supp. 1057 (S.D. Cal. 1990), *aff'd sub nom. United States* v. *Petti, 973 F.2d 1441 (9th Cir. 1992); United States* v. *Ferrara*, 771 F. Supp. 1266 (D.C. Mass. 1991).

[15] *Ferrara*, 771 F. Supp. at 1271.

[16] *Goldsmith*, *supra*, at 425.

that have been brought up as bills that strike an appropriate balance between civil liberties and the need to prevent crime.

Indeed, much in the bill, H.R. 1710, has very little to do with the Oklahoma City bombing and everything to do with eroding constitutional rights.

Denying aliens the right to see the evidence against them in a deportation proceeding will not prevent another Oklahoma City bombing. And I would like to address for a minute some of the things that Mr. Fein spoke of.

In many ways, we agree. I have to point out that the bill will provide for deportation based on secret evidence in many circumstances, because it will often be very easy for the Government to show that it needs to protect an informant from being exposed. That is going to come up rather often, and when that comes up, that is when the secret evidence and the secret deportation kicks in.

Second, the secret evidence provision in H.R. 1710, while it would allow for a "special attorney" to be appointed by the court to review that secret evidence, it would not allow the alien to choose that special attorney. And aliens do have a right to choose their attorney under the fifth amendment.

The court would be the one that choses the attorney that would see the secret evidence. And remember, that that proceeding is only about secret evidence. That is the whole core of that proceeding. So, in our view, it would run afoul of fifth amendment right to due process.

And one other thing that Mr. Fein spoke of that I need to point out, there are two instances where these aliens are going to be held for a long time without having been convicted of any crime. First, is at the front end of these proceedings when they can be held without ever having been determined as being terrorists.

Nonimmigrants would be held pending the duration of the proceedings. Immigrants, they would be held unless they could bear the burden of showing that they should be released. That reverses the burden that is in current law for holding aliens in deportation proceedings.

But there is also a back end. At the end of the proceeding, if the person is found deportable and they cannot be deported to any country—and what country is going to take them—they would be held. The statute says that there is no way for them to get out. They would be held, even though they have never been convicted of a crime. We think that is a problem.

The bill would also bar protected first amendment support for legal activities. It would also hamper legitimate relief evidence of NGO's working in troubled areas. This has nothing to do with preventing another Oklahoma City bombing.

The bill would repeal first amendment protections for fundraising for humanitarian purposes. I would like to take a minute to read to you the language that this bill would repeal.

This is language that protects first amendment activity that now appears in the material support for terrorism statute that Congress enacted last year. The bill would repeal this language: "An investigation may not be initiated or continued under this section based on activities protected by the first amendment to the Constitution,

including expressions of support or the provision of financial support for the nonviolent political religious, philosophical or ideological goals or beliefs of any person or group."

Repealing that first amendment protective language would do nothing to prevent another Oklahoma City bombing. Excluding people from the United States on account of their membership in an organization instead of on account of their activity, would do nothing to prevent another Oklahoma City bombing. Remember, under current law, people about whom there is a reasonable ground to believe might engage in terrorist activity after they enter the United States, are already excludable.

Federalizing State laws against violent crimes would do nothing to prevent another Oklahoma City bombing.

Denying aliens present in the United States now their due process rights by making them excludable rather than deportable would do nothing to prevent another Oklahoma City bombing.

Expanding Federal wiretap authority, increasing the use of roving wiretapping and wiretapping without a court order similarly would not be effective. Title III has not been effective in the type of crimes that could be terrorism. Wiretap authority has not been used in arson, firearms or bombing investigations since 1988. These are the kinds of things that we would expect to be done if this wiretap provision was actually effective in preventing terrorist-type activity.

Finally, all of the things that I have pointed out just now, they pale in comparison to our concern about one particular provision of the statute, and that is section 315. Section 315 of H.R. 1710 would create a new crime of domestic terrorism. It would label as terrorism certain activity which occurs wholly within the United States.

Under section 315, this would be the definition of terrorism: use of force within the United States in violation of the criminal laws of the United States or of any State that appears to be intended to achieve political or social ends by intimidating or coercing a segment of the population or influencing a government or government official.

The sweep of this language is breathtaking.

It would turn into terrorism any forcible blocking of an abortion clinic if that use of force violated any criminal law such as the FACE law.

It would turn into terrorism any forceful act of civil disobedience that violated a criminal law engaged in by any civil rights activist.

It would turn into terrorism the forcible entry by an animal rights group into a building at night for the sole purpose of hanging a banner from the window to expose the torture of animals.

It would turn into terrorism the forceful interruption of an anti-Semitic speech by a member of the Ku Klux Klan, if such activity was intimidating to the Klan and violated a State criminal law against disruptive behavior.

This section is breathtaking. And after it was determined that this was terrorism, then under this bill the dominos would fall. It would be a crime punishable by a substantial fine and up to 10 years in prison to provide material support or resources including cash or meeting facilities.

In other words, if the antiabortion group used church buses to get to the clinic or met in the church basement to plan the protests, the church would be providing material support for terrorism under this bill. Under H.R. 1710, the statutory protection against investigating first amendment activity at the church would be abolished leaving only the Attorney General guidelines as protection.

Under H.R. 1710, the FBI would be empowered to obtain without a court order in advance an emergency wiretap of the meeting in the church basement at which the protest was planned.

Congress has hesitated to adopt a statute defining terrorism in the United States because any such definitions threatened to sweep in a broad range of conduct and raises the prospect that the statute would be enforced selectively. Former President George Bush once said: "one man's terrorist is another man's freedom fighter." And he got it right.

We look forward to working with the committee to assure that in adopting terrorism legislation the protections of the Bill of Rights are preserved.

Thank you very much.

[The prepared statement of Mr. Nojeim follows:]

PREPARED STATEMENT OF GREGORY T. NOJEIM, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify before you today on behalf of the American Civil Liberties Union (ACLU). The ACLU is a nation-wide, non-partisan organization of more than 275,000 members devoted to protecting the principles of freedom set forth in the Bill of Rights. I will focus my remarks on the civil liberties implications of H.R. 1710, the "Comprehensive Antiterrorism Act of 1995" introduced by Mr. Hyde to cover both domestic and international terrorism. Where appropriate, I will compare that legislation to H.R. 896, the "Omnibus Counterterrorism Act of 1995," introduced at the request of the Administration in February 1995 to combat international terrorism, and H.R. 1635, the "Antiterrorism Amendments Act of 1995," introduced after the April 19 bombing in Oklahoma City at the request of the Administration ostensibly to combat domestic terrorism.

While each of these bills was introduced to combat terrorism, in the view of the ACLU, the legislation would do substantial damage to civil liberties in the United States. Instead of being tools to prevent "another Oklahoma City" the portions of the legislation that violate civil liberties have little to do with preventing such a bombing attack in the future. They are instead a collection of measures—many of which have been offered before attached to legislation promulgated as terrorism legislation.

From a civil liberties perspective, some provisions of H.R. 1710 are an improvement over the Administration's bills, but other provisions are a step backward, and raise even more civil liberties problems than they solve. Enacting H.R. 1710 in its current form, or amending it into a bill that would further erode civil liberties, would be like adding kerosene to the fire of distrust of the government that has been espoused by some following the tragedy in Oklahoma City. Amendments to the bill could mitigate the constitutional problems raised by the legislation.

The ACLU recognizes that the bombing in Oklahoma City should prompt us to re-examine the ability of law enforcement to protect us against violent activity. This re-examination should be conducted carefully, and any new proposals should be narrowly focussed on the problem they would address, and be consistent with the Constitution. Terrorism legislation to deal with criminal activity can be enacted without adding the Bill of Rights to the list of casualties in Oklahoma City.

Our concerns about the pending legislation are discussed below.

NEW, BROAD DEFINITION OF DOMESTIC TERRORISM

A. BACKGROUND

Section 315 of H.R. 1710 would substantially broaden the definition of "terrorism" in current law to cover domestic (as opposed to international) activity, including vio-

lence at abortion clinics. The activity that would become "terrorism" includes so much activity that the section cannot help but be enforced selectively, according to the politics of the day.

B. DISCUSSION

Section 315 of H.R. 1710 would re-write a section of U.S. law[1] defining "international terrorism." It would label as "terrorism" certain activity which occurs wholly within the United States. Under Section 315, "terrorism" would be defined as the use of force within the U.S. in violation of the criminal laws of the United States or of any state, that appears to be intended to achieve political or social ends by intimidating or coercing a segment of the population or influencing a government or government official. "International terrorism" would be terrorism that occurs primarily outside of the United States or transcends national boundaries.

The sweep of this section is breathtaking. It would turn into "terrorism" any forcible blocking of an abortion clinic if that use of force violated any criminal law, such as the FACE law. It would turn into "terrorism" any forceful act of civil disobedience that violates a criminal law, engaged in by any civil rights activist. It would turn into "terrorism" the forcible entry by an animal rights group into a building at night for the purpose of hanging a banner from the window to expose the torture of animals. It would turn into "terrorism" the forceful disruption of an anti-Semitic speech by a member of the Ku Klux Klan, if such activity was "intimidating" to the Klan and violated a state criminal law against disruptive behavior. It is clear that this definition would sweep in an extraordinarily wide range of activity.

Then the dominoes would fall. Under 18 U.S.C. Section 2339A, it would be a crime punishable by a substantial fine and up to ten years in prison to provide material support or resources, including cash, meeting facilities, transportation, or goods for the conduct of such "terrorism." In other words, if the anti-abortion group used church busses to get to the clinic, or met in the church basement to plan the protest, the church would be providing material support for terrorism. Under Section 2339A as it would be amended by Section 103 of H.R. 1710, the statutory protection against investigating First Amendment activity at the church would be abolished, leaving only the Attorney General Guidelines as a protection (see discussion below). Under Section 308 of H.R. 1710, the FBI would be empowered to obtain, without a court order, an "emergency wiretap" of the meeting in the church basement at which the protest was planned (see discussion below).

Congress has hesitated to adopt a statute defining "terrorism" in the United States because any such definition threatens to sweep in a broad range of conduct and raises the prospect that the statute would be enforced selectively. Former President George Bush once said, "One man's terrorist is another man's freedom fighter." This proposed section of law underlines President Bush's observation, and illustrates why legislating in this area is so difficult.

C. RECOMMENDATION

Section 315 should be deleted.

First Amendment Support for Legal Activities

A. BACKGROUND

The First Amendment to the Constitution guarantees to people in the United States the right to freely associate. This right extends both to citizens and to noncitizens. Courts have interpreted the First Amendment to mean that people are to be held accountable for their own actions, not for the actions of others. The courts have consistently held that raising and contributing money, and recruiting members, are activities protected by the First Amendment. Only support intended to further the unlawful activities of a group can be prohibited.

To be consistent with the Constitution, effective terrorism legislation must prohibit *unlawful activity*, not merely associations, because to do otherwise would be to operate on nothing less than guilt by association. Like Section 301 of H.R. 896, Section 102 of H.R. 1710 would do violence to this principle. The legislation would turn into a criminal act the giving of a pencil to a school operated by a group designated a terrorist organization by the President.

[1] 8 U.S.C. Section 2331.

B. DISCUSSION

Section 611 of H.R. 1710 would give the President unprecedented power to designate any foreign group a "terrorist" organization. Once so designated, its members would be barred from entering the United States[2] and Section 102 of H.R. 1710 would make it a criminal act to provide support for non-violent, charitable activities of such organizations. A similar provision barring support for legal activities appears in Section 301 of H.R. 896.

The proposed legislation would attack citizens who support the non-violent, legal activity of unpopular groups labelled as "terrorist organizations." Section 611 of H.R. 1710 would give the President unprecedented authority to designate any foreign organization found by the President to have ever engaged in "terrorist activity" that threatens the national security of the United States. "Terrorist activity" is broadly defined under current law to include unlawful use of any explosive or firearm (other than for mere personal gain—such as a robbery) with intent to cause substantial damage to property.[3] Once so labelled, anybody in the U.S. who sent money to the organization, even to support non-violent, charitable activity of the organization, would be subject to a substantial fine and up to ten years in prison.[4]

Current law already criminalizes the provision of material support for certain criminal "terrorist" activities.[5] The legislation therefore is calculated to outlaw support for what is left: lawful activities of designated organizations—a fundamentally flawed approach.

H.R. 1710 contains no provision for judicial review of the President's designation of a "terrorist organization." Moreover, few, if any, courts would second-guess the President when the criteria for the designation is the national security of the United States. Courts simply have no way to measure whether the group's activities threaten "national security." Under Section 611(a)(2), Congress, however, could pass a law reversing the Presidential designation, and would be advised of the impending designation at least three days prior to publication in the *Federal Register*. Congressional review opens up more problems than it solves: lobbyists from various groups would descend on Congress armed with reports, charts, legal briefs and arguments about why other groups who disagree with them should be designated as terrorists, or why they should not be designated.

In addition, because the bill allows for designation of any group that "engages in or has engaged in" terrorist activity, the President would be empowered to designate any group that has abandoned terrorist activity. Such groups would include the African National Congress, which the United States government once considered a terrorist organization. Finally, unlike H.R. 896, under H.R. 1710, there would be no opportunity for an individual to obtain a license to furnish support for the legal, non-violent charitable activities of a designated organization.[6]

H.R. 896 contains a similar provision at section 301, and it differs in a number of ways from H.R. 1710. Presidential designations of a terrorist group are effectively unreviewable by a court because designation is conclusive[7] and based on foreign policy and national security grounds. This provision in H.R. 896 differs in that the presidential designation is permanent unless reversed by the President, cannot be reviewed by Congress, can cover *domestic* groups who raise funds for or "act on behalf of" any foreign designated group, and a person could in theory obtain a license to contribute to the non-violent, charitable activities of the designated organization.[8]

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[2] The immigration implications of this new power to designate groups are discussed below under "Resurrection of McCarran-Walter Act."

[3] Under H.R. 896, terrorist activity would be even more broadly defined to include fundraising for the legal, non-violent, even charitable activities of organizations designated as terrorist organizations.

[4] Section 301 of H.R. 896 also provides for the freezing of the assets of any designated organization, without any due process.

[5] 18 U.S.C. Section 2339A.

[6] Section 611 of H.R. 1710 also provides that the presidential designation will lapse if not renewed every two years.

[7] The Administration has expressed a willingness to remove from its bill the language indicating that the designation would be conclusive.

[8] The licensing provision in the Administration bill would in theory allow a donor to secure a license to support the charitable, religious, literary, or educational purposes of the designated organization. However, the licensing provision is wholly illusory because: (i) it would require a *foreign* organization, declared a "terrorist" organization by the President, to open its books to the Treasury Department as a condition of granting the license; and (ii) it would require a donor who would transfer money to such foreign organization to likewise open its books to the Treasury Department and be able to show "the source of all funds it receives, expenses it incurs, and disbursements it makes" regardless of whether the expenses, disbursements, and income relate

Continued

The fundraising provisions of each piece of proposed legislation take a fundamentally flawed and unconstitutional approach. Criminalizing support for such legal activities is not the way to deal with terrorism. These sections of the bill smack of McCarthyism at its worst. Instead of outlawing support for legal, non-violent activities of designated organizations, the ACLU suggests Congress focus on outlawing support for *illegal* activities of any individual or organization.

The Supreme Court has repeatedly held that contributing money to political groups is protected by the First Amendment.[9] It has also repeatedly held that the First Amendment bars the government from prohibiting support for an organization unless the government proves that the person furnishing the support intended to further the unlawful activities of the organization. It developed this principle in a series of cases involving the Communist Party, despite the government's contention that the Communist Party posed a threat to national security and sought to overthrow the U.S. government by force.[10] In *Healy* v. *James*, 408 U.S. 169, the Court held:

> "guilt by association alone, without [a showing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization pursuing unlawful aims and goals, and a specific intent to further those illegal aims.

The implications of logic supporting this provision in H.R. 1710 are profound. The logic suggests that the government could, without violating the Constitution, punish any support for any group that plans to engage in unlawful activity. Taken to its logical end, this means that the government could punish a person for paying membership dues to the National Association for the Advancement of Colored People (NAACP) if the member knew that the organization planned an act of civil disobedience. This logic suggests likewise that it would be permissible under the Constitution to punish a person who paid membership dues to an anti-abortion group, if the person paying the dues knew the group planned to trespass on the premises of an abortion clinic.

Even as written, the legislation could have a dramatic, negative effect on organizations that would conduct relief activities in many troubled parts of the world.[11] By barring individuals and organizations from providing even in-kind support to organizations the President has designated as "terrorist" organizations, the legislation could disrupt relief efforts encouraged by the U.S. government.

In some troubled parts of the world, relief organizations have no choice but to work through organizations likely to be designated as "terrorist" organizations by the President. Relief organizations must often pay small fees or bribes to groups that conduct some objectionable activity. Afghanistan is a prime illustration. To furnish any funds, goods, or services to such a group, even if done to advance a humanitarian endeavor, would become a crime.

The faction in Somalia headed by Mohammed Farah Aideed ("Aideed faction") would likely have been designated a "terrorist" group, had legislation such as that now proposed been pending when the United States was leading relief efforts in Somalia. To conduct relief work in Somalia, many non-governmental organizations were *required,* as a condition of getting a truck full of supplies such as grain or medicine through an area controlled by the Aided faction, to hire "guards" furnished by this faction, and give a portion of the supplies to this faction. NGO's did not like to do this, but they did it to save lives. Under the pending legislation, paying those "guards" or furnishing that bag of grain as a "toll" so a truck filled with grain could

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to the charitable activity it would like to support—a virtually impossibility for individual donors. No exception was made for religious institutions, which likewise would be required to open their books to the government in order to make a donation. This would risk impermissible entanglement between church and state.

[9] *See Citizens Against Rent Control* v. *Berkeley,* 454 U.S. 290, 295–296 (1981); *Federal Election Commission* v. *National Conservative Political Action Committee,* 470 U.S. 480, 493–495 (1985); and *Roberts* v. *United States Jaycees,* 468 U.S. 609, 626–27 (1984).

[10] *See Keyishian* v. *Board of Regents,* 385 U.S. 589, 606–07 (1967) (striking down a statute barring members of the Communist Party from employment); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966) (same); *United States* v. *Robel,* 389 U.S. 258 (1967) (same); *Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441, 448–49 (1974) (regarding ballot access); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964) (freedom to travel abroad); *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971) (right to practice law); and *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) (same).

[11] The following section assumes that the phrase "within the United States" is not intended to prohibit prosecution of an individual or organization raising funds here, but providing material support to a "terrorist" organization abroad. Section 301 of H.R. 896 clearly contemplates such prosecution.

get through, would become a criminal act.[12] This would be the case even if the giver of this aid had no intention of furthering the violent, illegal activity of the Aideed faction.

Another example of a group likely to be designated a "terrorist" organization is the Zapatistas in Chiapas, Mexico. If the President designates the Zapatistas a terrorist organization, it would then become illegal to do relief work in Chiapas, if as part of that work, a relief organization furnished money or goods to institutions affiliated with the Zapatistas. One can be sure that the designation of which group is a terrorist group will be made in large part on the basis of political concerns, and as a result of pressure exerted by foreign governments on our own.

Much of this relief work would not be conducted if criminal sanctions were threatened. The work is already dangerous enough. The same dilemma would be faced by organizations doing missionary work in troubled areas of the world, if as part of that work, the organization had to pay in money or goods an arm of an organization designated a terrorist group.

C. RECOMMENDATION

The proposed legislation takes a fundamentally flawed approach to the alleged problem of fundraising for terrorist activity, if indeed there is one.[13] To pass constitutional muster, terrorism legislation would have to focus on activity instead of on associations. This section should be struck altogether. Instead, Congress might consider expanding the list of crimes in 18 U.S.C. Section 2339A to make criminal the provision of material support for more violent activity abroad.

REPEAL OF FIRST AMENDMENT PROTECTION FOR FUNDRAISING ACTIVITIES

A. BACKGROUND

Section 103 of H.R. 1710 (as well as Section 601 of H.R. 896) would subject citizens and aliens to FBI investigation for activity protected by the First Amendment. Last year, Congress adopted legislation prohibiting people in the U.S. from providing "material support" for terrorist acts.[14] To prevent FBI "fishing expeditions" into activities protected by the First Amendment, the legislation included clauses prohibiting investigations of people: (i) who provide humanitarian assistance to people not directly involved in criminal activity; and (ii) engaged only in activities protected by the First Amendment. This legislation would repeal those modest protections and permit investigation in the absence of facts that reasonably indicate that the target of the investigation knowingly and intentionally has or will engage in the violation of a federal criminal law.

B. DISCUSSION

The proposed legislation would repeal the following language appearing in the statute Congress enacted to bar people in the United States from providing material support for certain crimes:

> (c) Investigations——
>
> (1) In general.—Within the United States, an investigation may be initiated or continued under this section only when facts reasonably indicate that——
>
> (A) in the case of an individual, the individual knowingly or intentionally engages, has engaged, or is about to engage in the violation of this or any other Federal criminal law; and
>
> (B) in the case of a group of individuals, the group knowingly or intentionally engages, has engaged, or is about to engage in the violation of this or any other Federal criminal law.
>
> (2) Activities protected by the First Amendment.—An investigation may not be initiated or continued under this section based on activities protected

[12] In fact, under Section 301 of H.R. 896, the President would have the power to designate such a U.S.-based NGO as a "terrorist" group and prohibit it from fundraising to do this relief work. *See* proposed 18 U.S.C. Section 2339B(b) and (c)(2). In contrast, H.R. 1710 would permit the President to designate only foreign organizations as "terrorist" groups.

[13] To our knowledge, the Administration has made no showing that substantial funds are being sent from the United States to support terrorist activity abroad. Such a showing, including dollar amounts and the type of activity being funded, should be a minimal prerequisite for seeking new legislation to stop such alleged funding. Indeed, this provision should not be considered until the Secretary of State and the Attorney General produce data that would justify Congressional action.

[14] 18 U.S.C. Section 2339A.

> by the First Amendment to the Constitution, including expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group.

U.S.C. Section 2339A(c). In many ways, this provision, which Section 103 of H.R. 1710 would repeal, is a model of how the line should be drawn between support for illegal activity and support for constitutionally protected activity.

Paragraph (c)(2) is a particularly important protection, and it is difficult to understand how this provision, which protects against unfounded investigation of First Amendment activity, would hamper investigation of criminal activity. In fact, the guidelines governing FBI investigations of such activity state specifically:

> It is important that such investigations [of criminal activity] not be based solely on activities protected by the First Amendment or on the lawful exercise of an other rights secured by the Constitution or laws of the United States.[15]

The Administration, in the section-by-section analysis provided Congress when H.R. 896 was introduced in February, claimed that the "knowingly and intentionally" language in subparagraphs 1(A) and 1(B) disrupt the "natural flow of a criminal investigation," because these elements of the crime might not be determined until an investigation is commenced. However, the guidelines governing FBI investigatory activity specifically provide for preliminary inquiries in such circumstances, so that a determination about whether to commence a full investigation can be made. The guidelines say:

> On some occasions the FBI may receive information or an allegation not warranting a full investigation—because there is not yet a "reasonable indication" of criminal activities—but whose responsible handling requires some further scrutiny of initial leads. In such circumstances, though the factual predicate for an investigation has not been met, the FBI may initiate an "inquiry" involving some measured review, contact, or observation activities in response to the allegation or information indicating the possibility of criminal activity.
>
> This authority to conduct inquiries short of a full investigation allows the government to respond in a measured way to ambiguous or incomplete information and to do so with as little intrusion as the needs of the situation permit. . . . It is contemplated that such inquiries would be of short duration and be confined solely to obtaining the information necessary to make an informed judgment as to whether a full investigation is needed.[16]

Nothing in the statutory language H.R. 1710 would delete would prohibit the FBI from conducting a preliminary inquiry to determine whether a full investigation of material support for terrorism should be opened. When conducting such a preliminary inquiry, the FBI could use, under its guidelines, investigative techniques including questioning of informants, confidential sources and acquaintances of the alleged wrongdoer, physical and photographic surveillance, under cover operations and infiltration, and electronic surveillance.

The FBI has a history of commencing unfounded investigations into First Amendment activity of groups, including its investigation of the Committee in Solidarity with the People of El Salvador (CISPES) and the Cointelpro investigations of civil rights groups and leaders in the 1970s. Recently, the AIDS activist group ACT UP learned that the FBI had maintained a file of over 100 pages on the group, and refused to make most of the file public. Moreover, the FBI recently announced that it was "re-interpreting" the Attorney General Guidelines that govern its domestic investigations in a manner that would allow it to track more activities in the United States. Against this backdrop, Congress is asked by the FBI to repeal a substantial protection against FBI investigation of protected First Amendment activity.

Section 103 of H.R. 1710 would also delete from existing law the portion of 18 U.S.C. Section 2339A excepting "humanitarian assistance to persons not directly involved in such violations" from the definition of proscribed material support for terrorism.[17] Deletion of this language suggests that a person could be "providing material support to terrorists" if they provided "humanitarian assistance to persons not directly involved in such violations" of criminal law as are set forth in the statute. If the First Amendment protective language described above is deleted, then persons

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[15] The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, p.3.

[16] *Id.* at 4.

[17] H.R. 896 contains no similar provision.

may be investigated for engaging in such humanitarian activity. The deletion would create even more problems for NGO's doing relief work in troubled areas of the globe. They would lose the safe harbor this protective language created.

C. RECOMMENDATION

H.R. 1710 should be amended to include all portions of the protective language recited above, or Section 103 should be deleted from the bill altogether, to preserve these protections as they appear in current law.

DEPORTATION BASED ON SECRET EVIDENCE

A. BACKGROUND

The Fifth Amendment to the U.S. Constitution guarantees that a person shall not be deprived of life, liberty or property without due process of law. Section 601 of H.R. 1710, like Section 201 of H.R. 896, would establish a new court that could deport aliens as "terrorists" without allowing them an opportunity to see the evidence against them.[18]

Section 601 of H.R. 1710 would allow for the use of evidence kept secret from an alien in deportation proceedings brought against an alien allegedly deportable for engaging in terrorism activity. It provides for a new court that would receive classified information about the alien out of the presence of the alien and the alien's attorney. It would commence a special removal hearing. During the proceedings, the accused non-immigrant alien would be held in custody, and the accused permanent resident alien would be held in custody unless he or she could prove, at a hearing at which classified information could be submitted *ex parte* and *in camera*, that the alien should be released because he or she is not likely to flee, and would not endanger national security or the safety of any person.

For the actual hearing, the government would summarize any classified information to be used against the alien. The court would approve the summary if the court found it sufficient to: (i) inform the alien of the general nature of the evidence that the alien is deportable as a terrorist and (ii) permit the alien to prepare a defense. The court-approved summary would be provided to the alien unless the court found that there is a reasonable likelihood that provision of the summary would cause serious and irreparable harm to the national security, or serious bodily injury to a person.

In such a case, if the alien is a non-immigrant, the alien could be deported based on the secret evidence, examined by the court *in camera* and *ex parte*, without any further protection. If the alien is a permanent resident, the judge would appoint an attorney with a security clearance ("Special Attorney") to review the secret evidence and challenge it in an in camera proceeding on behalf of the alien. Such Special Attorney would be prohibited from disclosing the secret evidence to the alien or to the attorney chosen by the alien, at the risk of facing a minimum of 10 years in prison.

Section 601 of H.R. 1710 is similar to legislation Congress declined to adopt in each of its two previous sessions. It differs from that legislation, from H.R. 896 and from S. 735, terrorism bill the Senate passed a few days ago in that a Special Attorney acting in the alien's interest would have access to the secret information. Nonetheless, this procedure does not pass constitutional muster because it denies aliens—both permanent residents and non-immigrants—their due process rights to confront the evidence against them, and in the case of permanent residents, the due process right to choose their own counsel.

The government has never before used secret information to deport an alien living in the United States. The most fundamental requisite of due process is that any evidence the government relies upon must be disclosed so that it can be responded to and defended against.

This provision of law is unnecessary. Already, the government has the power to exclude from the United States any alien who has engaged in terrorist activity (as broadly defined), or about whom the Attorney General or a consular officer has reasonable ground to believe is likely to engage after entry in terrorist activity. 8 U.S.C. Section 1182(a)(3)(B). After entry, an alien who commits a serious crime—a crime of the type most of the public considers "terrorism," is treated as follows: they are arrested, they are held (and held without bond if they are a flight risk or

[18] Even more striking, Section 202(d) of H.R. 896 would allow the use of secret evidence in a deportation proceeding against any non-immigrant alien, even if the grounds of deportation have nothing to do with terrorism at all. It could be used to deport a student alleged to have worked off-campus in violation of their status, or against a person alleged to have done nothing more than overstay a visa. This proposal does not belong in a terrorism bill.

a danger to the community), they are tried, if guilty, are convicted, are sent to prison, and in the case of serious crimes, they are deportable at the end of their time in prison. Instead of using this procedure, the bill would substitute a procedure allowing the government to deport an alien, convicted of no crime, as a terrorist, on the basis of evidence the alien never sees.

The Supreme Court and the lower courts have consistently held that aliens who have entered the United States gain the full protections of the due process clause, and therefore cannot be deported on the basis of information not disclosed to them. *Kwong Hai Chew* v. *Colding,* 344 U.S. 590, 597 (1953) (interpreting secret trial provision not to apply to resident alien because to do so would raise due process concerns); *Rafeedie* v. *INS,* 880 F.2d 506 (D.C. Cir. 1989) (affirming preliminary injunction against INS attempt to use secret information to exclude permanent resident alien); *Rafeedie* v. *INS,* 795 F. Supp. 13 (D.D.C. 1992) (declaring unconstitutional the government's attempt to use secret information to exclude permanent resident alien). In *Matthews* v. *Dias,* 426 U.S. 67, 77 (1976) the Court stated:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivations of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

As recently as January, 1995, the District Court of the Central District of California held that to deny nondiscretionary relief to plaintiff aliens based on classified information kept secret from them would deny them due process rights. In *American-Arab Anti-Discrimination Committee* v. *Reno,* CV 87 2107 (January 24, 1995), Slip. Op. (appeal pending) Judge Wilson stated:

> One would be hard pressed to design a procedure more likely to result in erroneous deprivations. As Justice Frankfurter observed: "Secrecy is not congenial to truth-seeking. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

citing Joint Anti-Fascist Refugee Committee v. *McGrath,* 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring).

The courts have permitted the government to use classified information only to exclude aliens who have not yet entered the United States (*U.S. ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537 (1950)) or to deny an alien a discretionary immigration benefit (Jay v. Boyd, 351 U.S. 345, 357–59 (1956), reasoning that because an alien's application for discretionary relief can be denied for any reason whatsoever, it may be denied on the basis of secret information)—never to deport an alien already present.

The danger presented by withholding from aliens the evidence upon which they would be deported is real and significant. In one case that went to the Supreme Court, *U.S. ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537 (1950) secret evidence was allowed to be used to exclude from the United States the alien wife of a U.S. citizen. Mrs. Knauff was in exclusion proceedings and had not yet entered the United States. As a result of public pressure, a hearing was granted notwithstanding the Court's ruling that because Mrs. Knauff had not entered the U.S., she did not have the right to see the secret evidence. In the course of the hearing, the secret evidence was found to be worthless because the "confidential source" offering the evidence was determined to be a jilted lover. Mrs. Knauff was allowed to enter the United States. The case provides a graphic illustration of the danger of allowing secret evidence to be used against aliens in deportation proceedings.[19]

Providing the secret, undisclosed evidence to an attorney chosen by the court, not the alien, does not cure this provision of its due process infirmities. First, the provision only applies in the case of permanent residents—non-immigrants would often not receive a summary of the classified information, no Special Attorney could be appointed to review the secret evidence and argue on behalf of the non-immigrant alien, and he or she could be deported based on the secret evidence.

Second, an alien in a deportation proceedings has a right to choose his or her own counsel under the due process clause of the Fifth Amendment.[20] Section 601 of H.R. 1710 would deny the alien that right with respect to the review of the secret evi-

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[19] *See also,* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei,* 143 Penn. L. Rev. 993 (April 1995)

[20] *Montilla* v. *INS,* 926 F.2d 162, 166 (2nd Cir. 1991); *U.S.* v. *Villa-Fabela,* 882 F.2d 434, 438 (9th Cir. 1989); and *Rios-Berrios* v. *INS,* 776 F.2d 859, 862 (9th Cir. 1985).

dence. While the alien would have the opportunity to choose his or her own counsel for other purposes, the court would choose the Special Attorney who would review the secret evidence for the alien. This review is at the very heart of the special deportation proceedings that would be established under Section 601: without the secret evidence, there would be no need for the special deportation proceedings. Therefore, to deny the alien the right to choose his counsel in connection with the proceedings regarding secret evidence is to deny the alien his right to counsel in these proceedings.

Third, providing counsel, but not the alien, with access to the secret evidence does not satisfy the alien's due process rights. Often, it is only the alien—not a Special Attorney who is not even acquainted with the alien—who knows whether a particular piece of information is inaccurate, or a particular source unreliable. No "Special Attorney" would have known in the *Knauff* case discussed above that the source of the secret evidence was in fact a jilted lover. No "Special Attorney" would be in a position to impeach such a witness because the Special Attorney would be barred by law from disclosing the name of that witness to the only person who would know why the witness was unreliable: the alien client.

These provisions contrast sharply with the Classified Information Procedures Act (CIPA).[21] While we believe that CIPA itself raises constitutional concerns because it can operate to require a defendant to mount a defense with only a summary of the classified evidence, the CIPA procedures would be preferable to Section 601 of H.R. 1710.

CIPA establishes a procedure by which a defendant in a criminal case may seek to use classified information in his or her defense. If the government objects to the use of classified information, it can submit to the court a summary of the classified information which must provide the defendant with substantially the same ability to make a defense as would disclosure of the classified information.[22] The judge holds a hearing, in camera if necessary, at which the defendant is given an opportunity to question the adequacy of the summary. Under CIPA, if no fair summary protecting the classified information can be provided, the summary is rejected, the information cannot be used, and the court sanctions the government for refusing to consent to public disclosure, by dismissing the entire indictment or counts of the indictment, by entering findings against the government, or by striking the testimony of witnesses.

Thus under CIPA, when a fair summary protecting disclosure of classified information cannot be provided the defendant, the government cannot use the classified information. H.R. 1710 would turn CIPA on its ear: if provision of a fair summary of the classified information would, for example, disclose the name of an informant the government claims could be injured if identified, no summary would be required, the classified information *would be* used as evidence to deport the alien, (a Special Attorney could review the information and advocate for a permanent resident alien) and the government would suffer no sanctions.

The proposed legislation would *allow* the use of classified information against the alien when a summary could not be provided, whereas CIPA *prohibits* the use of classified information in such a circumstance. This use of classified information, kept secret from an alien, would violate the due process rights of aliens.

C. RECOMMENDATIONS

Section 601 of H.R. 1710 should be modified substantially to track CIPA. If so modified, the alien would receive a summary of the classified information the government sought to use against the alien. The alien would have an opportunity to challenge the adequacy of the summary. The summary would be approved by the judge if the judge found that the summary provided the alien with substantially the same opportunity to defend in the deportation proceedings as would the classified information. If approved, the summary would be used by the judge to determine whether the alien is deportable as a terrorist, and the classified information would not be considered by the judge or be part of the record in the proceedings. If no such summary could be provided, the summary and the classified information would not be used in the proceedings. In addition, proposed Section 508 would be amended so that aliens facing deportation proceedings in the special court would be held pending deportation proceedings like other aliens who are a flight risk or a danger to

[21] 18 U.S.C. App. IV, Section 1 et seq.

[22] The summary contemplated in Section 601 of H.R. 1710 does not even meet this minimal CIPA standard. Under Section 601, the summary would be approved if it was sufficient to inform the alien of the "general nature" of the evidence and "to permit the alien to prepare a defense." This is a far cry from a summary that provides an alien with substantially the same opportunity to make a defense as would the secret information.

the community. Such an amended statute would be far more likely to pass constitutional muster than would the current proposal.

RESURRECTION OF MCCARRAN-WALTER ACT

A. BACKGROUND

Section 611 of H.R. 1710 would, in principle, resurrect the McCarran-Walter Act, repealed by Congress just a few years ago after being ruled unconstitutional as applied to a particular alien. It would render associations, without more, grounds for exclusion under the Immigration and Nationality Act because it would render excludable every member of a "terrorist organization" designated by the President. No analogous provision appears in H.R. 896.

Section D of the McCarran-Walter Act allowed, among other things, for the deportation of aliens who "advocate the economic, international and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization" that so advocates, "either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization. . . ." Section F(iii) allowed for the deportation of "[a]liens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . the unlawful damage, injury or destruction of property."

The McCarran-Walter Act was used to exclude from the United States persons on account of activities protected by the First Amendment. Persons excluded have included Pierre Trudeau, once the Prime Minister of Canada, and Canadian naturalist Farley Mowat. People should be excluded from the United States on account of their *activities*, not on account of their political beliefs or their associations. Congress repealed the McCarran-Walter Act a few years ago and accepted the notion that aliens should be excluded from the United States on account of their illegal activities, not for engaging in activity that would be protected by the First Amendment, if engaged in by a person here.

B. DISCUSSION

Under current law, a person who has engaged in terrorism, or a person about whom a consular officer or the Attorney General has a reasonable ground to believe is likely to engage in any terrorism after entry, is already excludable.[23]

Thus, under current law, a person who might actually commit "terrorist activity" would be barred. The proposed amendment is therefore not calculated to bar from the United States such dangerous persons. Rather, it is calculated to bar people from the United States merely on account of their membership in an organization labelled a "terrorist organization" even if the person had never committed terrorist activity, did not support terrorist activity, and participated in or advocated only the legal activities of the organization. In fact, it would bar entry to a member who was attempting to turn the organization away from violent activity, and who sought to come to the United States for the express purpose of gathering support for that position. The violent acts of others would be ascribed to him or her merely on account of membership in the organization. This is guilt by association in its purest form.

Section 611 of H.R. 1710 would amend Section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)) by rendering excludable any alien who:

> [I]s a representative of a terrorist organization or . . . is a member of a terrorist organization

designated by the President upon a finding that the organization engages in or has engaged in terrorist activity that threatens the security of the United States.

Section 611 of H.R. 1710 would roll back nearly two decades of movement by Congress to bar people from the United States on account of their illegal activities, instead of on account of their associations and political beliefs. It would re-introduce the notion of guilt by association and render aliens deportable for associational activity fully protected by the First Amendment.

Just last year, the Administration testified in Congress against legislation that would bar from the United States aliens based on their political beliefs and affiliations. On February 23, 1994, Mary A. Ryan, Assistant Secretary for Consular Affairs of the Department of State testified that one could not presume that a member

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[23] 8 U.S.C. Section 1182(a)(3)(B)(i). Section 611 of H.R. 1710 would also render excludable not just an alien who has engaged in terrorist activity, but an alien about whom there is a reasonable ground to believe has engaged in terrorist activity—a substantially lower standard.

of a group that engages in widespread social welfare programs was a "terrorist" just because other members of the group engage in objectionable violent activity.[24] For that reason, the Administration objected to proposed legislation that would make mere membership in a "terrorist" organization a grounds for exclusion.

Moreover, the provision is not limited to groups currently engaged in terrorist activity but would operate to bar entry to members of organizations that have ever engaged in terrorist activity, even if today, the organization does not engage in terrorist activity. Under this provision, every member of the African National Congress would be excludable from the United States on account of past activity of the ANC which the U.S. government deemed terrorist activity, notwithstanding the fact that the ANC is the governing party in South Africa, and does not today engage in terrorist activity as it is defined in the statute.

This section would exclude from the United States people who come merely to speak at conferences and conventions, or to engage in other activity protected by the First Amendment. Americans who invite them to come speak, and who would like to hear them voice often controversial points of view, have a First Amendment interest in hearing what they have to say, and therefore in their entry into the United States.

C. RECOMMENDATION

This proposed section should be struck altogether. Absent this section, current law would still render excludable aliens who have engaged in terrorist activity, or about whom there is a reasonable ground to believe may engage in terrorist activity after entry.

In lieu of striking the section altogether, an amendment could be offered to apply the bar only to those members of organizations currently engaged in terrorism activity, and to ameliorate the effect of the provision on activities that do not violate the Constitution. A similar amendment was adopted in Section 901 of the Foreign Relations Authorization Act for Fiscal Years 1988 and 1989 to limit the McCarran-Walter Act's negative effect on activity protected by the Constitution. Such an amendment to 8 U.S.C. Section 1182 could be:

> Notwithstanding any other provision of law, no alien may be denied a visa or excluded from admission into the United States because of any past, current or expected beliefs, statements or associations which, if engaged in or maintained by a U.S. citizen, would be protected under the Constitution of the United States.

This would restrict the Secretary of State and the Attorney General from barring from the United States people merely on account of their First Amendment activity, or other activity protected by the Constitution. Similar language can be found in current law governing exclusion for reasons of foreign policy.[25] People who have, or about whom there is a reasonable ground to believe may after entry, engage in terrorism activity as it is defined in the statute would still be excludable on account of that activity.

A similarly-worded amendment could be offered to 8 U.S.C. Section 1251 to make it clear that aliens could not be deported from the United States merely on account of activity protected by the Constitution.

Federalizing State Law and Selective Prosecution on Account of Political Beliefs

A. BACKGROUND

Section 104 of H.R. 1710 (and the similar Section 101 of H.R. 896) would turn into federal "terrorism" crimes a broad range of violent activity already proscribed by state criminal law. These sections are so broad as to sweep in a wide range of conduct, federalize many state laws, and invite selective prosecution of unpopular groups for their political beliefs.

Section 104 of H.R. 1710 would allow federal prosecution of acts that transcend national boundaries and violate state laws prohibiting killing, kidnapping, or serious assaults, and property damage that creates a substantial risk of serious bodily injury, if: (i) a jurisdictional base could be met; and (ii) the Attorney General certifies that the act, or any activity preparatory to the act, or meant to conceal its

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[24] Written Testimony of Mary A. Ryan, Assistant Secretary for Consular Affairs, Department of State, Before the Subcomm. on International Law, Immigration and Refugees of the House Judiciary Comm., February 23, 1994, at 6–7.

[25] *See*, 8 U.S.C. Section 1182(a)(3)(C)(ii).

commission, is terrorism as broadly defined in Section 315 above. In other words, the Attorney General would be called upon to certify that the act was intended to achieve a political or social end by intimidating a segment of the population or influencing a government official.

All of the *activity* described in this section is already a crime under the laws of the states. However, H.R. 1710 would turn these state law crimes into federal crimes when the Attorney General makes a non-reviewable certification that the crime was politically motivated. Having the government presume the political opinion and motivation of an actor, in an unreviewable determination, is fraught with risk to the First Amendment.[26]

There is a risk that the Attorney General will make this certification only when it is politically expedient to do so because so many violent crimes would otherwise be federalized. The Attorney General would be put in the position of picking and choosing, based on an unreviewable determination about the political motivation of the actor, whether to prosecute such crimes as terrorist acts.

The Senate took a much preferable approach in the corresponding Section 102 of the terrorism bill it approved a few days ago, S. 735. The Senate chose not to federalize state laws. The Senate bill limits to certain federal criminal law violations the class of crimes that would become federal terrorism offenses upon the certification of the Attorney General. Adoption of the Senate formulation would in part remedy the problems identified above with respect to H.R. 1710. However, it would still grant the Attorney General non-reviewable authority to presume the intent of the accused.

Section 105 of H.R. 1710 and the similar Section 102 of H.R. 896 would create a new federal crime for conspiring in the United States to (a) murder, kidnap, or maim outside of the U.S.; or (b) damage property abroad that either belongs to a government with which the U.S. is "at peace," or is a railroad, canal, bridge, airport, airfield other public structure or "religious, educational, or cultural property" abroad. In either case, a predicate act to effect an object of the conspiracy would have to occur in the U.S. These sections are over broad and fraught with the risk that they would be enforced only against politically unpopular individuals and groups.

Under this legislation, the government could prosecute as terrorists a group of veterans that planned to rescue a comrade in post-war Vietnam if the rescue involved blowing the lock off of a prison door. This is the kind of activity swept up within the legislation, but unlikely to be prosecuted for political reasons. Instead, this section would be enforced only against unpopular groups and individuals.

C. RECOMMENDATION

Section 104 of H.R. 1710 should be amended by deleting references to state law and substituting therefore the pertinent sections of federal law, and the Attorney General's certification should be replaced by a requirement that the government prove the intent of the actor.

EXPANDING THE ROLE OF THE MILITARY IN LAW ENFORCEMENT

A. BACKGROUND

The ACLU opposes increased participation by the military in law enforcement. Section 312 of H.R. 1710 would authorize the Army, Navy, Air Force and Marines to participate in a broad range of law enforcement activity, including investigatory activity, upon request of the Attorney General in cases involving "weapons of mass destruction."

Except in certain narrowly defined circumstances, current federal law prohibits use of the military "as a posse comitatus or otherwise to execute the laws." 18 U.S.C. Section 1385. This prohibition is linked to our tradition of civilian control of the military and to a recognition of the dangers posed by setting the military against our own citizens. The Posse Comitatus Act grew out of southern opposition to the use of the military for law enforcement during Reconstruction, as well as concern about the use of the military to suppress labor movements. Repressive, authoritarian regimes have frequently employed their militaries as law enforcers. In fact, the United States recently sent troops to Haiti for the express purpose of putting the Haitian military out of the business of conducting civilian law enforcement ac-

[26] The corresponding section of H.R. 896, Section 101, would sweep in even more conduct, opening the door even wider to the possibility of selective prosecution. Under Section 104 of H.R. 1710, the property damage that could amount to terrorism must create a substantial risk of serious bodily injury to another person. No such limitation appears in Section 101 of H.R. 896.

tivity. Congress should strongly resist efforts to move the United States in this direction.

B. DISCUSSION

Section 312 of H.R. 1710 would create a large exception to the ban on military participation in law enforcement. Section 312 would permit the Attorney General to request "technical and logistical assistance" from the Secretary of Defense in cases involving all weapons of mass destruction, upon a certification by the Attorney General that:

> (1) such assistance is needed to counter the threat posed by such weapon or to enforce the criminal laws relating to such weapons; and
> (2) civilian law enforcement expertise is not available to provide the required technical assistance.

Section 312 would leave "technical and logistical assistance" undefined. However, such assistance would not include the authority to apprehend and arrest any person.

This provision is loosely patterned on 18 U.S.C. Section 831(e), which similarly permits the Attorney General to call on the military for assistance in investigating offenses involving nuclear materials, and the phrase "technical and logistical assistance" sounds less threatening than military participation in law enforcement. Nevertheless, the ACLU believes that this provision expand military participation too broadly.

First, it sets a lower threshold for military involvement than does Section 831(e), or even the corresponding Section 111 in H.R. 1635, the Administration's proposal, both of which require a showing of an "emergency." No emergency situation is required to justify military involvement in civilian law enforcement under Section 312 of H.R. 1710. In addition, under the nuclear provision in existing law, the Attorney General must determine that "civilian law enforcement personnel *are not capable* of enforcing the law," whereas the proposed provisions permit the Attorney General to involve the military in civilian law enforcement relating to certain criminal activity whenever "civilian law enforcement expertise *is not available.*" At a minimum, a determination of an emergency, and of necessity, should be prerequisites to military participation in law enforcement.

Second, it allows for military involvement not just in chemical and biological weapons cases, as proposed in Section 111 of H.R. 1635, but in cases involving *all* weapons of mass destruction. In addition to chemical and biological weapons, such weapons include guns (other than shotguns) with a bore of more than one-half inch in diameter that can expel a projectile by action of an explosive or propellant.[27]

Third, it allows for the provision by the military of not just "technical assistance" as would be the case under Section 111 of H.R. 1635, but of both "technical" and "logistical" assistance.

Fourth, it leaves the terms "technical" and "logistical" assistance entirely undefined, opening the door to potential military involvement in a wide range of activity.

Even the definition of technical assistance offered in H.R. 1635 is troublesomely vague and potentially quite expansive. Although authority to apprehend and arrest is expressly denied, almost any other conduct may fit within the definition. Technical assistance includes any "provision of equipment and technical expertise," and that latter term is not defined. Acting Assistant Attorney General Markus told the Senate Judiciary Committee that an identical provision in a Senate bill:

> . . . would authorize the military . . . to provide equipment and personnel to assist in investigating, searching, collecting and analyzing evidence concerning the criminal use of biological or chemical weapons, and to assist in disarming or disabling those in control of chemical or biological weapons.

This is much more than technical assistance. The idea of the military actively participating in searches and investigations raises the fear cited by Sen. Nunn—the military is not trained to act "in accordance with due process and civil procedures."

Concerns about the scope of "technical and logistical assistance" in Section 312 are heightened by the fact that the military is already permitted by statute to provide true technical assistance and logistical assistance to civilian law enforcement. 10 U.S.C. Sections 371 et seq. permit the military to provide civilian law enforcement officials with relevant information (section 371), to make military equipment and facilities available to them (section 372), to train them in the operation and

[27] 18 U.S.C. Section 921(a)(4)(B).

maintenance of equipment (section 373(a)), and to provide them with other "expert advice." Under the circumstances, the "technical assistance" contemplated by Section 312 must be intended to authorize much more active participation by the military in criminal investigations.

The ACLU might not object to a truly narrowly tailored posse comitatus exception for cases involving chemical and biological weapons. There may be true "emergency situations" in which civilian law enforcement authorities are incapable of enforcing the law and in which it might be acceptable to permit experienced military personnel to handle and disable chemical and biological warfare agents. The statutory exceptions proposed in Section 312 go far beyond this, however.

C. RECOMMENDATION

The military should not be granted such expansive criminal investigative authority. As Senator Sam Nunn has noted, "the military is not trained for law enforcement. They are trained to search and destroy using massive military force, not detect and investigate and arrest in accordance with due process and civil procedures."

In addition, ACLU believes that Congress should take the opportunity presented by the recent focus on this issue to reexamine existing law and further proscribe military involvement in domestic law enforcement activities. In addition to the narrow nuclear materials exception discussed above, statutory permission for military participation in criminal investigations can be found in 18 U.S.C. sec. 351 (concerning assassination, kidnapping, or assault on members of Congress, the Cabinet, and Supreme Court Justices), 18 U.S.C. sec. 1116 (concerning the killing of foreign officials, official guests, and internationally protected persons), and 18 U.S.C. sec. 1751 (concerning assassination, kidnapping, or assault on the President, Vice President, and presidential staff). When investigating violations of these sections, the Attorney General is authorized to call in the Army, Navy and Air Force without any restrictions. 18 U.S.C. sec. 374 authorizes military personnel to operate equipment for specific purposes to support criminal law enforcement in connection with violations of certain specified statutes. In addition, 10 U.S.C. Sections 331–33 permit the President to call in the military to suppress an insurrection against a State government or a rebellion against the United States or to enforce federal authority.

Opening Confidential INS Files for Law Enforcment Purposes

A. BACKGROUND

In 1986, at the same time it adopted employer sanctions, Congress in the Immigration Reform and Control Act of 1986 enacted a general amnesty for aliens who had lived in the United States out-of-status for a certain number of years. Likewise, it granted certain Special Agricultural Workers (SAW's) the right to apply to remain permanently in the United States. To encourage these people to come forward and register for the general amnesty, Congress included a provision in the legislation it adopted to prohibit use of the information it collected through the amnesty and SAW programs for other purposes. Without this statutory assurance, many aliens would not have come forward to register for this relief, granted by Congress upon a promise of confidentiality.

B. DISCUSSION

Section 631 of H.R. 1710 (as well as Section 203 of H.R. 896) would breach that promise of confidentiality. It throw open to law enforcement officials the photographs, fingerprints, addresses, receipts, and confidential letters from ministers, neighbors and friends submitted upon a statutory promise of confidentiality by an alien to show long term continuous presence in the United States. These documents could be used for any criminal law enforcement purpose against the alien if the alleged criminal activity occurred after the application was filed and was prosecutable as an aggravated felony, but with out regard to the length of the sentence that could be imposed.

These documents were submitted on a confidential basis and upon a statutory promise that they would be used for no other purpose but the amnesty and SAW programs. Time and again, advocates whom the Immigration and Naturalization Service encouraged to help aliens prepare applications for the amnesty and SAW programs assured fearful aliens that the information they submitted would be used only to assess their eligibility to participate in those programs. The statute promised confidentiality. Had the government wanted to use the information submitted in the amnesty and SAW programs for law enforcement purposes, it need not have promised confidentiality on a blanket basis. Those who submitted these documents have a privacy interest in the documents. Moreover, for Congress now to renege on this

promise of confidentiality would be to hinder the INS from conducting any similar program in the future, and indeed from conducting any immigration program in which cooperation of an alien would be secured by a promise of confidentiality.

This is yet another instance pointing up the fact that this bill, though purportedly made necessary by the bombing in Oklahoma City, is full of proposals unrelated to the bombing. First, the bombing did not involve aliens at all. Second, the proposed section 304 would not limit the breach in the promise of confidentiality to investigations of terrorism activity as defined in the bill, but would rather reach to all investigation of any serious crime allegedly committed by the applicant. Again, information submitted or retained to carry out one government program is sought for another purpose. It is this very kind of information cross-use that is at the heart of the threat to the right of privacy in the United States.

C. RECOMMENDATION

Section 304 should be deleted in its entirety.

OTHER PROVISION TARGETING ALIENS

A. BACKGROUND

While the recent bombing in Oklahoma City is repeatedly cited as a justification for this and other terrorism legislation, many sections of this legislation are simply unrelated to that incident, allegedly perpetrated by a U.S. citizen. Sections 621, 622, and 623 of H.R. 1710, are three such sections. Section 621 would provide for expedited exclusion of aliens who arrive in the United States without valid travel documents or visas; Section 622 would prohibit judicial review of certain orders of deportation; and Section 623 would purport to strip due process rights of aliens in the United States who entered without inspection by subjecting them to exclusion, instead of deportation proceedings.

B. DISCUSSION

These provisions have nothing whatsoever to do with the recent bombing in Oklahoma City, or with terrorism. Section 621 would establish a system making it extremely difficult for a refugee fleeing persecution but bearing no travel documents to obtain protection against persecution. Under Section 621, an alien who arrives at a U.S. port of entry without a passport or other travel document, or without a valid visa when required to have one, would be put into expedited deportation proceedings. In order to be admitted, they would have to indicate an intention to apply for political asylum, and establish, in the airport, on the spot, after a lengthy journey, likely without access to counsel or to documentary evidence, that they have a credible fear of persecution. It is not uncommon for legitimate refugees to arrive without adequate travel documentation. Few refugees, exhausted after a long trip and fleeing their persecutors, are likely to be able to make this showing even if they indeed qualify as refugees. If they fail to make the showing, they would be excluded. The ACLU believes this process entirely inadequate to protect those fleeing persecution. People who receive a parking ticket are entitled to more procedural protections than envisioned under this section.

Section 622 would bar judicial review of certain activities of the INS that are contrary to law. It would strip courts of jurisdiction to entertain class action suits brought to ensure that INS practices conform with Congressional mandates.

Section 623 is particularly troubling. It would make excludable, rather than deportable, aliens who are in the United States, but who entered without inspection. Under current law, an alien who has effected an entry—regardless of how this was done—is deportable, not excludable. An alien has effected an entry when the alien is either: (i) physically present and inspected or admitted; or (ii) has actually and intentionally evaded inspection and is not under restraint.

An alien in deportation proceedings is protected by the Fifth Amendment right to due process. The government bears the burden of proving that the alien is deportable by clear, convincing and unequivocal evidence. In contrast, in exclusion proceedings involving a non-permanent resident, an alien has only the rights statutorily provided by Congress. In a deportation proceeding, the INS bears the burden of proving the subject of the proceeding is an alien, and then the alien bears the burden of proving a lawful entry, and if he or she does so, the INS bears the burden of proving the alien is deportable. In contrast, the alien in exclusion proceedings bears the burden of showing that he or she is admissible. The proposed section of law is in fact an attempt to subject aliens who have entered without inspection to this higher burden, and to strip such aliens of the due process rights guaranteed in the United States to all persons here.

ACLU hopes to submit to the Committee further supplementary analysis of these provisions.

C. RECOMMENDATION

Because these provisions have nothing to do with responding to terrorism or to Oklahoma City, ACLU urges that they be deleted from this legislation.

PROPOSED EXPANSION OF ELECTRONIC SURVEILLANCE AUTHORITY

A. BACKGROUND

Both H.R. 1710 and H.R. 1635 seek to expand statutory authority to conduct wiretaps and other forms of electronic surveillance. They would expand the list of felony investigations in which an electronic surveillance order could be sought, expand the authority to conduct roving wiretaps and wiretaps without a court order, and permit the admission of evidence obtained from unlawful electronic surveillance.

The ACLU opposes virtually all of these provisions. Electronic surveillance is a particularly intrusive investigatory technique, subject to the search and seizure requirements of the Fourth Amendment. *Katz* v. *United States*, 389 U.S. 347 (1967). Wiretaps should be authorized therefore only in the most serious cases and subject to the most stringent protections. The proposed expansions of wiretap authority sweep far too broadly and, in at least some instances, probably run afoul of the Constitution.

Equally important, such expanded authority is quite unnecessary. Virtually all federal felonies characteristic of terrorism, including those that would likely form the basis for the Oklahoma City prosecution, are already on the list of felony investigations for which an electronic surveillance order may be sought. Yet the FBI has very rarely used wiretaps in investigations of arson, bombings, or firearms violations. Out of 8,800 wiretaps applications filed by federal and state authorities between 1983 and 1993, only 16, less than 0.2%, were for arson, bombing, or firearms. The last known request in such a case was filed in 1988. Congress should not be considering expanding federal wiretap authority, when the FBI is not using the authority that currently exists.

B. DISCUSSION

1. Expanding the criminal investigations in which an electronic surveillance order may be sought

Current federal law prohibits the interception of oral,[28] wire,[29] and electronic communications,[30] except as specifically provided. 18 U.S.C. sec. 2511. In order to conduct electronic surveillance, the FBI or other law enforcement authority must obtain a court order based upon probable cause. Federal law enforcers may obtain a court order for interception of oral or wire communications only in connection with investigations of certain specified federal offenses. The current list of federal offenses that may support an electronic surveillance order covers several pages in the U.S. Code Annotated and already includes virtually every felony that might be committed by terrorists, including all federal offenses involving murder, kidnapping, robbery, or extortion; espionage, sabotage, piracy, and treason; assassination and hostage-taking; destruction of trains, vessels, aircraft, and aircraft facilities; and offenses involving explosives, biological weapons, and nuclear materials. *See* 18 U.S.C. sec. 2516.

Section 301 of H.R. 1710 would expand this list of offenses that will support a court application for electronic eavesdropping or wiretapping. Section 106 of H.R. 1635 would permit any federal felony to support an order for a wiretap or electronic listening device if the Justice Department certifies that "there is reason to believe the felony involves or may involve domestic terrorism or international terrorism."

The ACLU opposes either method of expanding the list of felonies that will support an electronic surveillance order. There has been no showing that any additional

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[28] "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such Communication is not subject to interception under circumstances justifying such expectation," 18 U.S.C. sec. 2510(1).

[29] A "wire communication" is "any aural transfer made in whole or in part through the use of facilities for the transmission of Communications by the aid of wire, cable, or other like connection," *Id.*, sec. 2510(2).

[30] An "electronic communication" is "any transfer of signs, signals writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical System," that is not an oral or wire communication. *Id.*, sec. 2510(12).

authority is needed or that the FBI has ever failed to obtain a desired wiretap because a particular predicate felony was not on the list. In fact, as discussed earlier, the FBI rarely if ever invokes most of the wiretap authority it already possesses. Of the 8,800 electronic surveillance applications filed between 1983 and 1993, over three quarters concerned suspected violations of drug and gambling laws. Most of the rest involved racketeering investigations. Not once since 1988 has the FBI reported seeking electronic surveillance authority in a case involving bombing, arson, or firearms.

Because bugging and wiretapping are particularly intrusive investigatory techniques that undermine the personal privacy we all cherish, they should be permitted only when investigating the most serious crimes. The government has made no showing of need for this additional authority, let alone a showing that its need for more wiretaps outweighs the threat to privacy such expanded authority would pose.

The ACLU is especially concerned by the proposal in H.R. 1635 to expand wiretap authority whenever the Justice Department certifies that "there is reason to believe the felony involves or may involve domestic terrorism or international terrorism." First, such a provision would weaken the probable cause standard for obtaining an electronic surveillance order. Right now, before issuing such an order, a judge must first determine that there is probable cause to believe "that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516" and also probable cause to believe that "particular communications concerning that offense will be obtained through such interception."[31] Because the Justice Department "terrorism" certification would not be subject to judicial review, the court would make no determination that it was supported by probable cause, and therefore will be unable to make a true probable cause determination about whether the subject of the surveillance is connected to an enumerated offense.

Equally important, we are deeply concerned by the idea that the Attorney General can evade statutory limits on investigations simply by invoking the frightening specter of terrorism. Civil liberties are often compromised in times of fear. During World War II, fear of domestic terrorism led to the unjustifiable internment of many thousands of American citizens of Japanese heritage. Fear of the communist threat led to the unconstitutional excesses of the House Un-American Activities Committee in the McCarthy Era and the unlawful Cointelpro surveillance and infiltration of peaceful political protest groups in more recent times. Given this history, we must vigorously oppose any legislation that permits an assertion of "terrorism" to override statutory protections.

II. Expanding authority For emergency wiretaps

Section 308 of H.R. 1710 seeks to expand authority to conduct emergency wiretaps without court authorization.[32] The ACLU opposes this provision as unnecessary, open ended, and possibly unconstitutional.

Under current law, law enforcement officials can, under certain circumstances, set up emergency electronic surveillance without a court order. Specifically, 18 U.S.C. Section 2518(7) authorizes an emergency wiretap if a law enforcement official determines that

(A) an emergency situation exists that involves—
(i) immediate danger of death or serious physical injury to any person,
(ii) conspiratorial activities threatening the national security interest, or
(iii) conspiratorial activities characteristic of organized crime.

and the official believes that there are sufficient grounds for a court to issue a wiretap order.[33]

Section 308 would create a new category of "emergency situations" to include conspiratorial activities involving domestic terrorism or international terrorism, as broadly defined (see discussion above.)

Such an expansion of emergency wiretap authority is unnecessary. If there is either an immediate danger of death or serious physical injury or a threat to our national security interests, an emergency wiretap can be obtained under current law. No showing has been made that there are cases of terrorism involving neither an immediate threat to persons or a threat to our national interests that nevertheless justify a warrantless wiretap. Given that only sixteen wiretaps concerning arson,

[31] 18 U.S.C. Section 2518(3).

[32] The Senate decisively rejected an amendment to its terrorism bill that would have granted this addition authority to conduct a wiretap without first obtaining a court order.

[33] After establishing the emergency wiretap, the law enforcement official must apply for an order approving the interception within 48 hours. *Id.*

bombings, and firearms have been sought in the past twelve years, it seems highly unlikely that there can be many, if any, cases falling into this category.

In addition, the proposed definition of "domestic terrorism" in H.R. 1710 Section 315 makes this emergency wiretap proposal even more open ended. Virtually any violent act can be described as "coercing a segment of the population." Therefore, "conspiratorial activities involving domestic terrorism" sufficient to trigger an emergency wiretap could be almost any information about the possible commission of a violent act, if the act "appeared" to be intended to achieve "political or social ends." The narrow emergency wiretap exception would threaten to overwhelm the rule requiring a prior court order.

Finally, we believe that there are serious doubts about the constitutionality of the proposal. As noted earlier, the Supreme Court has determined that electronic surveillance is subject to the requirements of the Fourth Amendment. *Katz* v. *United States,* 389 U.S. 347 (1967); *Berger* v. *New York,* 388 U.S. 41 (1967). Under the Fourth Amendment, a warrant is generally required before law enforcement personnel can conduct a search or seizure. The Supreme Court has recognized certain exigent circumstances under which a search or seizure can be conducted without a warrant. Immediate danger of death or serious bodily injury or a threat to national security may be a sufficiently exigent circumstance to justify a warrantless wiretap. In the absence of a threat to persons or the national interest, however, it is hard to imagine what "emergency" exists that would justify carrying out a Fourth Amendment search and seizure without court authorization. Congress should therefore tread very carefully in this area and we urge that the House, like the Senate did, reject this expansion of wiretap authority.

III. Expanding authority for roving wiretaps

Section 309 of H.R. 1710 seeks to expand authority to conduct "roving" wiretaps of wire and electronic communications. The proposal is likely unconstitutional and should be rejected.

The Fourth Amendment requires that a warrant, to be valid, must "particularly describ[e] the place to be searched and the persons or things to be seized." In conformity with this constitutional command, 18 U.S.C. Section 2518 generally requires that each electronic surveillance application and order contain "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted." 18 U.S.C. Section 2518(1)(b) (ii); id.(3)(d). Subsection 11 contains two exceptions to this requirement. For interception of oral communications, section 2518(11)(a) forgoes this particular place requirement if "specification is not practical." However, for interceptions of electronic and wire communications, Section 2518(11)(b) requires a showing that the person whose communications are to be intercepted has the purpose "to thwart interception by changing facilities." H.R. 1710 would adopt the lesser standard that currently applies to roving bugs for roving wiretaps.

The ACLU is concerned that roving wiretaps, to a far greater extent than roving bugs, would result in the inevitable interception of many innocent communications by persons other than the subject of the order. H.R. 1710 would grant the FBI the authority to wiretap all of the phones that *might* be used by their target. This threatens the privacy of all other persons who would use those phone, which cannot be justified without some showing of necessity.

More importantly, this provision of H.R. 1710 is in all probability unconstitutional. Courts upholding the constitutionality of the roving wiretap provisions of Section 2518(11) have stressed the intent to thwart as a justification for the lack of particularity. *See, e.g., United States* v. *Silverman,* 732 F.Supp. 1057 (S.D.Cal. 1990), *aff'd in relevant part, United States* v. *Petti,* 973 F.2d 1441 (9th Cir. 1992). More importantly, courts upholding the roving exception for electronic bugs have emphasized the fact that the "impracticality" of specification was caused by the target's efforts to thwart interception. *See, e.g., United States* v. *Bianco,* 998 F.2d 1112 (2d Cir. 1993). Absent an effort to thwart interception, it seems highly unlikely that an unparticularized order would pass muster. Congress should reject this provision as well.

IV. Admitting evidence from unlawful wiretaps

H.R. 1710 also proposes an unconstitutional abandonment of the Fourth Amendment as it applies to electronic surveillance. At present, 18 U.S.C. Section 2515 codifies the constitutional requirement that information obtained from an unlawful search and seizure may not be introduced as evidence in court. It bars the admission of evidence derived from an unlawful wiretap or electronic bugging device in any judicial, legislative, or regulatory proceeding.

The Section 306 of H.R. 1710, like Section 105 of H.R. 1635, would rip a gaping hole in this statutory exclusionary rule. It would amend 18 U.S.C. Section 2515 to provide that the requirement that evidence be excluded "shall not apply to the disclosure by the United States in a criminal trial or hearing or before a grand jury of the contents of a wire or oral communication, or evidence derived therefrom, unless the violation of this chapter involved bad faith by law enforcement."

No explanation has been offered by the FBI to show why it purports to need this new authority to use illegally obtained evidence. It certainly cannot have anything to do with the need to combat terrorism, the ostensible purpose for this legislation, given the paucity of requests for wiretapping authorization in such cases over the past ten years.

In the ACLU's view, this section is unconstitutional. Although the Supreme Court has in recent years announced certain limitations on the exclusionary rule for evidence obtained in violation of the Fourth Amendment, the blanket exemption for law enforcement malfeasance found in Section 306 goes far beyond anything permitted by the Supreme Court. In *United States* v. *Leon*, 468 U.S. 897 (1984), the Supreme Court permitted the introduction of evidence derived from an unconstitutional search undertaken in good faith reliance on a defective search warrant. Similarly, earlier this term in *Arizona* v. *Evans*, 63 U.S.L.W. 4179 (March 1, 1995), the Supreme Court held that the exclusionary rule did not apply to an unlawful search based upon a reasonable, but mistaken, good faith belief that a warrant was outstanding.

To date, however, the Supreme Court has continued to adhere to the exclusionary rule in cases involving warrantless searches; yet Section 306 of H.R. 1710 would authorize the admission of evidence from an unconstitutional search, even if no court authorization had ever been sought. Likewise, in the two cases cited above, the Supreme Court limited the exclusionary rule in cases where law enforcement officers could demonstrate that they had acted in good faith;[34] this section would reverse the presumption and admit evidence unless the defendant can prove that the officers acted in bad faith. Evidence of the circumstances of the unconstitutional search and seizure will inevitably be in the possession of the officers, and it will be extremely difficult for a defendant to establish that they acted with an improper motive. Thus law enforcement officials will be given an incentive to operate close to the constitutional margin in conducting wiretaps on the theory that, even if their actions are unconstitutional, frequently they will nevertheless be able to use the evidence in court. This is precisely the reverse of the incentives for conscientious, constitutional behavior that the exclusionary rule was designed to evoke. For both these reasons—the extension of an exclusionary rule exception to warrantless searches and the conversion of a good faith exception into a requirement of a bad faith showing—we expect that the courts will reject this provision as unconstitutional. It would be far better for the House to itself reject this unconstitutional legislation, especially as it has nothing to do with the counterterrorism purpose of H.R. 1710.

C. RECOMMENDATION

ACLU believes that none of these dangerous proposals should be adopted. Instead of adopting proposals to expand wiretap authority found in H.R. 1710, Congress might consider ordering a study and report on electronic surveillance. Such a study should consider the infrequent request for electronic surveillance in anti terrorism investigations and solicit input from civil liberties groups about ways in which necessary investigations can be conducted consistent with our constitutional liberties.

PROPOSED EXPANSION OF COUNTERINTELLIGENCE INVESTIGATIONS

A. BACKGROUND

The foregoing provisions all relate to governmental authority to conduct investigations of potential violations of criminal law—past, present, or future. Other provisions of both H.R. 1710 and H.R. 1685 seek to expand federal authority to conduct investigations of persons in this country for purposes other than crime prevention, detection, and prosecution. The federal government asserts authority to conduct "counterintelligence investigations" as an aspect of the executive power to protect national security. Without identifying a potential violation of law, the Executive

[34] In one case the officers relied upon what appeared to be a valid search warrant, while in the other case they relied on an erroneous report in a police computer that a valid warrant had been issued and remained outstanding.

claims the power to investigate U.S. citizens to prevent foreign intelligence activities and identify persons acting as agents of a foreign power.

Most foreign intelligence operations that could be conducted within the United States, as well as most acts of international terrorism, violate provisions of U.S. criminal law and could give rise to a lawful criminal investigation. Nevertheless, law enforcement asserts that it needs to be able to conduct noncriminal counterintelligence investigations under a national security rationale. Both H.R. 1710 and H.R. 1635 seek to expand the statutory authority to employ various investigative techniques in such noncriminal, counterintelligence investigations.

The ACLU opposes the investigation of persons in this country without a criminal basis and believes that such investigations are generally unconstitutional infringements on individual liberty. The additional investigatory powers sought for counterintelligence investigations in both bills are already available to law enforcement authorities conducting criminal investigations. We therefore oppose expanded authority to carry out counterintelligence investigations in order to discourage any increased use of these practices, which are essentially unrestrained by law.

Before turning to the specific powers sought, we note once again that these legislative proposals have nothing to do with the recent tragedy in Oklahoma City. The investigations into the bombing of the Alfred P. Murrah building presumably are all criminal investigations, subject to the laws and guidelines for such investigations, not the separate provisions relating to counterintelligence activities. Federal authorities already possess all of the investigatory powers they need to thoroughly investigate the Oklahoma City bombing. The provisions discussed below merely seek to extend these powers to noncriminal investigations, that have nothing to do with the bombing in Oklahoma City.

B. DISCUSSION

I. Expanding authority to use pen registers and trap and trace devices in counterintelligence investigations

Section 302 of H.R. 1710 (like Section 101 of H.R. 1635) seeks to expand the permissible uses of and lower the showing required to obtain authorization to utilize a pen register or a trap and trace device in a counterintelligence investigation. A pen register is a "device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached," 18 U.S.C. Section 3127(3), *i.e.*, it records the telephone numbers of outgoing calls. Conversely, a trap and trace device is "a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted," 18 U.S.C. Section 3127(4), like a Caller I.D. device.

Under current law, the government may obtain a court order authorizing the installation and use of a pen register or trap and trace device by submitting an application that includes a certification that "the information likely to be obtained is relevant to an ongoing criminal investigation" being conducted by the requesting law enforcement agency. 18 U.S.C. Sections 3122–23. However, in order to obtain authorization for a pen register or trap and trace device in a counterintelligence investigation, it appears[35] that the government must satisfy the requirements for issuance of a court order under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. Sections 1801 et seq. The applicant must establish by probable cause that (1) "the target of the electronic surveillance is a foreign power or an agent of a foreign power" and (2) "each of the facilities at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." 50 U.S.C. Section 1805(3). In addition, the application must certify that the purpose of the surveillance is to obtain foreign intelligence information and that the information cannot be obtained by normal investigative techniques. 50 U.S.C. Section 1804(a)(7). Finally, FISA requires the use of "minimization procedures," that is, specific procedures designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." 50 U.S.C. Section 1801(h)(1).

Section 302 of H.R. 1710 would replace the showing required under FISA with one similar to that required in a criminal investigation. Specifically, Section 302 would authorize the installation and use of a pen register or trap and trace device upon a certification that "the information likely to be obtained is relevant to an on-

[35] Pen registers and trap and trace devices are not expressly mentioned in the Foreign Intelligence Surveillance Act. Because they involve the interception of an electronic communication, they appear to be subject to the Act's general requirements for electronic surveillance orders.

going foreign counterintelligence investigation."[36] This change would not simply reduce the showing required to utilize these devices in a counterintelligence investigation. More importantly, this change would appear to permit, for the first time, the federal government in counterintelligence investigations to employ pen registers and trap and trace devices against United States persons who are not themselves suspected of being agents of a foreign power.

As noted earlier, virtually all foreign intelligence activities potentially violate one or more federal criminal laws. It should therefore not be difficult, in an appropriate case, to open a criminal investigation and obtain authorization for pen registers and trap and trace devices under existing 18 U.S.C. sec. 3123. If the FBI insists on proceeding through a counterintelligence investigation, it should be required to make the heightened showing required by FISA before utilizing such devices. The House should reject this proposal

II. Granting authority to compel production of sensitive consumer information in counterintelligence investigations

Section 303 of H.R. 1710 and Section 102 in H.R. 1635 seek for law enforcement authority to compel consumer reporting agencies to disclose sensitive consumer information in connection with counterintelligence investigations. They would amend the Fair Credit Reporting Act, 15 U.S.C. sec. 1681 *et seq.*, in a number of ways. They would require a consumer reporting agency to disclose a consumer's name, address, former addresses, current and former places of employment, and the names of all financial institutions at which the consumer maintains or has maintained an account, upon a written request from the FBI that certifies that the "information is necessary for the conduct of an authorized foreign counterintelligence investigation" and that there are specific and articulable facts giving reason to believe that the consumer is an agent of a foreign power engaged in international terrorism or clandestine intelligence activities or that the consumer is about to be in contact with a foreign power or its agent. In addition, both bills would authorize the FBI to obtain consumer credit reports by means of an *ex parte* court order issued upon a similar *in camera* showing. Both bills would also prohibit consumer reporting agencies from informing the consumer of these compelled disclosures and would limit the remedies available for violations of the consumer's rights.

Again, the proposed changes should be rejected as ill-advised and unnecessary. If the FBI is in a position to make a representation that a person is an agent of a foreign power engaged in international terrorism or clandestine intelligence activities in violation of the laws of the United States, then the FBI has the "reasonable indication" necessary under its guidelines to open a criminal investigation. The Fair Credit Reporting Act already authorizes consumer reporting agencies to disclose consumer reports "[i]n response to the order of a court." 15 U.S.C. sec. 1681b(1). Thus the FBI can obtain all of the desired records by opening a criminal investigation and issuing grand jury subpoenas or comparable court orders. It does not make sense to establish a separate, counterintelligence process for obtaining this information which is more insulated from court review.[37]

Again, this expanded authority has nothing to do with the FBI's ability to investigate the Oklahoma City bombing or similar acts of domestic terrorism. Those are criminal acts that may properly be investigated as crimes, with all of the investigatory tools there available to law enforcement, as well as the protections for violations of individual rights.

III. Granting authority to compel production of common carrier and public accommodations records in counterintelligence investigations

Both Section 304 of H.R. 1710 and Section 104 of H.R. 1635 seek to authorize the FBI to gain access to common carrier and public accommodations records in foreign counterintelligence investigations. These provisions violate the principle that the government should be obliged to abide by criminal investigatory processes when investigating persons within its borders.

Section 304 of H.R. 1710 applies to the records of common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities. It would

[36] Curiously, the section as revised apparently contemplates that state law enforcement officials would conduct their own foreign counterintelligence operations, and similarly grants them the opportunity to use pen registers and trap and trace devices in such state investigations.

[37] The Administration has sought to justify this change by analogy to 12 U.S.C. sec. 3414(a)(5)(A), which establishes a similar procedure for obtaining records protected under the Right to Financial Privacy Act. While there are obviously some parallels between financial records and consumer credit records, the ACLU submits that the appropriate response, if any, is to repeal the special national security process for obtaining financial records.

require such entities to comply with an FBI request for records so long as the FBI certifies in writing that the records are sought for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.

Section 304 sweeps up a broad assortment of records without any showing that such broad authority is necessary and it fails to establish a procedure to challenge an over broad or otherwise unreasonable or improper request for records.

This problem is minor compared to the larger problem: the proposal represents an unwise and unnecessary expansion of the FBI's power to conduct noncriminal investigations. All of these records can easily be obtained by grand jury subpoena in a lawful criminal investigation. No showing has been made that the grand jury process is somehow inadequate to meet legitimate law enforcement needs in investigating the Oklahoma City bombing or other terrorist acts. Congress should insist that the FBI employ that process to obtain records on the activities of U.S. persons; the FBI should be deterred from conducting more investigations without a criminal predicate.

IV. Expanding authority to obtain telephone billing records in counterintelligence investigations

Section 310 of H.R. 1710 and Section 109 of H.R. 1635 seek to increase the federal government's ability to compel disclosure of telephone toll and transactional records in counterintelligence investigations. 18 U.S.C. Section 2709 currently authorizes the FBI to obtain "subscriber information and toll billing records information, or electronic communication transactional records" from a wire or electronic communication service provider in connection with a counterintelligence investigation in accordance with procedures therein specified. Apparently an issue has arisen about whether "toll billing records" include records of local telephone usage or only long-distance services. Section 310 would modify section 2709 to make it clear it applies to both "local and long distance toll billing records."

The ACLU does not perceive a meaningful difference between local and long distance toll billing records that would justify differential treatment. Nevertheless, for the reasons we have repeatedly identified in this discussion, we must oppose this change as well. The FBI and other law enforcement agencies are perfectly able to obtain both local and long distance records by subpoena in a proper criminal investigation. Rather that expanding the FBI's powers to conduct unreviewable counterintelligence investigations essentially unrestrained by law, Congress should be considering repeal of section 2709 so as to encourage the FBI to conduct its investigations through the criminal process.

C. RECOMMENDATION

We urge Congress to reject each of these proposals to conduct intrusive investigatory activity without a criminal predicate. People in the United States understand that when there is evidence of crime, the FBI should investigate, and focus its investigation on the possible perpetrators of crime. They become uneasy, however, when authority to conduct intrusive investigatory activity is requested in cases outside of this sphere of criminal investigations. The bombing in Oklahoma City, which is a crime, should not be used as an excuse to give the FBI more tools and authority to investigate activity that is not a crime.

FORCING PRIVATE INDUSTRY TO FACILITATE SPYING ON ITS CUSTOMERS

A. BACKGROUND

Sections 401 and 402 of H.R. 1710 would amend the Communications Assistance for Law Enforcement Act by creating a funding mechanism for the costs of retrofitting the telephone system in the United States to enhance the ability of law enforcement officials to wiretap telephones of American citizens.

B. DISCUSSION

The above-referenced digital wiretapping law is extremely troubling. Congress required phone companies to re-build switching devices to enhance the ability of the FBI to wiretap. Under this profoundly troubling logic, Congress could similarly require home builders to include listening devices in the walls of the houses and apartment buildings they construct so that the FBI could turn on the microphones if one day it needed to do so. This idea was wrong when adopted, and it would be wrong to fund that idea program today, particularly in light of the distrust of government exposed in the wake of the tragedy in Oklahoma City.

C. RECOMMENDATION

Sections 401 and 402 should be struck from H.R. 1710.

CONCLUSION

Many provisions of H.R. 1710 run afoul the Bill of Rights. Moreover, much of the bill, which concerns aliens and expanding FBI counterintelligence investigative authority, has nothing to do with the bombing in Oklahoma City. ACLU urges the Committee to carefully reconsider this legislation, and to strip away the parts that would make us no safer, just less free.

Mr. HYDE. Well, I certainly thank you, Mr. Nojeim, for your usual excellent presentation.

And now, the panel will be open for questions, and the Chair recognizes Mr. Scott of Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Fleissner, indicated that—you talk about the exclusionary rule. I would like for to you say what changes there might be, particularly in light the Attorney General's statement that there wouldn't be any change?

Mr. FLEISSNER. I was interested this morning when you asked—and the question was an excellent one—you asked Ms. Gorelick about whether the good-faith exception which is in this legislation could be applied in an instance where the emergency wiretap provision was used under exigent circumstances where you can't get to a court to get the warrant just like in the many kinds of searches the doctrine is recognized. The Attorney General can authorize up to a 48-hour wiretap and then it is all presented to a judge to see if the judge agrees with the initial decision. That is the emergency provision.

As far as I can tell, it may be that it has never really been used. Of course, if a terrorism situation arose where it came into play, the 48 hours, or whatever it might take to get a formal wiretap warrant under title III, could make a huge difference in the saving of life.

The legal question is: Could the Government bring a warrantless search under the emergency provision and find itself in a circumstance where the judge disapproved of the initial decision of the Attorney General to seek it; that the Attorney General didn't have probable cause? Could it be claimed by law enforcement that they were acting in good faith?

The Assistant Attorney General this morning said she didn't think that that would come up. And I agree with her. My reason is that the good-faith exception, which is in the *Leon* case, requires that the law enforcement officer act in reliance on the judgment of a magistrate who reviewed the warrant, which subsequently is found to be not a good judgment by the magistrate, there having been no real probable cause. There has to be a reliance on a judicial determination or as in one Supreme Court case, on a statute allowing the search.

In my opinion, if the Justice Department makes the decision to go in without a warrant, and it turns out to be wrong, that evidence is going to end up being suppressed, and I don't believe under the Constitution it is going to be saved by the statutory bad-faith provision in the bill.

Mr. SCOTT. This is a new bill that would change the existing law, and you don't think—there is nothing in any of these bills that, have you seen, that would change the law to allow that in evidence? Because in the emergency situation, that is prime time that you could actually step over the line and the time that innocent people would need protection. You don't see anything in these bills that would allow that in evidence if a court subsequently found that it was not the probable cause?

Mr. FLEISSNER. No, I don't think that the bad-faith provision which is in H.R. 1710 is going to save the Government and allow evidence in if they use the emergency provision without having probable cause. It would come into play where the Government seek a proper warrant and an article 3 judge issues a warrant under title III and then the court of appeals disagrees with that judge's view of whether there was probable cause, in that case the good-faith exception would come into play.

Mr. FEIN. If I could amplify on the answer. The Supreme Court, although expressly in *Leon* limited its decision to acts where the police were relying on a warrant, by no means has the Court ruled on the prospect in a different case from permitting the evidence to enter even if the police were acting unilaterally but it was reasonable and it was not in reliance on a warrant. Given the current composition of the Supreme Court, I think it is probably very likely that confronted with that second kind of case, the good-faith exception would be enlarged.

Mr. SCOTT. But this bill wouldn't do it?

Mr. FEIN. Excuse me?

Mr. SCOTT. There is nothing in this bill——

Mr. FEIN. This bill wouldn't affect that decision; that is correct.

Mr. SCOTT. Mr. Nojeim, you indicated that the detainee would not have a choice of attorney. Did I understand you that the judge would pick the attorney for him? Who would pick the attorney?

Mr. NOJEIM. The alien has the right to pick their attorney for the general deportation proceeding. A special proceeding where it involves secret evidence—and that is what the special proceeding is all about, secret evidence—the court chooses the attorney for the alien.

The court selects a panel of attorneys that have security clearances and the court chooses that attorney for the alien, not the alien. And there is a series of cases that says that the alien has a fifth amendment right to due process and subsumed within that right is the right to choose their counsel. And I have cited those cases on page 15 of my written testimony. And there are actually a number of other cases that we hope to bring to the committee's attention in the coming days.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. HYDE. I might say to Mr. Nojeim while this colloquy was going on, it was very helpful. I am very interested in providing the alien with the opportunity to choose the lawyer from the list of those who have been cleared to handle, rather than have him appointed by the judge.

At least give the option to the alien to make that selection. Only if the alien refuses to make the selection, then the court could appoint one. I think that makes it a little better. It may not satisfy

Mr. Nojeim, but I think your bringing that up was very useful and we are going to try to do that.

Before I yield to Mr. Goodlatte for questioning, I just want to have a little colloquy with you, Mr. Nojeim. You talked about providing material support for terrorists. And you brought up the abortion clinic situation. I assume we are talking about bombing an abortion clinic, are we not?

Mr. NOJEIM. I think that the statute covers forcible prevention of people from coming to the clinic so it need not be——

Mr. HYDE. The statute would cover forcibly preventing people? That would be an act of terrorism?

Mr. NOJEIM. Under this, yes.

Mr. HYDE. Well, counsel doesn't agree with you. We will have to talk further on that.

But assuming you are talking about an act of violence and preventing people from accessing an abortion clinic could be done in a violent manner clearly, depending on the determination of the persons seeking to go in and the persons seeking to inhibit the entrance. But, I have no problem with: whoever within the United States provides material support or resources, or conceals or disguises the nature, location, source or ownership of material support or resources; because, whoever is doing that supplying of material support, has to do it knowing or intending that it be used in preparation for and carrying out of a terrorist act. And, bombing an abortion clinic, as far as I am concerned, is terrorism. And, whoever materially supports that act knowing that that is the end desired result—I have no problem with that person being found guilty.

So, now, if we are talking about peaceful picketing, or if we are talking about pushing and shoving, which is deplorable and wrong and criminal and ought to be prosecuted, but I don't think it rises to the level of terrorism. Those, I guess, are judgments courts can make. But the material support, if you know what the purpose is, and it is terrorism, I have no problem with that and I wouldn't think you would.

Mr. NOJEIM. As I read section 315 of H.R. 1710, it would be terrorism to use force in violation of the criminal laws of the United States or of any State that appears to be intended to achieve a political or social end by intimidating or coercing a segment of the population.

And under that definition, I think that the forcible blocking of the clinic would amount to terrorism under the statute. And I would also like to ask whether you perceive a need to repeal that first amendment protective language that I recited and that appears on page 9 of my testimony on the material support provision?

It seems to me that that language would be frankly very difficult to object to, and was put in that statute to prevent FBI fishing expeditions into that kind of protected first amendment activity.

Mr. HYDE. Staff tells me that stopping people from entering an abortion clinic would not be covered by this material support because the sections are specified on page 5; 3237, 351, et cetera, et cetera, two full lines, 2½ lines of sections. And, the access to an abortion clinic is not in there and, therefore, that would be immunized from sanctions under this law.

Mr. NOJEIM. But does staff agree that the blocking of the clinic would count as terrorism as it is defined in this bill?

Mr. HYDE. I don't think they do agree. The definitions would be within these sections that are——

Mr. NOJEIM. No, no. The definition of terrorism which is independent of the material support provision.

Mr. HYDE. The gentleman from Virginia.

Mr. GOODLATTE. The gentleman is correct. The section we are talking about providing material support might cover the church schoolbus, but it would not necessarily cover the individual who actually blocked the clinic. Is that your point?

Mr. NOJEIM. Right. Right.

Mr. GOODLATTE. That is the concern he has raised.

Mr. HYDE. Well, counsel says only if the church schoolbus were used to violate one of these section.

Mr. GOODLATTE. I agree that the secondary crime of providing material support would be excluded if it is not included in one of those sections. But what about the initial definition of a terrorist act which would cover the individual act——

Mr. HYDE. That is what concerns me, and I do not intend that the definition of an act cover terrorist acts that are not terrorist acts. And we are looking at violence that rises to the level of extreme violence.

Mr. BARR of Georgia. Would the chairman yield for a question?

Mr. HYDE. Yes.

Mr. BARR of Georgia. The language that we are focusing on here is problematic for me and we got into this with some of the other witnesses. It starts out on line 1 of page 50 the term "terrorism" means the use of force or violence. Force can be used against an installation, a building; breaking and entering, for example, would it not? So it doesn't require even an act of violence against a person to fit within the definition of terrorism here. That is one concern I have.

Mr. HYDE. Well, surely damage to a building can be quite extensive. Let's say nobody was killed in Oklahoma City but you blew off the whole front of a Federal building. That is an act of terrorism as I would define it and as I think it is defined under the bill.

Mr. BARR of Georgia. If the chairman would yield, I think we have put our finger on something here that perhaps we may need at a minimum to look a little closer at the language to come up with something that is a little clearer. I think this discussion has raised some gray areas.

Mr. HYDE. I think again Mr. Nojeim has made a contribution to our understanding.

Mr. FEIN. Mr. Chairman, it seems to me that the critical language that needs to be examined relates to the purpose of the violation has to be intended to achieve political or social ends. Now, that may be too broad.

It may suggest that there may be some circumstances where blockading an abortion clinic might be an act of terrorism if they had that political or social goal as a purpose. Identical actions might also not be an act of terrorism if it didn't carry along those particular objectives.

That is pretty sweeping when you speak of any political or social end. It is hard to imagine any kind of criminal act other than one committed by someone who has had a lobotomy that couldn't be said to have some political or social end to it. They don't commit criminal acts out in the middle of the Sahara Desert.

And I would suggest that you would want to refine that phraseology because I think with a little bit of deft sculpting here you could eliminate what most people would not define as terrorist activity and may involve a crime of force and violence, but doesn't have that sweeping effect to intimidate and cow the population, that I think we all understand as least instinctively to be acts of terrorism.

Mr. HYDE. I agree with the gentleman, and I think the point is well taken. This has been a useful discussion. And if the gentleman has any suggested language, we would welcome it to narrow or clarify that because social ends could mean the proliferation of gardens or something. And we surely don't mean that, although we would love to see the proliferation of gardens.

All right. I thank you, and if you have some suggested language, any of you, it would be most welcome. And I thank the gentleman from Virginia and now I yield to him for questioning.

Mr. GOODLATTE. Thank you, Mr. Chairman. And following up along those lines, Mr. Nojeim, do you have any acceptable definition of terrorist?

Mr. NOJEIM. Well, from where we come from at the ACLU, we believe that most of the acts that the committee is looking at now, the really violent activity are already crimes. And we should call them crimes and maybe you want to look at the penalties, maybe you want to look at the ability of the FBI to prevent those crimes, but once we start going down the road of labeling this terrorism or that terrorism, this group over that group, then we run into all these problems about definition and run into all these problems about selective prosecution. We run into problems with measuring a person's political intent.

And from where we come from, the route that should be taken is, is it a crime or isn't it a crime?

Mr. GOODLATTE. What if you define it based upon the action rather than based upon the intent?

Mr. NOJEIM. If it was a statute that talked about this action is an act of terrorism, we would say, OK that action is a crime.

Mr. GOODLATTE. I respect what you are saying but the problem is of course if we were to do that, that would throw out of kilter the whole piece of legislation in terms of every place that the word "terrorism" is used, we would have to start from scratch in rewriting the bill.

Mr. NOJEIM. And maybe focus on a word like "crime".

Mr. GOODLATTE. I might recommend that we do that, but if we could define terrorism in a way that did take into account that there are certain acts performed by terrorists which coupled with whatever we say the terrorist is then makes it an act of terrorism, would simplify this process for us considerably and hopefully still meet your objective.

Mr. HYDE. Would the gentleman yield to me for a second?

Mr. GOODLATTE. Certainly.

Mr. HYDE. I appreciate your courtesy.

Mr. Nojeim, I would very much like your definition of terrorism. Do you have a definition of terrorism?

Mr. NOJEIM. I haven't prepared a definition of terrorism.

Mr. HYDE. Would you think about it and perhaps help us by giving us one? You do concede that there are terrorists in this world?

Mr. NOJEIM. What we concede are that Congress should be looking at the criminal laws to see whether they effectively protect us from things like Oklahoma City and from other things that people call terrorism.

Mr. HYDE. But as a philosophical, legal point, do you concede that there are such persons as terrorists afoot in the world, without describing them?

Mr. NOJEIM. Sure.

Mr. HYDE. If you could help us define that, that would be most welcome.

Mr. SCOTT. Mr. Chairman, he doesn't have a definition right now, but he knows one when he sees one.

Mr. HYDE. You know it when you feel it. What was it Churchill said? Nothing feels as good as being shot at and missed.

Mr. FEIN. The knowledge that one has been shot at without result. He said that as a journalist covering the Spanish-American War.

Mr. HYDE. Well, I have exercised what he thought it was—the Boar War? Exercised what is called substantial compliance.

Mr. FEIN. Mr. Congressman, could I make a suggestion? And I am not sure how well it might satisfy the concerns that the ACLU has. If you took the definition of terrorism which includes things that are already criminal and instead of making it a separate crime, I would have it as a criminal enhancement in the penalty phase of any proceeding, which is really what we want to do here. It much relaxes due process concerns.

The Supreme Court has said when you are getting to the penalty phase, after you have got someone convicted of a crime, that there is all sorts of information and less precise language that will do if you want to raise the level of the penalty into the 5 years, 10 year, life term level.

And it may well be—and I haven't looked at how 315 fits with everything else—that you could utilize the definition of terrorism there as a criminal enhancement. The same way in which there are criminal enhancements in hate crime statutes where the committing of the crime with a particular intent isn't by itself a particular offense, but it is used to enhance the penalty.

And what we are trying to do is stick these guys away for a long time. There is no reason why, since the predicate is already a violation of law, you couldn't throw this definition into the penalty phase.

Mr. GOODLATTE. I think that is a good suggestion.

Mr. Nojeim, going on to another area that the chairman questioned you about, is it your opinion that the aliens subject to deportation hearings should have the opportunity to choose any attorney they want to to examine evidence that the Government feels is necessarily to be kept secret to protect informants and so on of the U.S. Government?

Mr. NOJEIM. Yes, and——

Mr. GOODLATTE. How do you reconcile that with the fact that hundreds of thousands of attorneys in this country, the Government may not have the confidence that every one of those attorneys will reliably not provide that information to the defendant or to the—or to some other interested party that may be engaged in terrorist activities?

Mr. NOJEIM. First, it is already the case that attorneys often get security clearances. And we would prefer to see something that said that the alien chooses his attorney and then the attorney applies for a security clearance. That happens rather often, but it doesn't really solve the problem with the bill.

The problem with the bill is that the alien doesn't get to see the information. The alien often doesn't get to see a summary, as the defendant in a CIPA proceeding would always get. In CIPA, the defendant always gets a summary and the summary always has to provide them with substantially the same opportunity to prepare a defense as would the classified information.

Mr. GOODLATTE. I had some exchange with Mr. Sofaer. But aren't we talking about a different set of circumstances when we are talking about international terrorism and somebody who is from another country that we have only limited jurisdiction over and for a limited period of time and we are talking about what are in effect acts of war? Aren't we going far too far in terms of trying to protect that individual's rights, which I will tell you quite frankly he is not entitled to the same rights and protections that a U.S. citizen would be entitled to in a criminal trial proceeding?

Mr. NOJEIM. If we really were talking about that person, I would probably agree with you.

But, remember, under current law there is already a procedure for dealing with a person who is a real live terrorist who blows things up. They get arrested. They get tried for their crime. They get jailed if they did it. At the end of their time in jail if they are an alien, they are deportable. That is what current law is. And so that is the way that we should be dealing with criminals. It makes sense to me and I would think it makes sense to the committee.

Mr. GOODLATTE. I don't think it makes sense from a national security standpoint, though. With a criminal trial, you have a witness step forward who is then known to the defendant. We have witness relocation programs and so on. I don't think that is an effective tool to utilize in circumstances where you are talking about an international intelligence network that we are trying to protect for future use and future protection of the country.

Mr. NOJEIM. With all due respect, it seems that the criminal procedure is the way to go when you have somebody who has actually done something like that.

Mr. GOODLATTE. If I may, Mr. Chairman, ask one more question along with similar lines.

You also indicated that you objected to the fact that the individual could not be released pending the outcome of the case under certain circumstances. And you made the comment what country is going to take them, meaning that if they are—actually after the determination is made that they are deportable and you said what

country is going to take them. That means they would be held indefinitely.

Why is it—these are not citizens of the United States, why is it that if no other country would take them, why should the United States take them by having them released on to the streets of this country when they are, one, deportable and, two, may be a threat to the society?

Mr. NOJEIM. What we think the United States should do is to try them. If they are indeed criminals, if we are really talking about terrorists——

Mr. GOODLATTE. But deportation isn't always a criminal act. There might be a suspicion that the person will at some point in time commit a criminal act and they may be deportable for reasons totally unrelated to a crime. But simply because they don't meet our qualifications for immigration in this country, why should we then accept them into the country just because no other country will take them?

And I throw back at you your suggestion that why would they take them if that occurs to somebody in other countries, why wouldn't it also occur to us that we wouldn't take them?

Mr. NOJEIM. I don't know what to do with these aliens who go through this procedure, because I don't think that they would be taken by another country. But I don't think that they should be held indefinitely.

Mr. GOODLATTE. Presumably most of them have a native country that they would have some rights to return to.

Mr. NOJEIM. But would you be able to get their native country to accept them back?

Mr. GOODLATTE. I don't know, but it seems to me that they would have a greater obligation than we would.

Mr. FEIN. Mr. Congressman, there are thousands right now of Cubans who are being held indefinitely in the United States because they are deportable to Cuba and Fidel Castro won't take them back and we are holding them indefinitely. We don't put them back on the streets where they can do additional mischief.

Deportation is emphatically not a criminal proceeding. It is intending to allow us to take some safeguards prior to the commission of a criminal act. And it doesn't make any sense in my judgment to treat it as a criminal act—the punishment isn't a crime, there is not the same stigma attached or otherwise.

And to suggest that you need to have mirror image of a criminal trial in a deportation case is I think wrong-headed even though you do have some modest concerns with them. The analogy of the criminal trial is certainly something that the U.S. Supreme Court has never suggested that there is.

Mr. GOODLATTE. Thank you.

Mr. HYDE. I thank the gentleman and thank the gentleman for his contribution.

The gentleman from Georgia, Mr. Barr.

Mr. BARR of Georgia. Thank you, Mr. Chairman.

I would like to also thank the chairman and commend the chairman for pulling another three excellent panels today. It has been very, very informative. Both from a theoretical standpoint as well

as some of the standpoint of focusing on specific language and specific concerns with the language.

Mr. Fein, you made an interesting observation before about in sort of conclusion to the phase of our discussion that had to do with trying to define terrorism and perhaps looking at it more as useful in a penalty enhancement phase.

If we were to take that approach, would the need for most of 1710 fall by the wayside? In other words, isn't 1710 based very much on trying to define terrorism and then have been that definition apply to all a whole range of, as was indicated earlier, whether we call them dominoes or what not. Can you reconcile that for me?

It is an interesting concept that you came up with, but does it fit within the context of the bill that we are trying to work with or is it basically a complete alternative that you are talking about?

Mr. FEIN. I haven't examined things closely enough to be categorical, but I do think insofar as you are revising the definition of terrorism—the revision might not be needed if you are using it just as an enhancement in a criminal case.

Whereas the need for specificity is much greater if it is an independent crime. If you did seek to change the terms, then you would need to reexamine how much broader, if you wanted to make it broader, your provisions with regard to providing material aid to a terrorist organization because there are many interconnected provisions of the bill that tie in to the overall understanding of what terrorism is and you couldn't change one definition.

I am talking about the definition, not what sanctions go along with it, without considering whether or not that would necessitate some revision in the language elsewhere. But there might be a problem, there might not.

It would just depend upon whether or not you were really—you could leave the existing definition intact because you were just using it as a criminal enhancement not as defining a new crime.

Mr. BARR of Georgia. But this bill doesn't look at it that way. It is built on a certain premise and structure and that is trying to define the term "terrorism" and then have that definition used in various procedures.

Whether it is wiretap procedures or deportation or the whole range of issues that I think, Mr. Nojeim, you referred to as dominoes.

Do you see, Mr. Nojeim, some way of reconciling these two approaches within the framework of this bill, or is there no way to do it?

Mr. NOJEIM. I am not sure. And, indeed, I didn't—and I want to do this for the committee—I didn't do a search to see what other criminal statutes refer to section 2331, because it could be that, and likely is, that there are other statutes that pull in this language that we are talking about right now that would be changed substantially, that their effect would be changed substantially if we start going down the road of amending that language.

Because, remember, as it is currently drafted, it is all about international terrorism. It is about things that happen abroad or come from abroad. And where we see the real problem is when you start bringing that into the United States and start looking at do-

mestic activity and labeling this or that as terrorism, then we have these civil liberties problems.

But I don't know if there is going to be time before the markup, but I will try to get something to the committee that talks about what other statutes rely on section 2331 for their operative acts.

Mr. BARR of Georgia. I would appreciate that. I think that would be helpful.

[The information follows:]

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July 5, 1995

Hon. Henry J. Hyde, Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington D.C. 20515

Dear Mr. Hyde:

Thank you for inviting the ACLU to testify at the hearings conducted on June 12 on H.R. 1710, the "Comprehensive Antiterrorism Act of 1995."

During the hearings, it became clear that the definition of terrorism originally appearing in Section 315 of H.R. 1710 (a proposed amendment to 18 U.S.C. Section 2331)[1] was too broad. Congress has been reluctant in the past to define terrorism for the very reason that any definition of "terrorism" appearing in the criminal code would likely sweep in conduct not normally thought of as "terrorism." In fact, the definition of terrorism adopted by the Judiciary Committee at mark-up is likewise overbroad, and would include sabotaging a bicycle with intent to injure the rider, or causing substantial damage to a STOP sign with a .22 calibre rifle.

Indeed, adoption of this new, broad definition of "terrorism" effectively eviscerates the limitation on prosecution set forth in Section 104(a) of H.R. 1710 (proposed Section 2332b(d)). The bill now turns every killing, kidnapping, maiming, injuring, serious act of assault, and act of property damage creating risk of harm to a person, into a crime under federal law if a jurisdictional base can be met, and any conduct involved in the act transcends a national boundary. This would federalize state law crimes to a vast extent.

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[1] A Lexis search of Title 18 did not reveal another criminal statute which incorporates the definition of terrorism set forth in 18 U.S.C. Section 2331. However, "terroristic action" is an aggravating circumstance under the Federal Sentencing Guidelines, and would apparently authorize a sentencing judge to penalize such activity more severely than would be the case for criminal activity that does not constitute "terrorism." See, United States Sentencing Commission, Guidelines Manual, Section 5K2.15 and App. C Amendment 292 (Nov. 1994). In addition, under Section 308 of H.R. 1710, conspiratorial activities involving terrorism, as defined in 18 U.S.C. Section 2331, could justify an "emergency" wiretap without a prior court order.

For these and other reasons, ACLU has traditionally taken the position that rather than trying to define "terrorism," legislation amending the criminal code ought instead to define activity that is a "crime." A bill outlawing criminal activity, as opposed to one struggling to define terrorism, is much more likely to be drawn narrowly, reduce the extent to which activity illegal under the laws of the states becomes a federal crime, and reduce the risk of selective enforcement. We do not have an alternative definition of "terrorism" to offer.

Please include this letter in the record of the proceedings.

Sincerely,

Gregory T. Nojeim
Legislative Counsel

Mr. BARR of Georgia. In conclusion, could whoever—whichever one, or all three of you, just give me some wrap-up thoughts on those provisions contained in 1710 concerning posse comitatus. We have been focusing on some other provisions here, but I would like your thought on the involvement of the Department of Defense.

Mr. FEIN. I don't think, Mr. Congressman, there are constitutional problems. I think we have many things that the Department of Defense needs to accomplish with a full-minded focus on defeating the enemy abroad.

I, myself, had reservations about them being involved in international narcotics trafficking. This seems to me a far less severe intrusion on our general resistance having the military involved in law enforcement than is the case with regard to international narcotics trafficking. And I don't find it objectionable.

Mr. BARR of Georgia. Professor.

Mr. FLEISSNER. I think one of the most important aspects is the technical one, that there are some limitations in terms of the abilities of domestic law enforcement to deal with some of these new technologies such as poisons that are potential threats.

And echoing General Barr's comment earlier today, I think having the military provide that kind of support to domestic law enforcement in dealing with what could be a horrendous situation, involving potential loss of life, I think is appropriate. And other than that, I don't really have any further comment.

Mr. NOJEIM. The ACLU believes that the role of the military in civilian law enforcement is already too broad. And in my testimony on pages 22 through 24, I cite some of the statutes that already permit military involvement in civilian law enforcement.

Section 312 is, in our view, a very broad expansion. And I have mentioned some of the things that this formulation lacks that, for example, appear in the nuclear exception for involvement of the military.

For example, this section does not mention that there would have to be an emergency that triggers military involvement. We think that would be a minimum.

This section does not indicate that there would be a necessity—in other words, that civilian law enforcement was incapable of dealing with the problem, whereas that does appear in the nuclear exception.

Third, this is not limited to technical assistance, which is the case in the nuclear exception, but includes technical and logistical assistance, and it doesn't define either term. And that could be something that is very broad.

And fourth, I am sorry, one more moment—no, I am sorry that, is it. It doesn't define technical and logistical.

Mr. BARR of Georgia. OK.

Again, thank you all very much, and I appreciate the panel, Mr. Chairman.

Mr. HYDE. I am going to yield to Ms. Lofgren, but before doing that, I just want to interject on this last topic that Mr. Barr brought up. I understand the lack of sympathy for bringing the military into nonmilitary law enforcement activities. We don't want a military police beating down our doors at 3 in the morning.

On the other hand, aren't we foolish not to seek out and utilize the expertise, conceding there is superior expertise in resources and training and personnel, on weapons of mass destruction, poison gases and explosives, so long as there is a fence built around that technical and logistical-only support, and they are expressly forbidden to engage in police activities, apprehension or arrest of any person. That is what we are trying to do. And it seems to me that goal does not raise the specter of a military police, jackbooted thugs banging their way through your door in the middle of the night. But to deprive ourselves of their equipment, their training and their expertise in these very difficult and dangerous situations seems to me somewhat foolish.

Now, we have a Corps of Engineers. We have military who drain creeks because they have the expertise. They have the equipment to do it. And I don't see a real problem with that. And I really don't see a problem with this, although purists, and I don't mean that pejoratively, who don't want the toenail in the door, much less the foot in the door, are going to be concerned about this. And we will have a struggle, I am sure.

Mr. NOJEIM. If I could add?

Mr. HYDE. Surely. Surely.

Mr. NOJEIM. One thing I would request the committee consider, whether under existing law that kind of—you know, the equipment-type thing that you were talking about, whether that is not already available in certain circumstances. Because I think under existing law it is.

Mr. HYDE. How about the expertise, though?

Mr. NOJEIM. With regard to the expertise, maybe one way to deal with that is to provide that some of these thousands new FBI agents would be trained by the military to obtain some of that expertise. I have to add also that the ACLU is not going to object if a statute is truly very tightly drawn to be limited to those circumstances. If it is really tightly drawn.

Mr. HYDE. That is good news, and I appreciate hearing that.

The gentlelady from California.

Mr. FEIN. If I could just interject a word of caution, Mr. Chairman, about trying to get too precise in the standards and emergency procedures, it is just not innocuous language that you would throw in there. It is unlikely that the FBI or the Department involved in a serious case is going to needlessly ask the Defense Department just knowing the logistics of communication in the Pentagon. And I worked in the Department for 10 years. That is going to slow things down just trying to get your phone call answered. They are not going to call lightly for outside assistance.

Secondly, you put in things like emergencies, that is just another litigating aspect that is going to protract the trial and then raise the exclusionary rule; it wasn't a true emergency and you used the Department of Defense personnel. And if you have any kind of defendant that has the resources of O.J. Simpson, it would protract the case enormously.

And when you clutter up provisions that don't have any clear evident likelihood of abuse, it does substantially complicate the likelihood of a successful criminal prosecution that has nothing to do with the likely guilt or innocence of the accused.

Mr. HYDE. I thank you.

Ms. Lofgren.

Ms. LOFGREN. Mr. Fein, I noted that you and the ACLU have a dramatically different view of section 601 of the bill, and I was interested in your comments about the Classified Information Procedures Act, although Mr. Nojeim indicates that summaries are provided in that circumstance. I am new to the Congress.

Can you give me an example, putting to the side exclusion proceedings in immigration, but an example where secret evidence is allowed for someone who has due process rights and who is present in the United States in a civil or criminal proceedings?

Mr. FEIN. Deportation is a civil case. Yes, there certainly are many examples in jurisprudence where our own citizens, claiming that their constitutional rights have been violated and seeking damages, get their case thrown right out of court because of an affidavit submitted by our national security officials stating that even responding to the case would jeopardize national security.

Halprin v. *Helms* is an example of that. And it is well established in the constitutional jurisprudence that even if you allege a constitutional violation, if state secrets are at issue, you will not get to see the state secrets. It goes in camera and ex parte, and you are out of court.

That is our own citizens. This is deportation proceedings, and a civil case according to the U.S. Supreme Court and doesn't involve any U.S. citizen. So I think if you look at some of the harshness that confronts our citizens, this would actually be somewhat less.

Ms. LOFGREN. Could you comment on that, Mr. Nojeim?

Mr. NOJEIM. Well, I would have to look more at those other circumstances that he was talking about, but we can't forget that the Supreme Court has said about deportation that deportation can deprive a person of everything that makes life worth living.

So we take the proceedings very seriously and we think that a high level of due process rights applies, particularly in the case of aliens who have strong ties to the United States such as permanent residents.

Ms. LOFGREN. Let me ask you if you had any further comments on this subject, I would very much value having them. This is an area that I think is hard to sort through for me, frankly.

And also on the designation—the President's designation of terrorist groups. I have strong concerns in that area that you have basically addressed in your testimony, both orally and in writing, and yet I am looking for a way, that would not be violative of first amendment rights, to address this issue. Because there are groups that are involved in terrorism that we may find out about before the crime has actually been committed, and we would like the ability as a country to protect ourselves and yet we also want to protect our Constitution because that is the thing that has kept us free and safe.

So if you have suggestions on improvements for meeting those two goals, I would—either now or before Wednesday, I would be very eager to hear them.

Mr. NOJEIM. Let me offer a suggestion now. Where the bill runs into problems, all the bills run into problems, is in the designation of groups, when they start talking about groups instead of about

activities. If the bills are changed to outlaw activities to, outlaw support, material support for activities, they will survive constitutional challenges.

The worst thing we could do now would be to enact legislation so that when there is a real terrorist, the terrorist goes into court and says this is unconstitutional. That would be the worst-case scenario. So we think that if the bills are restructured to focus on activity instead of on associations, instead of on memberships and instead of on groups, that they will survive.

In fact, in the material support provision, one thing that people could consider is combining the sections 102 and 103 into one section by instead of listing all those crimes in section 103, inserting in lieu of, that all terrorism activity as it is defined in the Immigration and Nationality Act.

Then, then it would become a crime for providing material support for any terrorism activity and it wouldn't be a crime—because we would get rid of section 102—it wouldn't be a crime for providing material support for legal activities of organizations.

Ms. LOFGREN. Thank you.

I yield back the balance of my time, Mr. Chairman.

Mr. HYDE. Well, we have come to the end of a very full and interesting day and on a high note in terms of quality of presentation.

All three of you have made a great contribution and we thank you and we reserve the right to contact you again.

Thank you very much.

The committee will resume at 9:30 tomorrow morning.

I want to thank the members of the committee who were here today. It was an off day in Congress, and I know it was a sacrifice, but you are taking your responsibilities very seriously, for which I am grateful.

Thank you.

The committee is adjourned.

[Whereupon, at 3:30 p.m., the committee adjourned, to reconvene at 9:30 a.m., Tuesday, June 13, 1995.]

INTERNATIONAL TERRORISM: THREATS AND RESPONSES

TUESDAY, JUNE 13, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, Carlos J. Moorhead, Bill McCollum, George W. Gekas, Howard Coble, Lamar Smith, Bob Goodlatte, Stephen E. Buyer, Martin R. Hoke, Sonny Bono, Fred Heineman, Ed Bryant of Tennessee, Steve Chabot, Michael Patrick Flanagan, Bob Barr, John Conyers, Jr., Barney Frank, Charles E. Schumer, John Bryant of Texas, Jack Reed, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, and Sheila Jackson Lee.

Also present: Alan F. Coffey, Jr., general counsel/staff director; Patrick Murray, counsel; Tom Smeeton, administrator/chief investigator; Kenny Prater, clerk; Tom Diaz, minority counsel; and Perry Apelbaum, minority counsel.

Mr. HYDE. The committee will come to order.

Under the rules of the committee, one Member plus the Chairman creates a working quorum, and while I regret other Members are not here, if yesterday is an example, they will come drifting in. But I don't think it is fair to the witnesses to keep them waiting around indefinitely. And their statements are available for study by the Members and the staff.

So, we will commence. Today we have four excellent witnesses. Russell Seitz is an associate at Harvard University Center for International Affairs, the John Olin Institute for Strategic Studies and the author of many scholarly publications on a wide range of subjects; John Hay is a research physicist with the U.S. Bureau of Mines, Pittsburgh Research Center. He serves as the in-house expert to other research groups within the Bureau of Mines as well as other government agencies regarding matters involving or related to explosives technology; Christopher Ronay is the president of the Institute of Makers of Explosives, whose member companies produce approximately 90 percent of the commercial explosives consumed annually in the United States and Canada.

Mr. Ronay was an FBI agent from 1972 until 1994 where he served for a time as the Chief of the Explosives Unit. He has worked on various bombing investigations including the Beirut Embassy and Marine Corps barracks, Pan Am 103 and most recently the World Trade Center.

Robert Delfay is the executive director of the Sporting Arms and Ammunition Manufacturers Institute whose members include the major manufacturers of sporting firearms ammunition and propellant powders in the United States.

We are very pleased to have this distinguished panel. If you would come forward and sit at the desk.

Mr. Seitz, I take it, is not here. Well, all right. We will proceed, then, with Mr. Hay. Oh, is that Mr. Seitz? And you would take the end seat. Catch your breath, and we will begin with you. Are you ready to—usually when that happens to me I have just climbed three flights of stairs. I am relying on a long introduction and I don't get one.

Mr. Seitz, you have been introduced as an associate at Harvard University Center for International Affairs, the John M. Olin Institute for Strategic Studies and the author of many scholarly publications on a wide range of topics.

So we are pleased to hear from you this morning.

STATEMENT OF RUSSELL SEITZ, ASSOCIATE, JOHN M. OLIN INSTITUTE FOR STRATEGIC STUDIES, HARVARD UNIVERSITY

Mr. SEITZ. You give me too much credit, sir.

It takes a great deal of fertilizer to feed the world. Made by the millions of tons out of air, water, and natural gas, ammonium nitrate is equally serviceable as a plant food or an explosive.

Yet, it was sold without question throughout the country until the Oklahoma City bombing. Now, the bomb's victims have sued the ammonium nitrate's manufacturers asking why, since it can be rendered harmless, were they left at risk?

Despite the carnage here and elsewhere, this Pandora's cornucopia of destructive potential flows on. Ten dollars buys all the ammonium nitrate you can carry. It can cost more to rent a truck than to build a powerful bomb. Last year, over 4 billion pounds was sold legally in this country, enough for literally a million bombs as powerful as the one that leveled the Federal building in Oklahoma City.

Now, global control of explosives made from just air, water and energy is a problem that analysts are tempted to toss on the "too hard" pile. But the domestic supply of ammonium nitrate could, by following the example of the European Community, be rendered harmless by the simple process of blending it with other inert fertilizers, typically potassium and phosphorous compounds that are used in agriculture anyway to render its ammonium nitrate content essentially unexplodable.

Europe learned the hard way about ammonium nitrate. In 1921, a multimillion-pound detonation blew away the Rhineland town of Oppau. Here, too, thousands have been killed or maimed. People from Halifax, Nova Scotia to the Gulf of Mexico have cruel memories of the shiploads that exploded. At Texas City, about 2 kilotons; at Halifax, about 3. Eruptions that literally brought a taste of Hiroshima to our shores.

But despite heroic efforts to halt the proliferation of weapons of mass destruction, the shipment of ammonium nitrate continues. Cargoes of tens of thousands of tons are commonplace.

It should worry those regulating nuclear materials and nerve gas that at 8 cents a pound, an atom bomb's worth of explosive yield is appallingly cheap. Hiroshima and Nagasaki for the half of price of a small corporate jet. Selling a townhouse on Central Park could yield the Manhattan Project's end result.

So great is the scale of the fertilizer trade that explosive power enough to refight World War II is on the loose, and the nuclear nonproliferation treaty is powerless even to address it. Absent constant vigilance, any entity with the price could gradually load an aging supertanker with a quarter megaton or more of ammonium nitrate and fuel oil.

It is easy to dismiss such a virtual H–bomb as a novelistic device, until one goes off like the munitions ship that demolished Halifax in 1917. The survivors of that 3 kiloton catastrophe can testify that it doesn't take a nuclear bomb to ruin your entire day.

Hard die the reflexes of the late cold war. A clear and present danger resides in the thousands of barge and train loads that annually ply the Nation's waterways and rails unguarded. The Nation's coasts and rivers play host on a daily basis to thousand ton fertilizer, and even larger fuel barges by the hundred. There is little to deter their hijacking of their tugs or the transfer of their cargoes, let alone to defend the cities that they transit.

I believe that this illustrates that H.R. 1710 ought to address a wider spectrum of explosive delivery systems than now appears to be the case. Ideally all of them, from pneumatic tubes and water mains to pilotless aircraft and submersibles, proliferation is where you find it and it pays to look hard.

Last year another detonating cord was stolen from the blasting industry to set off thousands of tons of ammonium nitrate based explosives. At ground zero all kilotons, nuclear and conventional, are created equal.

Back in the American heartland, farming changes but slowly, but there are other nitrogen fertilizers already out there competing with pure ammonium nitrate. They might displace it entirely. Changing the matter things are made from can change the shape of things to come. Urea, ammonium nitrate's chief competitor, can be mixed with it 50–50 to form a cheap, pure nitrogen fertilizer that cannot be readily exploded or readily unmixed.

Since most ammonium nitrate is already sold in this country as inert blends, adding urea to the unblended remainder may be the most economic and least disruptive solution to the problem. It is a solution that would leave farmers at liberty to adjust soil nitrogen to suit themselves.

Meanwhile the Department of Agriculture is already present in force at the county level. Whatever measures are taken, it could assist in deploying them, be it mechanical taggants or chemical detection enhancers that can be added to otherwise odorless ammonium nitrate.

But actually interdicting explosives before they are placed and detonated takes obvious precedence over identifying whence they came after they have exploded.

If we are prepared to understand and accept the minimal risks their use entails, there exist isotopic tracers that can enable the detection of explosives in quantity outside of the city limits or even

in transit on the high seas. I urge you to explore this direction and to invite the Attorney General to reflect that much sound technical work has already been done in response to other tragedies in the recent past. It would probably pay to survey them to see what is already on the shelf. It is time to extend those studies into action, not merely to repeat them.

Even though Hollywood's spectacular obsession with exploding office buildings may trouble the Nation's psyche far more than talk radio does, it remains hard to imagine anything transcending what we witnessed in Oklahoma City. Yet the very enormity of that act testifies that we must exercise the imagination of disaster or endure unending surprise.

Mr. HYDE. Thank you very much, Mr. Seitz.

Next we will ask Mr. Hay to testify. And may I suggest, what you haven't done and should have, if you gentlemen could confine your remarks—we do have your statements, if you have submitted them—to 5 minutes or so, certainly not watching the clock. But we have another panel and we want time for questions, too.

So with that benign admonition, Mr. Hay.

STATEMENT OF J. EDMUND HAY, RESEARCH PHYSICIST, PITTSBURGH RESEARCH CENTER, U.S. BUREAU OF MINES

Mr. HAY. Thank you, Mr. Chairman, for the opportunity to testify before your committee. I would like to offer for you today some technical observations relative to an item in the proposed legislation, H.R. 1710; namely, the proposal to render potential explosive ingredients inert.

The chief of those explosive ingredients is, of course, ammonium nitrate which is the least expensive and the most widely available used ingredient in commercial explosives and is essentially a major ingredient of all commercial explosives.

Ammonium nitrate generally speaking is available in two basic grades: one is intended for use as an explosive ingredient and one is intended for use as a fertilizer. The principal difference being the porosity of the individual granules or prills.

It seems probable that any technical modification of the explosive grade material to diminish its usefulness to terrorists would also diminish its usefulness to legitimate users and we are assuming, therefore, that the object of control would be to control the availability of the explosives grade material but not to tamper with its technical properties. So that I am assuming that the proposed desensitization refers primarily to the agricultural grade.

With this regard, there are two important considerations. The proposed modification of the product should render it useless to the potential terrorist, but also cause no severe hardships for legitimate users. It is well established that dilution of explosives diminishes their detonability. This continues to be exploited in various types of explosives formulations.

There is little doubt that it can be applied to ammonium nitrate and its mixtures, but I want to point out that I used the term "diminish" detonability, not "eliminate," because it is a fact that the detonability of the substance depends on the quantity of the substance, the intensity of the stimulus, the degree of confinement available to the explosive and several other properties, and is thus

not a uniquely determinate property like the specific gravity of a crystal is a uniquely determinate property.

The object is to determine a diluent level and a level of dilution that minimizes its usefulness as an explosive while retaining its benefit as a fertilizer. This needs to be done with great care as evidenced by the event which Mr. Seitz has already referred to in Oppau, Germany.

This material was already believed to be highly desensitized. It was 45 percent ammonium sulphate in the ammonium nitrate. And yet it proved to be detonable anyway. In spite of the fact also that this reduced its value as a fertilizer rather considerably.

There have been several proposals to incorporate various ingredients to reduce detonability. Although I do not claim to know all of them, I have noticed that in some instances the data which supposedly substantiates the effectiveness is based on small charge sizes and initiating stimuli. These attempts can be very misleading if they are not validated by appropriate testing.

The quantity of product and number of legitimate user of agricultural ammonium nitrate are very large and many of the users, not to say the suppliers, may be presumed to be vulnerable to economic and other impacts of the degradation of the product.

With this in mind, the Bureau has been considering the subject of what sort of diluents one might add to ammonium nitrate that would minimize—the degradation of the agronomic uses and maximize the degradation of the explosive properties.

Mr. Seitz has given half of my testimony for me in his suggestion about the addition of urea. And, therefore, I will skip over some of what I have already written.

The main point in our mind about the possibility of urea as a good additive is that it has a high nitrogen content of its own and therefore the nitrogen content, which is the principal reason why one uses ammonium nitrate, is not degraded by the addition of urea.

The other interesting thing is that it is normally sold in a form, prills, which are identical in size, shape, appearance and so forth to ammonium nitrate. They are physically indistinguishable. So you can't very well envision someone separating the ammonium nitrate from the urea and getting back ammonium nitrate. And both have similar solubility, so it would be impractical to attempt to reseparate them by differential crystallization or some other chemical technique.

Now, the point that I really need to make is that existing data on the effects of urea which we have at this point pertain only to small diameter charges and the same is true of any proposed diluent that we have heard of.

It is not, by any means, proven that any of these diluents will work at the level which has been claimed for them if one postulates a large charge, a very large explosive booster, or heavy confinements surrounding the charge. This is something which needs to be very carefully evaluated because the detonability of any material, not to say a mixture of materials, depends on the confinement, the charge size, the magnitude of the stimulus, the particle size, the density and even the method of mixing.

And so we are basically saying here that we should not jump into—it would be inadvisable, that is, to jump into a simple formula such as 15 percent diammonium phosphate or 40 percent urea or any other particular or type of diluent without carefully evaluating it.

It could be that ammonium nitrate could still, with patient effort, be extracted from a mixture and be used. And I would respond that this could be true. Explosives could be made from chemicals that are so common that restricting their availability is beyond the bounds of reason. In other words, there is no absolute solution to the problem. We can only strike a balance between making life more difficult for ourselves or making life more difficult for terrorists.

The key point that I also would like to make, as Mr. Seitz has already mentioned, is the potential for a ready-made explosion. Ammonium nitrate does not need to be mixed with anything to be detonable. It is detonable in its own form as it is normally shipped in commerce and all a potential terrorist needs to do is find a truckload, railroad carload, shipload or large storage bin of ammonium nitrate, insert a sufficiently large booster—which fortunately for all of us has to be a large booster—and then he has a ready made bomb and he doesn't have to do any processing at all.

The addition of some kind of diluent at the point of manufacture would at least eliminate or greatly reduce the possibility of this nightmare.

As I indicated before at this point, the precise level of dilution required is unknown and there is considerable evidence that the detonability is strongly correlated with the degree of dilution and also strongly correlated with the size and the initiative stimulus and these factors all have to be accounted for.

The Bureau of Mines for its entire history, has been charged with the responsibility of performing research to improve the safety in the mineral industries and particularly with regard to accidental explosions and in pursuit of this mission has a long history of research, testing and test development related to the explosive behavior of chemicals that are either explosive ingredients or which have similar properties and particularly includes ammonium nitrate.

I also might remark the Bureau has also been previously involved of programs of technical evaluation of the feasibility of explosive tagging and our experience in this area is at your disposal. And of course we are willing to produce any assistance that we can to the Department of Justice, the Bureau of Alcohol, Tobacco and Firearms and other agencies in the studies of taggants and the feasibility of rendering common chemicals inert.

Thank you, Mr. Chairman, for the opportunity to testify and for your attention. The Bureau of Mines remains ready to assist with you any technical matters with which we have expertise and I am prepared to respond to any questions that you may have.

[The prepared statement of Mr. Hay follows:]

PREPARED STATEMENT OF J. EDMUND HAY, RESEARCH PHYSICIST, PITTSBURGH RESEARCH CENTER, U.S. BUREAU OF MINES

Mr. Chairman, members of the Committee, my name is Ed Hay. I am a Research Physicist with the Fires, Explosions, and Explosives Group of the Pittsburgh Re-

search Center of the U.S. Bureau of Mines. I am also chairman of the National Fire Protection Association's Technical Committee on Explosives and a member of Committee F–12 (Security Systems) of the American Society for Testing and Materials.

Since its inception in 1910, the Bureau has been charged with the responsibility of performing research to improve safety in the mineral industries, particularly with regard to accidental explosions. In pursuit of this mission, the Bureau has a long history of research, testing, and test development related to the explosive behavior of chemicals that are either explosive ingredients or that have similar properties. This especially includes ammonium nitrate, which is not only a major ingredient of virtually all nonmilitary explosives, but which has a long history of involvement in accidental explosions.

I would like to offer for you today some observations relative to two areas of the proposed legislation of H.R. 1710, namely:

The proposal to render common chemicals used in manufacturing inert as explosive ingredients and

The subject of explosive taggants.

Ammonium nitrate is the least expensive and most widely available used ingredient in commercial explosives. It is available in two basic forms:

One intended for use as a blasting agent ingredient, and

One intended for use as fertilizer.

The principal difference is the porosity of the granules, or "prills." It is probable that any technical modification of the explosive-grade material to diminish its usefulness to terrorists would have equally deleterious effects on its legitimate use. The only practical solution to the control of explosive-grade ammonium nitrate, therefore, appears to be outright legislative control of its availability. Thus, I prefer to confine my remarks to agricultural-grade ammonium nitrate.

In this regard, there are two important considerations. The proposed modification of the product should:

Render it useless to the potential terrorist, and

Cause no severe hardships for the legitimate user.

It is well established that dilution of explosives diminishes their detonability. This fact has been, and continues to be, exploited. There is little question that it can be applied to ammonium nitrate and its mixtures. I use the word "diminish" rather than "eliminate," because the detonability of a substance depends both on the quantity of the substance under consideration and the intensity of the stimulus to which it is subjected, and it is thus not a uniquely determinate property. The object is to determine a diluent and a level of dilution that minimizes its usefulness as an explosive while retaining its benefit as a fertilizer. This must be done with great care, as evidenced by an attempt in Germany in the 1920's to add 45% ammonium sulfate to ammonium nitrate to make it inert. This reduced the nitrogen content by 18%, yet this combination still produced the greatest single historical disaster involving ammonium nitrate in which the German town of Oppau was levelled. There have been several proposals to incorporate various ingredients to reduce detonability. Although I do not claim to know all of them, I have noticed that, in some instances, the data supposedly substantiating their effectiveness are based on tests with rather small charge sizes and initiating stimuli. Such attempts can be misleading if not validated by appropriate testing.

The quantity of product and number of legitimate users of agricultural ammonium nitrate are very large. Many of the users may be presumed to be vulnerable to the economic and other impacts of degradation of an essential commodity. Bearing this in mind, the Bureau of Mines has been considering the potential dilution of ammonium nitrate by a chemical that is itself a high-nitrogen fertilizer, namely urea. Urea contains 46% nitrogen, while ammonium nitrate contains 34%. Our data indicate that, at sufficient levels of dilution, the detonability of ammonium nitrate is greatly reduced. We look forward to other studies on the potential of urea and other diluents.

One might ask why the simple replacement of ammonium nitrate by urea in this application is not completely satisfactory. The answer is that, in certain widely prevalent agronomic applications and conditions, urea loses a significant fraction of its nitrogen before it is absorbed into the soil and is thus somewhat less cost-effective. Further assessment of the agricultural aspects of this issue, coupled with a review of the detonation aspects, is warranted by appropriate experts.

Another important point is that ammonium nitrate, or other potential explosive ingredient, should not be readily separated from the diluent. Urea is normally sold in a form in which it is physically practically indistinguishable from ammonium nitrate. It also has very similar solubility in water, so that neither the physical separation process nor methods based on differential solubility are practical for separating the two ingredients. A careful review of all possible separation schemes needs

to be conducted before such an approach would be considered for final implementation. I should note here that we are considering a simple mechanical mixture of the individual prills of the two substances, not a mixture in which the prills themselves would be composed of a more intimate mixture.

The proposal to use urea may seem paradoxical to those who are aware that, in concentrations below 20%, the addition of urea actually increases the detonability of ammonium nitrate, but at higher concentrations this effect is reversed. Once an explosive mixture reaches the condition at which the fuel content exceeds that which the available oxygen can oxidize, further additions of fuel diminish the detonability. In ammonium nitrate/urea, this occurs at 20% urea. Thus, a nondetonable mixture could not be made detonable simply by addition of fuel, as in the case of pure ammonium nitrate.

Existing data on the effect of urea pertain only to small-diameter charges. These data need to be extended to much larger charge sizes and much larger initiating stimuli to establish a level of dilution at which detonation would require such a large quantity of material and/or such a large stimulus as to be beyond any practical limit. This applies to any attempted diluent, not just urea.

It may be objected that ammonium nitrate could still, with patient effort, be extracted from the mixture and used. I would respond that this is true. It is equally true that with patient effort explosives can be made from chemicals that are so common that restricting their availability is beyond the bounds of reason. In other words, there is no absolute solution to the problem. We can only strike a balance between making life more difficult for the terrorist and making life too difficult for ourselves.

It has been said that urea seems to be a strange choice because it was used in the World Trade Center Bombing. Although true, the urea in this case was combined with nitric acid, and if one postulates the availability of nitric acid, the opportunities for making explosives are so great that I would not attempt to catalog them.

A key point here is that the level of effort required for the potential terrorist should increase with the magnitude of the intended explosion. At present, disaster comes ready-made, since ammonium nitrate is detonable in its own right without any added fuel. The fact that the explosive energy release of pure ammonium nitrate is less than one-half that of the normal mixture with fuel oil is of little comfort. All that is required to detonate a storage pile, truckload, trainload, or shipload is the insertion of a sufficiently large explosive booster. This scenario at least would be impossible if the ammonium nitrate were diluted at the point of manufacture.

As I indicated before, at this point the precise level of dilution required is unknown. There is considerable evidence that the detonability of a substance is strongly correlated with the energy that it would release if detonated, a value that is easily calculated. There is no known instance of a substance detonating that has an energy of less than about 200 calories per gram. An adequate margin of safety would probably be about 150 calories per gram. The level of dilution corresponding to this is about 58% urea. This, however, should be verified experimentally.

The Bureau of Mines has previously been involved in programs of technical evaluation of the feasibility of explosive tagging, and our experience in this area is at your disposal. And, of course, we are willing to produce any assistance that we can to the Department of Justice, the Bureau of Alcohol, Tobacco and Firearms, and other Government agencies in studying taggants and the feasibility of rendering common chemicals inert.

Thank you, Mr. Chairman, for the opportunity to testify before you and for your attention. The Bureau of Mines remains ready to assist you with those technical matters in which we have expertise. I am prepared to respond to any questions that you may have.

Mr. HYDE. Thank you.

Christopher Ronay, for the benefit of the Members who have arrived since the introduction, I will reintroduce the remaining two speakers.

Christopher Ronay is the president of the Institute of Makers of Explosives, whose member companies produce about 90 percent of the commercial explosives consumed annually in the United States and Canada. Mr. Ronay was an FBI agent from 1972 to 1994 where he served as the Chief of the Explosives Unit. He has worked on various bombing investigations including the Beirut Em-

bassy and Marine Corps barracks, Pan Am 103 and most recently the World Trade Center in New York.

STATEMENT OF J. CHRISTOPHER RONAY, PRESIDENT, INSTITUTE MAKERS OF EXPLOSIVES

Mr. RONAY. Thank you, Chairman Hyde.

I am accompanied by two of IME's members of the board of governors. Mr. David True from the Austin Powder Co. in Cleveland and Mr. Paul Rydlund of the El Dorado Chemical Co. in St. Louis. We would be very happy to respond to any of your questions.

We appreciate this opportunity to present testimony before your committee on the Comprehensive Antiterrorism Act of 1995 and in particular, on the sections of that relating to taggants in explosives.

As the chairman mentioned, prior to joining the IME last fall I was the Chief of the FBI's Explosives Unit and I spent 18 years in that Unit investigating bombings under the FBI's jurisdiction.

Prior to my career with the FBI, I was a captain in the U.S. Army in the explosive ordnance disposal business. So my professional career has been dedicated to assuring the public safety and the responsible use of explosives. I joined IME to a large degree because of the long tradition of cooperation between law enforcement and the explosives industry.

From my own experience, I know that IME and this industry are dedicated to preventing explosives from being used by criminals and terrorists.

IME was founded in 1913 as the safety association of the commercial explosives industry. Today our companies produce over 4 billion pounds of commercial explosives consumed annually in the United States in connection with mining, quarrying, construction, demolition and natural resource exploration.

Many of these industries support our positions and are submitting testimony separately. The National Mining Association has asked that we include a statement with our testimony, which we will do.

The primary concern of IME is the safety and protection of employees, users, the public and the environment during all phases of the manufacture and use of our products. Our mission is to provide technically accurate information and recommendations concerning the explosive materials that we produce and we wish to serve as a source of reliable data about their use.

Domestic and international terrorism incidents such as the recent bombing of the Alfred P. Murrah Federal Building in Oklahoma City, of course, raises concerns about what can be done to prevent such horrific events. IME has long offered its expertise and assistance to law enforcement and to the Capitol Hill to move forward on rational and effective legislative initiatives. That is our intent in testifying today.

I would like to highlight the following points: IME supports a comprehensive Federal licensing requirement for all purchasers of explosives, a requirement such as articulated in Congressman Quinn's bill, H.R. 488.

This bill, which is currently not a part of 1710 would require a license for the intrastate purchase of explosives. There is no such Federal requirement presently.

Number two, IME supports title V of H.R. 1710 implementing the International Civil Aviation Organization or ICAO for the marking of plastic explosives. This requires all plastic explosives manufactured in or imported into the United States to contain a chemical detection taggant. A detection taggant is such a material that will odorize the plastic explosive or sheet explosive so that it can be detected by current state of the art instruments and technology at security points and airports. We support this ICAO convention and have since its inception.

Number 3, IME supports section 305 of title III requiring a study of tagging of explosive materials, the rendering of explosive materials inert, and imposing controls for precursor chemicals of explosives; language from that title. We believe an independent and comprehensive study is required before any conclusion can be drawn as to whether the Treasury Secretary should begin regulatory proceedings to require the placing of taggants in explosives as is the recommendation of the Clinton administration.

Presently, the only study on taggants placed in explosives was completed 15 years ago by the Office of Technology Assessment. Fifteen years ago they said, "additional information is required on all aspects of the analysis, technical efficacy, safety, cost and utility of placing taggants in explosives."

IME believes it is essential that in the study we address the following concerns prior to legislatively mandating a regulatory requirement for placing taggants in explosives. Such a study should address first and foremost safety, our primary concern in this organization.

Safety is our number one concern in placing the taggants in the explosive materials during manufacturing. It is also of grave concern for the legitimate users of the explosives and what effects it has on the obtaining of their products in the operations; the mining and blasting operations I am referring to here.

In 1980 the OTA study quoted, "lack of data on long-term effects in terms of safety, stability, and performance is particularly important. As a result of this uncertainty, not even preliminary indications of safety are possible at this time, much less the demonstrations necessary for a tagging proposal, could be safely implemented."

Recently, the New Mexico Institute of Mining and Technology confirmed our own industry tests which found that the microtrace taggant destabilized TNT in the typical melt/pour operations during the manufacturing of cast boosters. This is an unsafe manufacturing condition and was not continued.

The environment is the second major concern. In 1980, little, if any, attention was given to environmental impact of placing taggants in explosives.

No one has fully evaluated the effects of introducing over 2 million pounds of taggants each year, which are made of plastic and metal, into the environment. Nor has the effect of the disposal of the increased hazardous waste generated by taggant—required processes been assessed. This is going to be a considerable thing to study and overcome.

Feasibility is the next issue I want to address. The use of explosives containing taggants during mining operations will result in

the contamination of the blasted materials, such as silica sand, and salt. And in some cases it will render it useless for production of the end products that we know and use every day.

For example, the Unimin Corp. has written its congressional delegation regarding the devastating impact on the American manufacturing of electronic semiconductors by the placement of taggants made of metal and plastic in explosives.

And lastly I would like to address the law enforcement effectiveness. Actually, I would like to put it first based on my background, but I put it last here because I think that it is something we have to remember when we leave here.

Very, very few criminal bombings, that is 1 to maybe 3 percent in some years over the last 5 years studied by the ATF, employ commercial high explosives; very few. Homemade or improvised explosives are the overwhelming choice of explosives for criminals. This is based on my experience and the statistics. So a very small percentage of commercial products are used in bombs.

The bombers of the World Trade Center and the bombers in Oklahoma City chose to make their own explosives. Those planning to blow up the Lincoln Tunnel, who are currently on trial in New York, were using improvised explosives. In order for taggants to be of any use to law enforcement, they would have to be found at a crime scene and contrary to the manufacturer of the taggant who indicates they are easily found, I am here to tell you my experience, based from the late 1970's on, is that they are very, very hard to find in a practical situation.

A great deal of time and resources has to be committed to finding it. You have to spend a lot of time at a crime scene and put a lot of people on it to find even—have any hope of recovering a taggant. If they were found, they lead only to the last legal purchaser of the taggant—of the explosive. And, therefore, would not point a finger directly at the criminal.

Criminals do not buy their explosives, by and large. They steal them or more commonly manufacture their own so taggants would play a very small role in fighting or investigating bombings. And they would play virtually no role in the prevention of bombings.

Contamination is also a serious problem as the concentration of taggants in the environment increases. Crime scenes would be contaminated with multiple taggants arriving at the scene in varying ways. A taggant which may be recovered following a criminal bombing may not be distinguishable from those which were in the building materials which had been mined. Buildings materials such as concrete, brick, mortar, stone, would also contain taggants in the near future.

Lastly, I must mention cost; the economy. Our industry has not comprehensively assessed all the costs of placing taggants in explosives because there are so many unknowns. We do know the currently quoted price of taggants for the 80-mesh size. And I do have some taggants with me that I can allow you to look at if you haven't seen taggants in the past.

The 80-mesh size is specified for the marking of ANFO (ammonium nitrate fuel oil). The cost of this taggant is $326 a pound. This equates roughly to the cost of $750 million annually.

This doesn't include important factors such as recordkeeping, the shutting down of the equipment for cleaning between batches and the cost of disposing of excess hazardous waste at the end of each production run to name only a few. These would more than triple the cost of purchasing explosives for the mining industry; I repeat triple the cost for the mining industry.

Furthermore, it is estimated that some small companies forced to buy taggants in lesser quantities at higher prices could not continue to be competitive and could go out of business. Companies engaged in international commerce could be also forced out of business or to moving plants beyond our borders to avoid the costs of taggants.

And many of our customers, our mining associates who use our products would be forced to a noncompetitive situation abroad in the export of their products. Regulations that increase the cost of mining impact on jobs and competitiveness, both abroad and at home.

I am sure you agree that our Nation's financial resources are limited and should be spent wisely. It is important to assess the full costs of requiring taggants before legislatively mandating a requirement that would have a devastating impact on a number of important and necessary American workplaces, particularly in light of the minimal benefit to law enforcement.

A comprehensive and thorough analysis of cost is necessary before Congress enacts legislation to regulatorily require taggants in explosives.

We can assure the committee of our full participation in any study provided that study is sound, thorough, objective, and complete. And we will work with Congress and the agency to address the conclusions of that study.

Lastly, I would like to emphasize that IME and its member companies have an excellent record working with law enforcement agencies to assist in the identification of explosives used in criminal cases.

Based on our technical expertise and experience, IME recommends the following: the implementation of the ICAO convention for the marking of plastic and sheet explosives; the adoption of the requirement for a comprehensive study of, among other concepts, tagging explosives; and an amendment to H.R. 1710 incorporating the provision of H.R. 488 requiring permits for all purchasers of high explosives.

Mr. Chairman, IME appreciates the opportunity to present our views here and hopes to be in a leadership position as we look to continually assure the control of explosives and the prevention of the illegal use of our products. We would be happy to respond to any of your questions.

[The prepared statements of Messrs. Ronay, Lawson, and Crawford follow:]

PREPARED STATEMENT OF J. CHRISTOPHER RONAY, PRESIDENT, INSTITUTE OF MAKERS OF EXPLOSIVES

I. INTRODUCTION TO INSTITUTE OF MAKERS OF EXPLOSIVES

Mr. Chairman, and Members of the Committee, I am Christopher Ronay, the President of the Institute of Makers of Explosives (IME), and I am accompanied by

members of IME's Board of Governors, Mr. David True, Vice President of Austin Powder Company of Cleveland, Ohio, and Mr. Paul Rydlund, Vice President of El-Dorado Chemical Company of St. Louis, Mo. We appreciate the opportunity to present testimony before the House Judiciary Committee on H.R. 1710, the Comprehensive Antiterrorism Act of 1995 and, in particular, on the sections related to tagging explosives. My statement will be brief and to the point. It is more fully amplified in IME's written statement which I understand will be made a part of the record. Following my short statement, Mr. True, Mr. Rydlund, and myself will be happy to respond to your questions.

Prior to my joining the IME last fall, I was Chief of the FBI Explosives Unit. I spent 18 years of my career with that unit and during that time have been personally involved with the bombing investigations under the Bureau's jurisdiction, including the bombing of Pan Am 103, the World Trade Center in New York, and the UNABOM investigation. Prior to my FBI career I was a Captain in the United States Army, commanding an Explosives Ordnance Disposal Detachment.

As you can see, my professional career has been dedicated to assuring the public safety and the safe use of explosives. I joined IME because of the long tradition of cooperation between law enforcement and the explosives industry. From my own experience, I know that IME and this industry are dedicated to preventing explosives from being used by criminals and terrorists.

II. Description of the Institute of Makers of Explosives

IME is the safety association of the commercial explosives industry in the United States and Canada. IME was founded in 1913 to provide technically accurate information and recommendations concerning explosive materials and to serve as a source of reliable data about their use.

The primary concern of IME is the safety and protection of employees, users, the public and the environment in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations.

The member companies of IME and their 60-odd subsidiaries and affiliates produce about 90% of the 4.1 billion pounds of commercial explosives consumed annually in the United States in connection with quarrying, mining, construction, demolition, and oil and gas exploration.

IME has a long record of promoting safety in the manufacture, transportation, storage, handling and use of the explosive products manufactured by its members. It has an equally long record of cooperating with federal, state and local law enforcement and regulatory agencies. Our industry's recommendations are today embedded in the regulations of federal agencies such as the Bureau of Alcohol, Tobacco and Firearms (BATF), the Department of Transportation (DOT), the Office of Surface Mining (OSM), the Mine Safety and Health Administration (MSHA), and the Occupational Safety and Health Administration (OSHA), as well as the regulations of over thirty states. We also are proud, as an industry, that we have been called upon to assist law enforcement agencies in their efforts to investigate bombing incidents and that we have been able to respond promptly and effectively.

As manufacturers of explosive materials, we have a special responsibility to ensure that our products are safe for their intended use. We are committed to doing everything possible to prevent the criminal use of our products and to assuring the safe handling by those who legitimately are in contact with them. We are also committed to working with government bodies in developing new technologies to safeguard the public.

III. Description of Commercial Explosives Industry and Regulations Controlling Its Activities

A brief description of the commercial explosives industry is appropriate. Members of the commercial explosives industry are involved in the manufacture, distribution and use of a wide variety of explosives products. The manufactured explosive materials are shipped to agents and distributors who, in turn, sell these products to the end users. Commerce in explosive materials is carried out within an aggressive, long-standing regulatory scheme enacted by Congress and administered by a number of state and federal regulatory agencies.

The Bureau of Alcohol, Tobacco and Firearms (BATF) requires all participants in the interstate commerce of explosives to have a license or permit to manufacture, sell, distribute, store, use or otherwise handle explosive materials. Currently, about 10,000 individuals and firms possess licenses or permits issued by BATF for these purposes. Manufacturers of commercial explosives represent approximately 10 percent of this total and distributors, importers, and consumers engaged in the sale,

distribution, storage, and use of explosive materials make up the remaining 90 percent. These BATF requirements do not apply to intrastate purchases of explosives.

BATF also has extensive regulations related to the storage of explosives. The Department of Transportation (DOT) regulates the transportation of all explosive materials. The Occupational Safety and Health Administration (OSHA) regulates the safety and health of employees engaged in the manufacturing and handling of explosives. The Mine Safety and Health Administration (MSHA) and Office of Surface Mining govern the use of explosives in mining activities and the Environmental Protection Agency (EPA) controls all environmental aspects of commercial explosives and their use.

Commercial explosives are used by a diverse group of industries with operations of varying sizes. Generally, the 4.1 billion pounds of commercial explosives produced in the United States can be broadly divided into the following industrial use categories:

About 65 percent of all the total annual tonnage of commercial explosives is used in coal mining, both open pit and underground. The coal mining users of commercial explosives range from large publicly-owned corporations to small independent operations. Explosive materials are used primarily for blasting the coal overburden to allow access to the coal seam. With the use of commercial explosives, the coal industry produced approximately 1 billion tons of coal in 1992.

Approximately 15 percent of explosive materials are used annually in quarrying and nonmetal mining.

Approximately 10 percent of explosive materials are used annually in metal mining.

Approximately 7 percent of explosive materials are used annually by the construction industry for buildings, roads, and pipelines.

The remaining 3 percent of commercial explosives are used in a variety of ways including oil and gas exploration, agricultural uses (e.g. clearing land, removal of stumps, and dislodging of boulders), and specialty functions such as fusing metals together.

Commercial explosives include a wide variety of explosive products that are put to many industrial, agricultural and residential uses affecting a broad cross section of individuals in this country. Several thousand different products/formulations are offered to the users of explosives. Because commercial explosives are used in construction, mining, oil exploration, and agriculture, regulatory programs potentially affect the safety of workers in many different workplace settings. They also can affect the costs of housing, fuel, energy, and a myriad of other products and services that are dependent on the use of commercial explosives.

IV. Overview of IME's Position on H.R. 1710

Domestic and international terrorism, such as the recent bombing of a federal building and day care center in Oklahoma City, raise concerns of what can be done legislatively to prevent these horrific events. IME has long offered its expertise and assistance to law enforcement and to Capitol Hill to move forward on rational and effective legislative initiatives. That is our intent in testifying today and offering our views on H.R. 1710.

A. OVERVIEW

With regard to H.R. 1710, IME's position on legislative initiatives under consideration is as follows:

1. IME supports a comprehensive licensing/permitting requirement for purchasers of explosives, such as that required in H.R. 488 sponsored by Congressman Quinn. H.R. 488, currently not a part of H.R. 1710, would expand the current requirements for permitting interstate purchases of explosives to include intrastate purchases of explosives.
2. IME supports Title V of H.R. 1710 related to the Convention on the marking of plastic explosives.
3. IME supports Section 305 of Title III requiring a study of tagging of explosive materials, rendering explosive materials inert, and imposing controls for precursor chemicals of explosives.

B. STUDY V. REASONABLE REGULATION

President Clinton and Congress have proposed that the government conduct a comprehensive study of placing taggants in explosives. President Clinton has also proposed that BATF regulatorily require that taggants be placed in explosives. IME

believes a study is necessary before any conclusion can be drawn as to whether BATF should begin regulatory proceedings to require placing taggants in explosives. There are good reasons, which are detailed in this statement, for our position.

The only major and comprehensive study on taggants was completed by the Office of Technology Assessment (OTA) in 1980. OTA, in its report entitled "Taggants in Explosives" noted the limitations of the project, primarily "the preliminary nature of the taggant research." The report noted "Additional information is required on all aspects of the analysis—technical efficacy, safety, cost and utility."

Over the last fifteen years new information and new technologies have been developed. It is important to evaluate all of this information as well as to address concerns that are, to the best of our knowledge, unresolved.

More specifically, with regard to the study of placing taggants in explosives, IME believes it is essential that the study address the following concerns prior to legislatively mandating a regulatory requirement for placing taggants in explosives:

Safety—There are safety concerns with placing taggants in explosive materials during the manufacturing process and with the legitimate use of the tagged explosives during mining operations. For example, it was recently concluded that the taggants destabilized TNT during a melt/pour operation for making cast boosters.

Environment—No one has evaluated the environmental effects of introducing over two million pounds of the plastic/metal chips (taggants) into the environment every year, or the effects of disposal of greatly increased amounts of hazardous waste resulting from leftover batches of tagged explosives.

Feasibility—Use of explosives containing taggants during mining operations will result in the contamination of the raw materials, such as silica, sand and salt and, in some cases, render it useless for production of end products. For example UNIMIN Corp. has written its Congressional delegation regarding the "devastating impact" on the American manufacturing of semi-conductors by placing taggants in explosives.

Law Enforcement Effectiveness—Very few criminal bombings, one to three percent, are made of commercial high explosives. Homemade explosives were the choice of criminals bombing the world trade center, the federal building in Oklahoma City, and those planning to bomb the Lincoln Tunnel in New York City. In 1993, only 36 bombings of 2,364, involved commercial high explosives. A number of those 36 bombings were solved and traced to the manufacturer through evidence left at the scene. Obviously, tags would have been relevant in only a handful of cases. In these cases, the tags would have to be found by investigators, which, in a devastating bombing such as in Oklahoma City, is most unlikely. If a taggant is found, the investigator is led to the manufacturer and to a listing of the purchasers of that batch. Criminals are not likely to legally purchase the commercial explosive. It is more likely to have been stolen from a storage magazine. One does not need a taggant to obtain a list of commercial explosive thefts, as those are required to be reported to the BAT. Furthermore, if taggants were required in explosives many crime scenes would contain multiple taggants (those from new building materials and construction sites) thus the taggant from the criminal bomb would not be distinguishable from those taggants resulting from legitimate use of explosives such as in the making of concrete, mortar and brick.

Cost—Our nations financial resources are limited. Congress has struggled with the federal budget and recognized the impacts of increased cost of regulation on business, jobs and competitiveness, both abroad and at home. The placement of taggants in explosives, the recordkeeping, the cleaning of pipes and gears between each batch of explosives, the cost of disposing of excess hazardous waste at the end of each batch would be very expensive and would raise the cost of mining operations and other commercial operations. Furthermore, cost estimates are needed regarding the impact on small business, which may be forced to shut down, and on trade, domestic and international. The mining industry would be severely impacted.

IME can assure the committee of its full participation in any study and that, provided the Report is sound, thorough and objective, we will work with the Congress and the agency to address its conclusions.

The remainder of our testimony will expand further on these issues as well as IME's position on legislative issues.

V. Identification Taggants

Section 305 of H.R. 1710 would require the Attorney General, in consultation with other interested parties with expertise, including the private sector, to conduct a

study on (1) placing identification and detection taggants in explosive materials; (2) whether materials commonly used to manufacture explosives can be rendered inert; and (3) whether controls can be placed on certain precursor chemicals used to manufacture explosive materials. The Attorney General would be required to report the results of this study to Congress within 6 months after the effective date of the legislation.

IME's comments are directed only towards the proposed study of identification taggants. Identification taggants are microscopic chips of metal and nine layers of different colors of plastic. Each batch of chips is assigned a code based on the color scheme. The theory is that each batch of chips can be easily placed in a batch of explosives; that law enforcement will, timely, find a taggant at a bomb scene (if a commercially manufactured explosive is used); that the color code will identify the manufacturer and the recorded purchasers; and that the information will lead to the criminal. There are many problems with this theory.

IME believes that a study is needed to examine the following: the unresolved safety issues raised by placing identification in explosive materials; the impact on the environment; the technical feasibility of adding taggants during manufacture; the effectiveness of taggants as a law enforcement device and whether taggants would enable law enforcement agencies to apprehend bombing suspects more quickly and efficiently than they do at present; whether tagging explosives is feasible for intended lawful mining use; and whether the high cost of this proposal is justified by the minimal benefits to law enforcement. IME believes that these issues are unresolved, at best, and that the study should be designed to require that these issues be thoroughly evaluated. IME's concerns about each of these issues is explained in more detail below.

A. SAFETY OF TAGGANTS

The manufacture of explosives is a very sensitive process that must be done with 100% safety or the result can be an explosion that kills and injures workers and demolishes the facility. Any change in the explosives formula, and particularly the addition of any new substance, can destabilize the mixture, setting off reactions that create a severe safety hazard. The Mine Safety and Health Administration (MSHA) requires that any change in the formula for a "permissible" (an explosive used underground) must be retested and reapproved before it is used in actual blasting. Furthermore, the Occupational Safety and Health Administration prohibits workers from carrying any loose items into a manufacturing facility because of the fear of foreign items getting into the explosives mixture.

July 25, 1979, there was an explosion in GOEX's cast booster plant in Camden, Arkansas, which GOEX believes was caused by the taggants. GOEX subsequently filed suit in Federal Court against The Aerospace Corporation and the 3M Company, which, at that time, was the owner of the taggant. Prior to the trial, the parties reached a settlement agreement with GOEX resolving the dispute (Aerospace paid an undisclosed sum to GOEX), with each party neither admitting or denying the adverse parties' allegations.

In 1993–94 the Austin Powder Company, Cleveland, Ohio, conducted a compatibility study by incorporating taggants into cast boosters. It was concluded that the taggants destabilized the TNT resulting in an unsafe manufacturing condition. Recently the New Mexico Institute of Mining and Technology confirmed this result (see attachment A).

In 1980, the Office of Technology Assessment (OTA) assessed the question of whether the addition of taggants to explosives might create a safety hazard. OTA concluded a full-scale qualification program is necessary before taggants can be added to all explosive materials and that:

> The addition of 3M (now manufactured by Micro trace, Inc.) identification taggants to . . . . and one variety of booster material produces a chemical reaction at elevated temperatures and high taggant concentrations
>
> There is little evidence regarding the safety of detection taggants, or of the combination of identification taggants, as testing has only recently been initiated and no results have yet been reported.

OTA also concluded "Additional information is required on all aspects of the analysis—technical efficacy, safety, cost, and utility."

MSHA has recently raised concerns with placing taggants in permissibles, explosives placed deep into the earth and then discharged. The concern is that the plastic/metal chip would not be entirely burned up during the blast and that these chips would be expelled, potentially igniting coal dust/gasses, and causing a second explosion endangering the worksite.

Furthermore, long-term production compatibility and the affects on stability and shelf life testing has not been performed. Such testing is essential to any thorough evaluation of the potential hazards of adding an identification taggant to explosives.

In 1980, the OTA stated: The lack of data on long-term effects in terms of safety, stability and performance, especially in products such as gels and slurries, is particularly important. As a result of this uncertainty, not even preliminary indications of safety are possible at this time, much less the demonstrations necessary before a tagging proposal could be safely implemented. (OTA, Tagging in Explosives, p. 6)

Even the company now manufacturing the taggant, Microtrace, Inc., will not attest to the safety of placing taggants in explosives. In fact, they would insist on the following disclaimer:

> MICROTRACE shall not be liable for any injury, loss or damage, direct or consequential, arising out of the use or the inability to use the product. Before using, user shall determine the suitability of the product for his intended use, and user assumes all risk and liability whatsoever in connection therewith.

As this disclaimer implicitly recognizes, manufacturing and using explosives are extremely dangerous activities. *These activities require 100 percent safety 100 percent of the time.*

B. ENVIRONMENTAL IMPACT

Whenever a new material is added to a product, the environmental impacts of that addition should be analyzed. One direct impact of adding taggants will be an increase in the volume of explosive waste, with a commensurate increase in the safety, cost, and technology concerns associated with waste disposal. This increase will occur as a result of being unable to reuse waste product that, except for the need to preserve the integrity of the taggant code, could otherwise be reused e.g. product obtained when cleaning out machinery between taggant batches, damaged packages etc.

Additionally, taggants are made from a combination of plastic and metal, neither of which is biodegradable. If added to explosives, the widespread use of these products will spread these taggants throughout the environment. Over time, taggant particles will inevitably accumulate in areas where explosives, are used e.g. mine sites, construction sites, and quarries..

We have no information with which to evaluate the effects of introducing these materials into the environment. We do not know whether metal will leach out, affect plant life, or end up in the food.

C. FEASIBILITY OF TAGGANTS

The impact on adding taggants to explosives would have a tremendous effect on related industries. One example is explained in a letter sent to Senators Helms, Faircloth, Dodd and Lieberman from UNIMIN Corp. which has a quartz operation in North Carolina. UNIMIN states that placing taggants in commercial explosives would devastate their business. (The letter is Attachment B.)

UNIMIN uses high purity silica to produce semiconductors. If the explosives used in blasting for silica-containing ore contained taggants, the raw material would be contaminated with the taggants. UNIMIN uses the most advanced technology in the industry to remove nearly all forms of contaminants from the silica products. The slightest impurity can result in defective silicon chips. The contamination of silica with taggants would make the product unsuitable for use in the production of semiconductors and provide foreign competitors with an enormous opportunity to make inroads into Unimin's market share. The company strongly opposes the requirement for taggants in explosives.

I have attached similar letters related to sand used in glass manufacturing (see Attachment C) and to salt (see Attachment D). It is likely many industries are in a similar situation.

D. EFFECTIVENESS FOR LAW ENFORCEMENT PURPOSES

In theory, taggants provide a utility to law enforcement. This is just not the case.

In the first place, commercially manufactured explosives, such as dynamites, water gels, slurries, ANFO and blasting agents, are used in only 1%–3% of the bombing incidents that occur each year in the United States. The remaining 97% to 99% consist of homemade mixtures and commercial powders. In the overwhelming number of incidents, therefore, taggants would not have been involved. The tragic criminal bombings at Oklahoma City and the World Trade Center, involved homemade explosives which would not have contained taggants.

For example, in 1993, the last year for which figures are publicly available, the BATF reported that approximately 2,364 bombing incidents, including the World Trade Center bombing, were perpetrated in the United States. Of these incidents, approximately, 714 (30%) were caused by devices using flammable liquids; 626 (26%) by devices using black and smokeless powders; 565 (24%) by devices using broadly defined chemicals; 303 (13%) by devices using fireworks powders; 32 (2%) by matchheads; and 31 (1%) by devices using dynamites and water gels or high explosives. The remaining incidents, approximately 4%, were caused by military, blasting agents and other unidentified explosives.

In the 1%–3% of bombings that did involve commercial high explosives, there are many forensic clues that help identify the manufacturer. The industry works closely with the BATF and the FBI to assist in identifying the product used, the manufacturer, and if possible, the likely purchasers of the explosives. For example, the companies provide law enforcement with samples of their products for forensic work and assist with the analysis as needed. The industry maintains detailed records of products sold and provides that information to law enforcement when requested. Furthermore, the BATF requires the reporting of all thefts of commercial explosives. Any taggant, if found, would be unlikely to provide additional or, timely, information that would lead to the criminal. The tag only identifies the purchaser of a specific batch of product.

Another problem which draws the utility of taggants into question, is the likely difficulty of actually finding any taggants after a blast of any magnitude. Investigators, using fluorescent lights and magnets in the dark will have to scour through tons of debris containing countless particles of metal and fluorescent materials looking for a chip the approximate size of a grain of sand. Additionally, if taggants are mandated in explosives, the resulting raw materials used in building and road construction will contain tags. Thus, a new building will contain many different tags confusing the investigation of the future bombings.

It has been asserted by some proponents of tagging that an identification tagging program would permit tracing a particular explosive, just as a firearm can be traced by a serial number, or a truck by the serial number on its axle. This assertion is not correct, of course.

A batch, or lot, of explosives can consist of hundreds or even thousands of explosive items. For example, a 20,000 pound batch of dynamite packed in 1¼″ x 8″ cartridges or sticks, a popular size, would be packaged in approximately 40,000 cartridges which would in turn be packed in 400 fifty-pound cases. The same taggant would be in each of the 40,000 cartridges. Therefore, if the identification taggant survived the detonation atmosphere, its recovery would not identify a particular cartridge. The recovery would simply identify all the legal purchasers of the dynamite comprising the entire 20,000 pound batch which could be distributed over large geographic areas.

There are many ways to circumvent a tagging program, and a bomber with only minimal grasp of the issue would be able to do so. Terrorists and professional criminals, the primary targets of a tagging program, are precisely the groups most capable of defeating its intent by:

Stealing the explosives;

Purchasing explosives using false identification;

Making explosives from many untagged, unregulated and commonly available materials such as ammonium nitrate fertilizer; and

Removing the taggants, which with the 3M taggant can be accomplished with relative ease in some explosives using an ultraviolet light and a simple magnet.

The industry shares in the universal concern that bombing suspects should be apprehended promptly. It is notable, however, that in the two most recent terrorist bombing incidents, i.e. the World Trade Center and Oklahoma City, suspects were apprehended promptly, without help from taggants. Taggants would not have reduced the time it took to make an arrest, or produced any significant improvements in an already laudable law enforcement performance.

E. COST EFFECTIVENESS

The costs to society of placing taggants in explosives depend on many things, none of which have been adequately estimated:

The cost of buying a batch of taggants (from a company monopolizing the market);

Safety testing all explosive formulations to which taggants are added;

Changes in the manufacturing process (e.g. converting the existing process to accommodate batch manufacturing; performing OSHA process safety management analyses on changed manufacturing processes and products; additional

clean-up operations necessitated by contamination concerns; reduced productivity due to lost time; the hiring of additional employees);

The size of the batch in which taggants are to be placed, and the taggant concentration;

Lost production due to the inability to rework damaged or off-spec explosives or explosives reclaimed during maintenance;

Recordkeeping by manufacturers, wholesalers, distributors and retailers;

The environmental costs associated with the inability to rework explosives which thus become hazardous waste;

Costs to secondary industries, such as silica miners who will be required to remove taggants from their mined product to ensure that their product will be suitable for its intended use e.g. semiconductor chip manufacture;

Law enforcement and government costs connected with the administration of the program;

Market distortions due to product losses, shifts to products without taggants, and the pressures placed on smaller businesses by the generally higher costs they would have to pay for taggants;

Product liability costs associated with the introduction of foreign matter into explosives, the percentage of taggants required in a pound of explosives; and

Costs of shutting down a manufacturing plant for cleaning before starting a new batch.

The 1980 Office of Technology Assessment report on "Taggants in Explosives," which is fifteen years out of date, evaluated some of these elements but acknowledged that the OTA data was very limited. In addition, the OTA Report did not estimate many of the cost elements listed above such as cost of shutting down the plant between batches to clean out pipes and gears, or the costs associated with disposing of the leftover explosives waste following each new batch of explosives. Furthermore, the OTA Report is out of date on the costs of tags; the differences in costs for large business versus small business; and the manufacturing processes used today.

Data from the companies themselves show an average of eight changes per day of running a different product through the same machine. How often would the government have the companies change tags for different batches? The costs could be astronomical. Confidential data show that small companies forced to buy tags in small quantities at the higher prices would most likely go out of business. Companies engaged in international commerce would be forced to manufacture overseas or beyond our borders to avoid the costs of taggants.

A commonly used 1993 cost estimate for buying the identification taggant for explosives was $0.09, which equates to roughly $400 million. This figure does not include any other of the cost factors cited above. Even so, this figure is significant when one considers the 1993 costs of various explosives:

Cost of bulk ammonium nitrate-fuel oil (ANFO) blasting agent at use site—about 10¢ per pound.

Cost of bagged ANFO blasting agent at use site—about 12¢ per pound.

Cost of bulk blend blasting agents at use site—20¢ to 25¢ per pound.

Cost of packaged blend blasting agents at plant—20¢ to 27¢ per pound.

Cost of Class A (UN Division 1.1) dynamites, emulsions, water gels and slurries at plant—less than 90¢ per pound.

The direct and indirect costs of an identification tagging program would vary enormously depending on the scope of the program implemented.

During the original pilot program referred to in the OTA study, BATF proposed a taggant concentration of 0.05% taggants, by weight, per pound of explosives and a batch size of 920,000 pounds. IME received information from sources, including BATF personnel, that BATF wanted to increase the taggant concentration to facilitate taggant recovery at bombing scenes and lower the batch size to 10,000 pounds to facilitate tracing legitimate users.

IME has not asked its members to conduct current cost analyses because specific details of a tagging program involving both an identification taggant and a detection taggant have not been outlined. Nevertheless, the cost of taggants must be focused considered, particularly in light of the minimal benefit to law enforcement.

A thorough study is needed before these kinds of devastating impacts are imposed on legitimate businesses in this country or we will once again be exporting jobs and market share overseas.

F. TAGGING IN SWITZERLAND

Proponents of tagging explosives have cited the Swiss experience as proof that tagging works. This is mixing apples and oranges. IME believes the Swiss experience should be a part of the study on tagging but we do not believe that it can be

cited as proof that a U.S. program is feasible since their program is vastly different than any under consideration in the United States.

The Swiss do not use the Microtrace taggant in all of their products. In fact, there are only three manufacturers of explosives in Switzerland and they use the Microtrace taggant in only a handful of explosives. Furthermore, they put a very low concentration of taggants in each batch of explosives and change tags only twice a year. Additionally, they do not clean out their manufacturing equipment between batches. Thus, some of each batch is contaminated with tags from the previous batch.

The Swiss program simply permits law enforcement to identify one of the Swiss manufacturers and a family or group of explosive products produced by that manufacturer. European competitors of the Swiss believe the program was implemented not as a law enforcement tool but as a non tariff barrier to protect Swiss manufacturers from outside competition, a belief that seems consistent with the Swiss decision not to require taggants in all products manufactured or imported.

The Swiss manufacturing experience similarly has no relevance in this country. In 1994, they produced about 6.6 million pounds of explosives compared to a U.S. consumption of about 4 billion pounds.

In the U.S., unlike Switzerland, there are forty to fifty manufacturers with multiple product lines, and discussion has focused on requiring all 4 billion pounds of explosives to be tagged in 10,000–20,000 pound batches. Thus, each time a batch of the requisite size is manufactured, the process would be stopped so that the machinery could be cleaned to make way for the next batch. Given the law enforcement purpose of the taggants, it may be assumed that the manufacturers will be required to prevent the cross contamination of batches with the codes of another batch. Switzerland does not appear to have confronted the technical problems likely to be involved in converting continuous stream manufacturing to a batch process, or in converting an existing batch process to the particular batch pound limits.

The Swiss program is more modest in scope and the industry is so different that it provides few if any insights into the manufacturing difficulties likely to be encountered in the U.S.

The Swiss program has also been lauded by taggant proponents for its effectiveness as a law enforcement tool. Taggants are alleged to have helped solve 566 bombing incidents. This information is grossly misleading as these figures include all criminal incidents involving explosives over a ten year period, including explosive thefts, non commercial explosives and undetonated bombs. Swiss Federal Institute figures verify 236 explosive attacks from 1984 through 1993. Of these, 60 involved marked material of which 28 were solved. It is not known to IME whether any taggant actually has been found at a bomb site and aided law enforcement in apprehending a criminal. One of the Swiss manufacturers told me he was not aware that Swiss law enforcement had ever found a taggant at a detonated bomb site.

V. Detection Taggants

Title V of H.R. 1710 implements the International Civil Aviation Organization (ICAO) Convention on the Marking of Plastic Explosives by requiring all plastic explosives manufactured in, or imported into, the United States to contain a so called "detection" taggant. A detection taggant is a chemical additive which odorizes the plastic and sheet explosives so they can be detected by sensitive machines at airports and other security points.

IME supports this provision. In fact, IME worked with government officials to assist in identifying a feasible and safe additive for use in U.S. plastic explosives.

IME also supports the study required in section 305 of H.R. 1710 related to detection taggants.

VI. Permitting

H.R. 1710 does not contain a provision requiring intrastate purchasers of explosives obtain a permit from the BATF before being authorized to purchase high explosives. IME would urge the Committee to incorporate such a provision as is currently in H.R. 488, a bill sponsored by Congressman Quinn (R–NY).

Current law requires interstate purchasers of high explosives to obtain a permit from the BATF before purchasing high explosives. The Quinn bill would expand the current law in two ways:

1) intrastate purchasers of high explosives would be required to obtain a BATF permit in order to purchase high explosives; and

2) permittees would be required to submit a fingerprint and a photo ID with each application.

IME believes such a law would aid in keeping commercial explosives out of the hands of criminals.

VII. Conclusion

Throughout its history, IME and its member companies have worked cooperatively with law enforcement agencies and regulatory bodies to develop extensive regulations governing the manufacture, transportation, storage and use of commercial explosives in a safe manner. We have worked with law enforcement investigators to assist in identifying the type of bomb and to trace a commercially manufactured bomb back to a manufacturer and to purchasers. We have worked with law enforcement to develop feasible detection taggants for plastic explosives.

Based on this experience, we recommend:

Adoption of Title V of H.R. 1710 which implements the Convention on the Marking of Explosives, an international agreement.

Adoption of Section 305 of Title III of H.R. 1710 requiring a thorough and comprehensive study of tagging explosives, rendering certain explosives inert, and controls of precursor chemical.

Amendment of H.R. 1710 to incorporate the provisions of H.R. 488, requiring permits for intrastate purchasers of high explosives.

IME appreciate this opportunity to present our views and would be happy to respond to any questions.

Attachment A

New Mexico Institute
of Mining and Technology
Socorro, NM 87801
Chemistry Department
(505) 835-5263

May 9, 1995

Howard Carlisle
Austin Powder
430 Powder Plant Rd
McArthur, OH 45651
(614) 596-5286

Dear Howard,

I am sorry not to get this to you sooner. The work was completed July 1994, but sending the results to you slipped through the cracks (in my office). The tagget does destabilized TNT. We examined the 80 mesh tagget at one temperature (270°C) and one concentration (5wt% tagget), but the effect was dramatic. The rate of decomposition was accelerated by a factor of 2 (rate of 1.5×10^{-3} s^{-1} for TNT versus 2.7×10^{-3} s^{-1} for TNT - 5% tagget). If you wish to predict how this destabilization would affect safe storage temperatures, activation parameters must be determined by similar studies over a large temperature range.

Our experimental procedure was as follows. The TNT (95 wt%) and 80 mesh tagget (5wt%) were ground separately for 15 minutes and individually weighed into melting point capillary tubes. The tubes were flame sealed and then heated in a metal bath for up to 30 minutes and then cooled and stored at 4°C until further analysis. The thermolysis residue was dissolved by successive extraction with 10 uL of acetone until the total volume of acetone used for extraction was 50 uL. The acetone extract was placed in a large tube, flame sealed, and stored at -20°C until further analysis. The relative fraction of TNT remaining in each residue was determined using gas chromatography (GC) and comparing peak area. Actual data is shown below.

Please feel free to call if you have any questions.

Sincerely,

Jimmie C. Oxley

Jimmie C. Oxley, Ph.D.
(505) 835-5928 FAX 5847

Attachment B

UNIMIN

Quartz Operation
P. O. Box 588
Bakersville Hwy.
Spruce Pine, NC 28777
(704) 765-4283
Fax: (704) 765-0912

May 24, 1995

The Honorable Jesse Helms
U.S. Senate
Washington, D.C. 20510

Dear Senator Helms:

I am writing on behalf of UNIMIN Corporation to express UNIMIN's opposition to S.761 (proposed by the Clinton Administration and introduced by Senators Daschle and Biden) which authorizes the Treasury Department (BATF) to promulgate regulations requiring the use of identification "taggants" in explosives manufactured in or imported into the United States. This legislation could devastate our business.

Utilizing our mineral resources and production facilities in Mitchell and Avery Counties in North Carolina, UNIMIN is the world leader in the mining, production and sale of high purity silica powders used both domestically and abroad in the production of semi-conductors. In the initial stage of UNIMIN's silica purification process, explosives are used to extract the silica-containing ore from the earth.

In order to meet the stringent purity requirements of our semi-conductor industry customers, UNIMIN has gone to great expense using the most advanced technology in the industry to remove nearly all forms of contaminants from our silica products. UNIMIN has reduced the metal contaminants to levels below 1 part per million. The slightest impurity in our materials can result in costly losses to our customers because they result in defective silicon chips. High purity silica is the hallmark of our international business success and leadership. We produce the world's purest natural silica powder. As a result we are the leading supplier of this essential semi-conductor product to producers in each of the U.S., Europe and Japan

This proposed legislation would force UNIMIN to introduce contaminants (the taggants to be included in the explosives we use) into our product, and could make our product unsuitable for their intended use -- the production of semi-conductors. This legislation would give our foreign competitors (who will not have their products contaminated by taggants from explosives used in silica mines abroad) an enormous opportunity to get our customers in the U.S. and overseas to drop their U.S. supplier, UNIMIN.

UNIMIN Corporation urges that you oppose this legislation. While everyone seeks to deter terrorism, further study and thorough consideration should be given to this important issue before any action is taken which will have unintended, far-reaching and commercially injurious consequences to UNIMIN's world leadership in the high purity silica market. There must be some way to meet the objectives of this legislation without requiring a company which depends entirely on the purity of its product to introduce contaminant taggants into our production stream.

UNIMIN urges you to support S.735, sponsored by Senators Dole and Hatch, which proposes a study of detection and identification taggants for non-plastic explosives.

UNIMIN looks forward to your support in this issue.

Very truly yours,

UNIMIN Corporation

Charles W. Klimper

Charles W. Klimper
Plant Manager

cc: The Honorable William J. Clinton
The President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

The Honorable Erskine Bowles
Deputy Chief of Staff for White House
Operations
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

The Honorable Patrick Griffin
Director for Legislative Affairs
The White House
1600 Pennsylvania Avenue, N.W.
Washingt n, D.C. 20500

cc: The Honorable Albert Gore, Jr.
The Vice President of the United States
Old Executive Office Building
17th St. & Pennsylvania Avenue, N.W.
Washington, D.C. 20500

The Honorable Robert Rubin
Secretary of the Treasury
3330 Main Treasury Building
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Ronald H. Brown
Secretary of Commerce
5858 Herbert Clark Hoover Building
14th St. & Constitution Avenue, N.W.
Washington, D.C. 20230

Ms. Cindy Douglas
Vice President External Affairs
Institute of Makers of Explosives
1120 19th Street, N.W.
Suite 310
Washington, D.C. 20036-3605

The Honorable Orin Hatch
Chairman, Senate Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Attachment C

Unimin Corporation
P.O. Box 508
Portage, Wisconsin 53901
(608) 742-2101

June 5, 1995

Honorable Herbert Kohl
United States Senate
Washington, D.C. 20510-2203

Dear Senator Kohl:

My name is Charles Collins and I am the plant manager of the Unimin Corporation sand processing plant located in Portage, Wisconsin. I am writing on behalf of Unimin to express Unimin's opposition to the mandated use of taggant's in explosives as part of the anti-terrorism bill which will likely come before the floor of the Senate this week. Unimin supports S.735 (the substitute) sponsored by Senators Dole and Hatch, as it relates to taggants in explosives and we ask that you support the Majority Leader's position and that of the Chairman of the Senate Judiciary Committee as it relates to this issue.

Unimin asks that you vote against any amendment to require taggants in explosives. Such taggant legislation could seriously harm our business by ruining our product.

Unimin Corporate is a national producer of silica sand, the main ingredient in the manufacture of glass for use in both the U.S. bottle and flat glass industries. Like most U.S. glass sand producers, our business uses explosives in the initial extraction of silica sand from the earth. In order to meet the demanding requirements of our glass manufacturing customers, it is essential that our materials meet stringent chemical specifications, particularly for certain impurities. Thus, our company has incurred great expense in using the most advanced technology in the industry to remove nearly all forms of contaminants from our silica products. Impurity in our materials can result in costly losses to our customers in the form of off-spec and defective products. High product purity is the hallmark of our business.

It has recently come to our attention that there is a proposed amendment to S.735 calling for the use of taggants in explosives. Taggants are little microscopic (metal and/or plastic) tags which are said to help trace the source of explosives in the event of terriorist bombings.

This proposed legislation would force Unimin and all other U.S. glass sand producers to introduce contaminants (the taggants to be included in the explosives we use) into our product, and could make our product unsuitable for its intended use -- the production of glass. This legislation would give Canadian and Mexican producers (who will not have their products contaminated by taggants from explosives used in non-U.S. silica mines) an enormous opportunity to get our customers in the U.S. and overseas to drop their U.S. silica sand suppliers. Further, even if Unimin and other domestic glass sand producers were able to successfully remove the taggant contaminants, there would be an increased cost to our bottle and flat glass customers. Such increased costs would place these U.S. glass producers at a great competitive disadvantage with Canadian and Mexican glass producers who purchase their sand from outside the U.S. without the added taggant removal cost.

Unimin Corporation urges that you oppose any amendment to S.735 which requires the use of identification taggants in explosives. While everyone seeks to deter terrorism, further study and thorough consideration should be given to this important issue before any action is taken which will have unintended, far-reaching and commercially injurious consequences to both the U.S. glass sand and glass production industries. There must be some way to meet the objectives of this legislation without requiring a company which depends entirely on the purity of its product to introduce contaminant taggants into our production stream.

Unimin urges you to support S.735 (without the above taggant amendment) which proposes a fair and objective study of detection and identification taggants for non-plastic explosives.

Unimin looks forward to your support in this issue.

Sincerely,

UNIMIN CORPORATION

Charles A. Collins

Charles A. Collins
Plant Manager

CAC/sjb

Attachment D

AKZO NOBEL

Bruce Higgins
Plant Manager

June 5, 1995

Senator John Glenn
503 Hart Office Bldg.
Washington, DC 20510

Dear Senator Glenn,

Akzo Nobel Salt has a salt mine located 1/2 mile from downtown Cleveland which supplies highway deicing salt to the Midwest United States and Canada. We employ about 270 people in high paying, full benefit, unionized jobs in the middle of a low income area. Because of the favorable business climate we recently expanded our facility, we are one of the few heavy industries to do so in the Cleveland area. Our business pumps millions and millions of dollars into the economy of Cleveland and Northeast Ohio each year.

There is a bill before congress however that could make us much less competitive and have few if any of the intended benefits. S. 761 would require the use of "Taggants" in explosives, or a "Taggants" amendment to S. 735. This is part of the anti-terrorism legislation. The purpose of Taggants is to help trace the manufacturer of explosives used in a terrorist act; the goal is certainly a worthy one, however in practice there are severe problems with the implementation of the bill.

Akzo Nobel Salt Inc
Cleveland Mine
P O Box 6920
Cleveland,
Ohio 44101
Phone:
216/651-7200
Fax:
216/651-[illegible]

Taggants are made of metal and plastic which are coded to show the manufacturer of the explosive. Plastic retains static electricity, we put our explosive into the blasting holes with compressed air. We take extreme measures to ensure that there is no static build up during the loading process. Introducing a plastic device into the explosive we use will place an unacceptable risk on our people. We are in fact prohibited by the Mine Safety and Health Administration from using plastic hole liners for this very reason (30CFR57.6602(e)).

The final consideration is that Taggants are expensive. The Institute for the Makers of Explosives estimates that Taggants will add about $0.50 per pound to the cost of the explosive. That will cost the Cleveland Mine over $1,000,000 per year, we would have no choice but to raise our prices to cover this cost. We compete directly with Canadian salt mines to supply salt to the cities and towns in the Midwest. In this time of budget cuts the cities have no choice but to award their business to the low bidder, we would loose business to our Canadian competitors who do not have this requirement and our people would lose jobs.

There are other approaches to the anti-terrorism issue that do not involve the safety of miners or their economic well being. We urge you to support these other measures and to reject the use of Taggants in explosives.

Sincerely,

Akzo Nobel Salt Inc.

Bruce Higgins

Bruce Higgins
Plant Manager

BH/md

PREPARED STATEMENT OF RICHARD L. LAWSON, PRESIDENT AND CEO, NATIONAL MINING ASSOCIATION

The National Mining Association (NMA) is a trade association, recently formed through the merger of the American Mining Congress and the National Coal Association that encompasses producers of most of America's metals, coal and industrial and agricultural minerals; manufacturers of mining and minerals processing machinery, equipment and supplies; and engineering and consulting firms and financial institutions that serve the mining industry. NMA is vitally interested in the provisions of H.R. 1710 that relate to explosive "taggants."

The mining industry is the principle consumer of commercial explosives in the United States. According to available information, the industry used approximately 90% of the more than 4 billion pounds of commercial explosives that are produced in the Nation. The mining industry has established and practices stringent security measures and has a virtually unblemished record of safe storage, handling and use of explosive materials.

The issue of placing "taggants" in explosives for purposes of tracing their origin has been raised in the aftermath of the tragic criminal act of terrorism in Oklahoma City. Everyone is interested in taking all actions to prevent such acts of terrorism from occurring in the future. Certainly, the Congress has the principal responsibility to strengthen or enact legislation that attempts to prevent the illegal use of explosives materials. The mining industry supports all reasonable efforts to stem the illegal use of explosives.

Taggants are generally classified as "detective (detection) taggants" and "identification taggants." Simply defined, "detection taggants" are substances (chemical additives) that are added to explosive materials that permit identification by sensitive detection devices, before detonation. "Identification taggants" are substances added to an explosive material during formulation or manufacturing, that are expected to be retrieved after a detonation. Usually, "identification taggants" are microscopic plastic and metal chips that can be color-coded to identify the manufacturer of the explosive material.

NMA joins other organizations in endorsing the use of "detection taggants" in plastic explosives as proposed in H.R. 1710, other legislation, and as contained in international agreements.

However, NMA strongly opposes broad requirements to include "identification taggants" in explosive materials. For purposes of this record, NMA's comments will address three fundamental objections. We believe that the use of "identification taggants" 1) poses safety risks, 2) introduces efficacy and contamination issues, and 3) would result in significant costs for minimal law enforcement benefit.

Further, the NMA endorses the Institute of Makers of Explosives (IME) statement and related material that is being submitted as a part of this hearing. The concerns raised by NMA, IME and other users of explosive materials, demand additional consideration before any mandated use of "identification taggants" is required. (The comments that follow refer to taggants but are directed at "identification taggants" only.)

Safety Risks—The manufactures and users of explosive materials *must* be confident in the extremely significant safety aspects of explosive materials. Without doubt, the sensitivity and stability of an explosive material must be predictable. The mining industry is duly concerned that the introduction of taggants into an explosive mixture can adversely effect its sensitivity and stability. We are concerned that the untested introduction of foreign materials such as taggants, may compromise the sensitivity and predictability of explosives, and place our workers at risk.

According to the report *Tagging in Explosives* issued by the Office of Technology Assessment (OTA) in April 1980:

> Preliminary safety testing has been conducted on only a portion of the material to which identification taggants would be added and compatibility testing has barely begun with detection taggants. Evidence has been found of reactivity (using high taggant concentrations at high temperatures) between the 3M Taggant and one type of smokeless powder, as well as booster material. This reactivity creates a presumption of incompatibility. Until this presumed incompatibility is resolved, taggants cannot be safely added to these explosive materials. . . . The lack of data on long-term effects in terms of safety, stability and performance, especially in products such as gels and slurries, is particularly important. As a result of this uncertainty, not even preliminary indications of safety are possible at this time, much less the demonstrations necessary before a tagging proposal could be safety implemented.

NMA understands that the findings contained in the 1980 OTA report have not been investigated further, nor have additional studies been conducted that would affirm or reverse these important findings. Clearly, the introduction of taggants in explosive material demands further investigation before exposing the men and women in manufacturing and the mining industry to the potential hazards identified in the OTA report. NMA supports further scientific study of placing taggants in explosive materials and would welcome the opportunity to participate in such a study.

Efficacy and contamination—The legal use of explosives that contain taggants will, by intent, result in the contamination of any product or material that is exposed to the explosives during and after detonation. At least two important yet unintended consequences will occur that warrant consideration. The exposure of mined products to microscopic taggants will result in the contamination of the product.

This circumstance is unacceptable in situations where the product must meet stringent purity requirements. For example, the UNIMIN Corporation is the world leader in the mining, production and sale of high purity silica powders used in the production of semi-conductors. UNIMIN has written to its Congressional delegation stating, in part:

> In order to meet the stringent purity requirements of our semi-conductor industry customers, UNIMIN has gone to great expense using the most advanced technology in the industry to remove nearly all forms of contaminants from our silica products. UNIMIN has reduced the metal contaminants to levels below 1 part per million. The slightest impurity in our materials can result in costly losses to our customers because they result in defective silicon chips. . . .

As expressed in the UNIMIN example, there are many high purity materials that are the product of mining and would be susceptible to similar contamination.

Contamination of raw materials that are mined with explosives present other unintended and unanticipated circumstances. Most construction materials such as glass, cement, gravel, sand, mortar, and bricks are the product of mining or derived from mining products. Raw materials are extracted from the earth with explosives. Therefore, these materials will contain taggants, even after construction is completed. It is conceivable that a building or other construction project could contain many raw materials, from numerous sources, each being contaminated with taggants from a variety of sources. Consequently, the recovery of a taggant at a crime scene may not necessarily identify or be associated with the explosive used in committing the crime.

Costs—It is difficult to quantify any exact costs of requiring the inclusion of taggants in explosive materials because of unresolved criteria such as taggant concentration in various explosives, additional manufacturing requirements (e.g. batch purity) and other unknown factors. It is evident however, that in any scenario, the costs would be profound for the mining industry.

For example, preliminary estimates suggest that the requirement for taggants in manufactured ammonium nitrate/fuel oil (ANFO) mixtures alone could be in the range of $750 million per year additional cost. This conservative estimate is for the taggant product only, not any related costs.

Regardless of the final measure of increased costs, consumers of coal-fired electricity and mineral resource products will ultimately bear the burden of the increases. Moreover, coal and other mining products compete in a global marketplace and would not be able to pass on the increased costs and will, as a consequence, be at a competitive disadvantage to foreign producers and competing products.

As imprecise as estimates are at this time, clearly the mining industry would be significantly impacted by the monumental cost increases associated with the inclusion of taggants in explosive materials.

The House recently passed H.R. 9, a bill that mandates risk/benefit analysis in creating and promulgating federal regulations. Legislation that imposes the use of taggants should be subject to similar risk/benefit analysis.

PREPARED STATEMENT OF KEVIN F. CRAWFORD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNIMIN CORP.

Unimin Corporation wishes to thank the Judiciary Committee for the opportunity to submit written testimony today to express it's opposition to Section 305 of the proposed anti-terrorist bill (H.R. 1710). Section 305 authorizes the Treasury Department (BATF) to promulgate regulations requiring the use of identification "taggants" in explosives manufactured in or imported into the United States. This legislation could devastate our business by ruining our product.

High Purity Quartz

Unimin is the world leader in the mining, production and sale of high purity silica powders used both domestically and abroad in the production of semi-conductors. In the initial stage of Unimin's silica purification process, explosives are used to extract the silica-containing ore from the earth.

In order to meet the stringent purity requirements of our semi-conductor industry customers, Unimin has gone to great expense using the most advanced technology in the industry to remove nearly all forms of contaminants from our high purity quartz products. Unimin has reduced the metal contaminants to levels below 1 part per million. The slightest impurity in our materials can result in costly losses to our customers because they result in defective silicon chips. High purity silica is the hallmark of our international business success and leadership. We produce the world's purest natural silica powder. As a result, we are the leading supplier of this essential semi-conductor product to producers in each of the U.S., Europe and Japan.

The proposed anti-terrorist legislation, in pertinent part, calls for the use of taggants in explosives. Taggants are little microscopic (metal, ceramic and/or plastic) tags which are said to help trace the source of explosives in the event of terrorist bombings.

This proposed legislation would force Unimin to introduce contaminants (the taggants to be included in the explosives we use) into our product, and could make our product unsuitable for their intended use—the production of semi-conductors. This legislation would give our foreign competitors (who will not have their products contaminated by taggants from explosives used in silica mines abroad) an enormous opportunity to get our customers in the U.S. and overseas to drop their U.S. supplier, Unimin.

Glass Sand and Glass Production Industries

Unimin Corporation is also a national producer of silica sand, the main ingredient in the manufacture of glass for use in both the U.S. glass container and flat glass industries. Like most U.S. glass sand producers, our business uses explosives in the initial extraction of silica sand from the earth. In order to meet the demanding requirements of our glass manufacturing customers, our materials must meet stringent chemical specifications, particularly for certain impurities. Thus, our company has again incurred great expense in using the most advanced technology in the industry to remove nearly all forms of contaminants from our silica products. Impurity in our materials can result in costly losses to our glass customers in the form of off-spec and defective product.

The introduction of taggant contaminants into nearly all U.S. produced glass sand products could make our product unsuitable for its intended use—the production of glass. This legislation would give Canadian and Mexican producers who will not have their products contaminated by taggants an enormous opportunity to get our customers in the U.S. and overseas to drop their U.S. silica sand suppliers. Further, even if Unimin and other domestic glass sand producers were able to successfully remove the taggant contaminants, this would result in increased purification cost to our glass container and flat glass customers. Such increased costs would place these U.S. glass producers at a great competitive disadvantage with Canadian and Mexican glass producers in domestic and foreign markets.

Conclusion

Unimin Corporation urges that you *oppose any legislation calling for the unqualified use of identification taggants* in explosives. While everyone seeks to deter terrorism, further study and thorough consideration should be given to this important issue before any action is taken which will have unintended, far-reaching and commercially injurious consequences to both Unimin's world leadership in the high purity silica market, as well as to the U.S. glass sand and glass production industries as a whole. There must be some way to meet the objectives of this legislation without requiring a company which depends entirely on the purity of its product to introduce contaminant taggants into our production stream.

Unimin urges you to support legislation calling for a fair and objective study of detection and identification taggants for nonplastic explosives. The focus of the taggant study should include not only consideration of costs, safety and environmental impact, but also assurance that *the purity of the minerals extracted by use of taggant laden explosives will not be compromised* to the detriment of both the quartz/silica producers and consumers in both the domestic and international eco-

nomic arenas. Legislation should require the use of taggants only in those situations in which all of the above criteria have been satisfied.

Once again, Unimin thanks this Committee for being given the opportunity to provide this written testimony and we look forward to your support relative to this important issue to our industry.

Mr. HYDE. Thank you, Mr. Ronay.

The next and last speaker on our panel before questions is Mr. Robert Delfay the executive director of the Sporting Arms and Ammunition Manufacturers' Institute, Inc., whose members include the major manufacturers of sporting firearms, ammunition and propellent powders in the United States.

Mr. Delfay.

STATEMENT OF BOB DELFAY, EXECUTIVE DIRECTOR, SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC.

Mr. DELFAY. Thank you, Mr. Chairman.

The Sporting Arms and Ammunition Manufacturers Institute, known as SAAMI, appreciates this opportunity to comment on the important issues related to the addition of identification taggants to sporting smokeless powders.

SAAMI was founded in 1926 at the request of the Federal Government, and conducts a number of ongoing standards and safety programs that help assure that U.S.-produced sporting firearms and ammunition are built to safe and uniform standards and that these products are used in a safe and responsible manner.

The 19 members of SAAMI, include the Nation's leading manufacturers of sporting firearms ammunition and smokeless propellent powders. A membership list is attached to our written statement, and I request that both be submitted for the record.

H.R. 1710 would direct the Attorney General to conduct a study to determine the feasibility and the law enforcement usefulness of putting detection and tracer taggants into explosive materials.

SAAMI supports this study. Those SAAMI members which manufacture smokeless powders are committed to assisting in the study's design and implementation and in providing such technical information as may be helpful and appropriate.

SAAMI members have assisted government agencies in similar studies in the past, and it is urged that any new studies would not duplicate the extensive and the authoritative testing already conducted and that they be designed to allow full and realistic assessment of the safety and the cost-effectiveness of taggant technologies.

The members of SAAMI suggest that significant safety, manufacturing, and distribution issues must be resolved before consideration can be given to the establishment of a program requiring the use of identification taggants in smokeless powders, used in sporting and law enforcement ammunition.

The first and most important of these issues is safety. Past studies have demonstrated that the addition of identification taggants to smokeless powders pose serious safety risks.

In 1979 and in 1980, SAAMI members participated in an extensive testing program designed by a Bureau of Alcohol, Tobacco and Firearms contractor. The test results were evaluated by the Congressional Office of Technology Assessment.

Testing shows and OTA concurred that, there was a significant decrease in stability of the tagged material due to an incompatibility between the smokeless powder and the taggant. The destabilizing effect of the taggant was confirmed by further tests at two government laboratories. OTA concluded that a demonstration of safety would have to be quite convincing to overcome the currently perceived incompatibility.

In another series of tests, the taggants caused low firing pressures. The OTA report stated that, quote: "Significantly reduced ballistic performance and evidence of improper ignition occurred and that improper ignition would constitute a safety hazard as the round might not clear the barrel."

Firing the next shot might destroy the firearm and cause serious injury to the shooter and/or bystanders.

OTA concluded, and I quote: "As a result of this uncertainty, not even preliminary indications of safety are possible at this time, much less the demonstrations necessary before a taggant proposal could be safely implemented."

Assuming that the safety issue could be resolved, there are other significant issues as to the production technology for and the cost of adding identification taggant to smokeless powders in the manufacturing process.

There are necessarily dozens of sizes, shapes and bulk densities of smokeless powder grains used for shot shells and the various rifle and pistol cartridges. To be effective, an identification taggant must match the physical characteristics of the particular powder or powder blend.

If it does not, screening of the blended powder in the manufacturing process would remove any taggants not of the same size or shape as the powder.

Similarly, to prevent a terrorist from removing taggants by screening, by vibration settling or by pouring the powder through an air stream, the taggant must be a good match to the size and the density of the powder.

Apart from inviting removal by a terrorist, failure to match the taggant with the powder could result in stratification of the taggant during shipping and storage.

Stratification of taggants could allow use of a powder thought to be tagged without taggants actually being in the powder or could lead to serious safety problems if a portion of the powder included an extraordinary concentration of taggants.

An identification taggant program would require a new, vast and costly recordkeeping system to link a specific lot of smokeless powder with a particular taggant and the last legal purchasers of the canisters packed from that lot.

A production lot of smokeless powder is typically between 10,000 and 20,000 pounds. Since the hand-loader normally buys a one-half-pound or a 1-pound canister of powder, the last recorded purchasers of a given lot of powder would normally be in the range of 15,000 to 30,000 individuals or police agencies.

It is difficult to conceive what benefit law enforcement personnel could obtain from expending the resources necessary to review lists of 15,000 to 30,000 suspects, much less to conduct a meaningful investigation of each. In addition, criminal terrorist misuse of explo-

sives occurs frequently as a result of thefts. The tagging program operating at optimum efficient will only lead investigators to the last legal purchasers.

In summary, as responsible manufacturers, SAAMI members are concerned first and foremost about the safety of their products. There also are major questions as to the technical feasibility and the cost of adding identification taggants to smokeless powders.

SAAMI urges that these considerations be fully explored in the study called for by this legislation and, again, volunteers its technical assistance in the planning and implementation of the study.

Thank you for this opportunity to share these comments with the committee.

Mr. HYDE. Thank you very much, Mr. Delfay.

[The prepared statement of Mr. Delfay follows:]

PREPARED STATEMENT OF BOB DELFAY, EXECUTIVE DIRECTOR, SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC.

The Sporting Arms and Ammunition Manufacturers' Institute, usually referred to as SAAMI, is a non-profit trade association composed of producers of sporting firearms and ammunition and smokeless propellant powders. The central purpose of SAAMI is to provide a forum for the industry to consider technical and safety matters that bear upon firearms, ammunition and smokeless propellant powders. A list of SAAMI's members is appended.

I. INTRODUCTION

The prevention of bombings and the apprehension of criminals who use explosives or smokeless powders in acts of terrorism and destruction are supported by all law-abiding Americans. As producers and users of smokeless powders, SAAMI members are particularly concerned about any illegal diversion of their product from its intended uses. However, consideration must be given to the effectiveness of using taggants to deal with this problem.

SAAMI supports the provision of H.R. 1710 which calls for a study to determine the feasibility and law enforcement usefulness of taggants in explosive materials and is committed to cooperate as may be helpful and appropriate. Based on prior studies, however, it is SAAMI's judgment that the addition of identification taggants to smokeless powders would pose serious safety risks and involve heavy cost burdens while providing little, if any, aid to law enforcement agencies responsible for investigating bombings.

Smokeless powders are sold in bulk to commercial manufacturers of ammunition and in small canisters to individuals and groups who hand load ammunition. Even those who have advocated tagging programs in the past have conceded that it is totally infeasible to include bulk smokeless powders sold to commercial manufacturers within a tagging program. Therefore, SAAMI's comments will primarily address the retail trade in smokeless powder for use by sportsmen and police departments.

A. THE RETAIL TRADE

Smokeless powder is the element of a shotgun, rifle, or pistol round which propels the projectile(s) from firearms. Smokeless powders are sold through a complex distribution chain in small amounts to firearm owners, to gun clubs and to police departments. These individuals, gun clubs and police departments form what is known as the hand loading trade. SAAMI estimates that there are over three and one half million hand loaders in the United States with a total market for smokeless powder sold to the hand loading trade in excess of 3 million pounds per year.

Typically, an individual hand loader will purchase a 1/2 pound or 1 pound canister of smokeless powder. With new or used cartridge cases, he will load his own ammunition. Hand loading ammunition is less expensive than purchasing factory loaded ammunition. In addition, hand loaded ammunition is tailored by the individual to provide the specific characteristics desired.

Consequently, it must be recognized that the regulation of smokeless powders would be regulation of ammunition powder purchased by a large number of law-abiding firearm owners.

B. ADDING TAGGANTS TO SMOKELESS POWDER

The addition of identification taggants to smokeless powders sold in canisters for reloading raises the following problems:

(1) Tests with an identification taggant establish that there are serious safety and operational problems.

(2) One manufacturing lot of smokeless powder will typically be distributed to 10,000 to 20,000 sportsmen for hand loading. It is questionable whether identification of the last *legal* purchasers of powder containing a particular taggant would be of any benefit to law enforcement agencies investigating the criminal misuse of smokeless powder.

(3) Identification taggants cannot be added to smokeless powders during the normal manufacturing process without a significant proportion of the powder being rendered unmarketable.

(4) It is unknown whether a sufficient variety of identification taggants can be developed to match the numerous different sizes, shapes and densities of smokeless powder gains such that taggants will not stratify in shipping or be easily separated from the powder by those inclined to use smokeless powder for criminal purposes.

(5) The recordkeeping required of manufacturers, distributors, jobbers and retail outlets for smokeless powders alone would cause a significant increase in the price of smokeless powders. The additional costs to manufacturers would include the cost of storing and inventorying taggants of all different sizes, shapes and densities; of actually physically blending taggants into the powder; and of powder rendered unmarketable by its failure to meet ballistics specifications after the addition of taggants. The additional costs to distributors, wholesalers and retailers would include the cost of storing powder in such a manner to facilitate recordkeeping and inventorying, the recordkeeping which would be required, and the time spent with BATF providing tracing information.

II. RESEARCH ON THE SAFETY OF IDENTIFICATION TAGGANTS

SAAMI's member companies participated in a testing program designed by a government contractor, Aerospace Corporation. The program was aimed at detecting those adverse effects from the presence of taggants in powder which were judged to be the most likely to occur and to be the most deleterious to proper and safe operation of firearms.

The test program focused on fouling of shotguns and centerfire rifles and on ignition of ammunition for centerfire pistols and revolvers. From over 50 different smokeless powders available to the handloader, 9 powders were selected for evaluation in this test program. Pressure, velocity and in-barrel-time uniformity were measured for each test firearm. The initial test program required that a total of 249,000 rounds of ammunition be loaded with smokeless powders containing taggants and fired in 7 different types of firearms.

These tests were conducted in 1979 and 1980. The results were evaluated by the Office of Technology Assessment (OTA) in its April 1980 report entitled *Taggants in Explosives.*

OTA, while questioning certain aspects of some test protocols, concurred with SAAMI's position that the safety of propellant taggants has not been demonstrated and that there is evidence of significant safety problems. The issues raised by OTA have not been resolved.

While the numerous means of circumventing a tagging program (OTA Report, at 40) and the program's substantial cost (Report, at 32) raise serious questions as to the desirability of taggant legislation, the OTA Report properly states that "cost and utility are moot points if the taggants are not safe . . . ." (Report, at 4). The Report further states that "[t]housands of people come into contact with explosives and gunpowders every day; an accident can have extremely severe consequences to those people, including injury and death." (Report, at 75). The tests conducted provide evidence that the proposed taggants can be hazardous to the consumer (*e.g.,* the handloader) and to employees in plants where taggants are added to explosives.

The OTA Report states that two separate heat tests of Herco smokeless powder at Hercules, Inc., "indicated a significant decrease in stability due to the addition of the taggants" (Report, at 88). The report also states that "[t]he decreased stability was confirmed" in tests at the Naval Ordnance Station and that a "series of tests" conducted by Lawrence Livermore Laboratory "indicated that there exists an incompatibility between something in the Herco and the melamine/alkyd which forms the basic matrix of the 3M taggants" (Report, at 89).

The OTA Report reflects Hercules' concern about the results of the tests: "Although Hercules tested only Herco powder, Hercules believes that their other

brands of powder designed for the reloading market are so similar to Herco that similar results could be expected" (Report, at 88–89). "Hercules has indicated that it does not consider the combination safe and has stopped all work on it" (Report, at 89). OTA independently concluded that "[d]emonstration of safety would have to be quite convincing . . . to overcome the currently perceived incompatibility" (Report, at 30 and 93).

The Winchester-Western Division of Olin Corporation described the results of its ballistics testing in a March 27, 1980 letter to OTA, which states in part:

> Consumer and product liability considerations dictate that there be a substantial safety margin in ammunition and firearms testing of this kind, particularly where it is proposed to add foreign objects (such as taggants) to gunpowder; . . .
>
> A finding of low pressure indicates a potential squib, and this is a totally unacceptable condition. (Low pressure indicates that the ejecter may not clear the barrel, in which case the firearm could explode on the following shot.) Our tests found low pressure [in two shots]. . . . Two low pressure shots in such a small sample is highly significant. . . .

The OTA Report, while questioning certain aspects of the test protocol, stated that "[s]ignificantly reduced ballistic performance occurred," that "[e]vidence of improper ignition occurred," and that "[i]mproper ignition would constitute a safety hazard as the round might not clear the barrel" (Report, at 90).

Research on taggants does not provide a basis for requiring taggants in smokeless powders. The OTA Report states that "[a]dditional information is required on all aspects of the analysis—technical efficacy, safety, cost, and utility" (Report, at 6). The Report further states that "each type of explosive product requires individual evaluation and testing" (Report, at 29), and that "[a] full set of qualification tests has not been completed on any single explosive product and only a small fraction of the hundreds of products has had any testing" (Report, at 90).

OTA concluded that "[i]t is necessary to resolve the incompatibility observed between the 3M identification taggants and the Composition B booster material as well as the Herco powder, however, before it makes any sense to finish the rest of the tests with other materials" (Report, at 92). OTA further stated that *"[a]s a result of this uncertainty, not even preliminary indications of safety are possible at this time, much less the demonstrations necessary before a taggant proposal could safely be implemented"* (Report, at 8; emphasis supplied).

The disturbing results of the test programs, and the major unresolved issues identified in the OTA Report as to the technical efficacy, safety, costs, and utility of a tagging program, confirm SAAMI's view that taggants should not be required.

III. Adding Identification Taggants to Smokeless Powder

A. Manufacturing Process

Understanding the effects upon smokeless powder manufacturing which would result from requiring the addition of identification taggants requires some knowledge of the significant elements of the manufacturing process. There are 13 steps in the process:

Step 1. The component materials for smokeless propellants are measured and physically mixed to give a desired composition. The components are nitrocellulose (nitrated cotton or wood fibers), solvent, nitroglycerin (used in double-base powder), stabilizers and burning rate control agents.

Step 2. The mix is granulated, with both the size and shape of the grain carefully controlled and varying by type of powder.

Step 3. The solvent is removed. The only function of the solvent is to dissolve the nitrocellulose to facilitate mixing and granulation.

Step 4. The material is screened to remove fine particles and particles that may have been malformed or which adhered to other particles.

Step 5. The grains are coated with ballistic control agents to ensure a proper burning rate and to act as antifouling and antiflash agents.

Step 6. The grains are dried.

Step 7. The powder is tested for ballistic characteristics. The powder is now considered a preliminary powder or blending stock powder. Some or all of a preliminary powder may be rejected and recycled for reworking through earlier process steps to modify its ballistic characteristics.

Step 8. The powder is glazed with a graphite coating. The coating eliminates static charge build-up which presents a fire hazard due to the possibility of a spark being generated.

Step 9. The powder is subjected to quality assurance tests to ensure proper physical, chemical and ballistic properties. If specifications are not met, the powder must be reworked.

Step 10. The powder is passed through a screen to remove chips, dust and other impurities.

Step 11. The powder is blended with other powders of known characteristics to obtain a particular powder type.

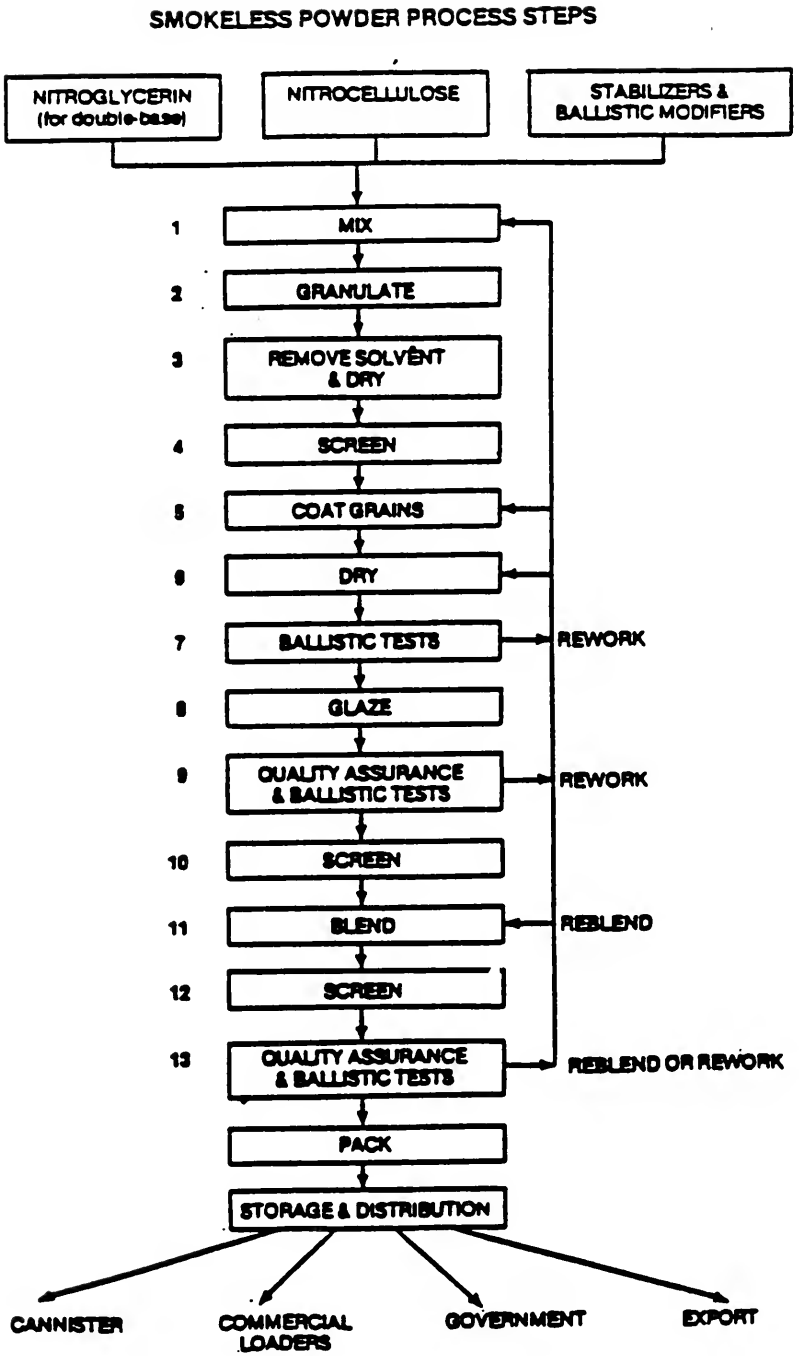
Step 12. The powder is passed through a screen to remove chips, dust and other impurities.

Step 13. The powder is tested to determine if quality assurance and ballistic specifications are met. If such specifications are not met, the powder must be reblended or reworked.

The schematic drawing on the following page illustrates these steps in the manufacturing process for smokeless powder.

B. POINT AT WHICH TAGGANTS COULD BE ADDED

For several reasons, the only possible point in the normal manufacturing process for the introduction of taggants into the powder is Step 11, the blending operation. First, there would be an extreme hazard of explosion if taggants containing a metallic substance were introduced into the process prior to Step 6, drying. Second, all machinery through which the powder with taggants passes will be contaminated with the particular taggant. To avoid this contamination, and the resultant mix of taggants, the taggants would have to be added as late in the process as possible. Third, if taggants were added at an earlier point and a powder failed to meet the quality assurance or ballistic specifications tested at Step 9 of the process, it would not be possible to recycle or rework the powder. Upon recycling, the powder would be mixed with powders which were intended to receive different taggants. Fourth, the size of a lot of powder tagged with a particular taggant could best be limited if taggants were added at Step 11.


SMOKELESS POWDER PROCESS STEPS
NITROGLYCERIN (for double-base)
NITROCELLULOSE
STABILIZERS & BALLISTIC MODIFIERS
1 MIX
2 GRANULATE
3 REMOVE SOLVENT & DRY
4 SCREEN
5 COAT GRAINS
6 DRY
7 BALLISTIC TESTS
REWORK
8 GLAZE
9 QUALITY ASSURANCE & BALLISTIC TESTS
REWORK
10 SCREEN
11 BLEND
REBLEND
12 SCREEN
13 QUALITY ASSURANCE & BALLISTIC TESTS
REBLEND OR REWORK
PACK
STORAGE & DISTRIBUTION
CANNISTER
COMMERCIAL LOADERS
GOVERNMENT
EXPORT

1. Reblending and Reworking Powders

There are major manufacturing problems with adding taggants during the blending operation. The blending operation is the most crucial step in the process for meeting product performance specifications. The characteristics of smokeless powder are very carefully controlled for the purpose of allowing the handloader to achieve precisely the same ballistic results time-and-time again for like powder types purchased at different times.

Quite often a powder must be reblended to produce an acceptable final blend. In such a case, reblending could result in a mixture of different taggants.

It is not feasible to plan production in such a way to ensure that a rejected powder can be reblended with a powder containing only identical taggants. Reblending will require lots with specific properties that are compatible with the characteristics of the powder to be reblended. Those lots may have been produced, blended and tagged many months earlier.

Complete or partial reworking of powder upon its failure to meet the Step 13 tests for quality assurance and ballistic characteristics is not unusual. Reworking of rejected powder from different blend lots, often a necessity, could result in a mixture of taggants. Further, reworking tagged powder through the early process steps would raise the same safety and taggant segregation problems as the original addition of taggants at those steps.

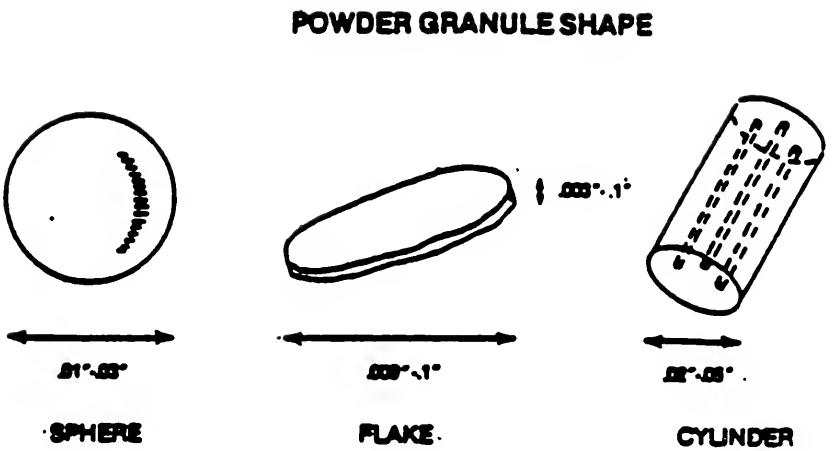
If reblending and reworking of tagged powders were not possible, many thousands of pounds of tagged smokeless powder might have to be destroyed annually. The problem could be alleviated if there were a quick and efficient method for removing the taggants from the powder. However, unless this method were a secret process or device which could not easily be duplicated, terrorists also could easily remove the taggants.

Assuming a method of removing taggants during manufacturing were found, manufacturing costs and prices likely would be increased significantly. A production lot of powder typically varies between 10,000 to 20,000 lbs., and ranges from 5,000 to 50,000 lbs. This is a sizeable amount of material to handle and process for any purpose.

2. Screening and Stratifying of Powders

The necessary variation in the size and shape of smokeless powder grains results in a serious obstacle to identification tagging. Smokeless propellant powders are used to power well over 1,000 different rifle, pistol and shotgun loads. The required burning characteristics to give proper velocity to the projectile(s) and stay within specified standard pressure levels is controlled by the physical size and shape of the grain, its chemical composition and its surface coatings. Thus, grain size or shape must be precise within a particular production lot of powder, and must be precise from lot to lot for a particular powder type.

There are approximately 30 different sizes or shapes of powder grains. These are illustrated by the schematic on the following page. Powder grains may be spheres, flakes, or perforated cylinders. The spheres can vary in diameter from about 1/100 to 3/100 of an inch. The flakes can vary in diameter from about 9/1000 to 1/10 of an inch. The thickness of flakes varies from 3/1000 to 1/10 of an inch. The cylinders are most always perforated, with one to seven perforations. The cylinder diameter ranges from 2/100 to 5/100 of an inch for powder used in small arms, but can be one inch or more for artillery ammunition. The length is usually three or four times the diameter. Apart from shapes or sizes, there are approximately eight different specified bulk densities for powder grains. The densities range from 0.45 to 1.2 gm/cc.



For some powder types, screening of the blended powder, Step 12 of the manufacturing process, would remove any taggants not of the same size or shape as the powder. To prevent removal of taggants by screening, by vibration, by settling, or by pouring the powder through an airstream, the taggant must be a good match to the size and density of the powder. The total number of combinations of smokeless powders formed by the different shapes, sizes and bulk densities is approximately 200. To adequately match these powders could require many different taggants.

Apart from inviting removal by a terrorist, failure to produce the necessary variety of taggants could result in the use of taggants which are not suitable to the present manufacturing process or which stratify in canisters during shipping and storage. Stratification of taggants could allow use of powder thought to be tagged without taggants actually being in the powder placed in a particular bomb. Also, a handloader could suffer a misfire, and possibly a blown-up firearm, by using powder with an extraordinary concentration of taggants.

3. Unknown Hazards

It is not possible at this point in time to assess other hazards or problems which may be created by the introduction of taggants into the blending and packing operations. As an example, airveying (conveying powder with moving air through tubing) is commonly utilized in packing powder. It simply is not known whether taggant materials would create hazards, such as hot spots, when moving through this type of system.

IV. Smokeless Powder Distribution

A. The Market Structure

The smokeless powder chain of distribution is quite complex. Master or national distributors sell powders to distributors and jobbers who in turn sell to retailers. The retail outlets for smokeless powders are the many thousands of federally licensed dealers. The ultimate consumer, the handloader, normally buys a ½ pound or 1 pound canister of powder.

As noted earlier, a production lot of smokeless powder is typically between 10,000 and 20,000 pounds, with a range of 5,000 to 50,000 pounds. A given lot of powder normally will be distributed by the manufacturer to more than one national or master distributor. The master distributors will sell powder from a particular shipment to numerous lesser distributors and jobbers.

The jobber normally markets powder in small quantities to retail outlets in his local marketing area. A 25 pound case of powder (containing 25 one-pound canisters) purchased by a jobber might be shipped by the jobber to 25 different dealers. The retail dealer purchases handloading powders at frequent intervals and in small

quantities because of prevailing government regulations regarding shipping and storage of powders.

B. EFFECT ON THE USEFULNESS OF TAGGANTS

The complex structure of the smokeless powder distribution system would have a profound effect upon the usefulness of an identification taggants program. Any given lot of smokeless powder sold in canisters will typically pass through at least four levels of distribution and be sold throughout the United States to thousands of individuals buying 1/2 pound and 1 pound canisters.

SAAMI questions whether in this situation there would be any benefit to law enforcement from the presence of identification taggants in a smokeless powder which a terrorist uses in a bomb. The last recorded purchasers of a given lot of powder would frequently be in the range of 15,000 to 30,000 persons. These legal purchasers would most likely be spread throughout the United States. It is difficult to conceive what benefit law enforcement personnel could obtain from expending the resources necessary merely to compose a list of the 15,000 or 30,000 purchasers, much less to conduct a meaningful investigation to determine which canister so purchased was misused. The large number of ultimate purchasers greatly enhances the possibility of harassment, intentional or not, of law-abiding dealers and handloaders.

In fact, there may be a need to investigate many more than 15,000 or 30,000 sportsmen. Sophisticated criminals might remove taggants from smokeless powder with the aid of a magnet, a black light and a pair of tweezers. Alternatively, they could construct bombs using different smokeless powders obtained in different locales or regions of the country by different persons. Finally, terrorists could disassemble factory-made ammunition and obtain the same types of smokeless powder found in canisters. It would be totally infeasible to include this smokeless powder within any tagging program. Through actions such as these terrorists could easily eliminate any utility that the tagging program may have for investigators.

In addition, criminal and terrorist misuse of explosives occurs frequently as a result of theft. A tagging program operating at optimum efficiency will only lead investigators to thousands of last *legal* purchasers.

In summary, as manufacturers, SAAMI members are concerned first and foremost about the safety of their products. There also are major questions as to the technical feasibility and cost of adding identification taggants to smokeless powders. SAAMI urges that these considerations be fully explored in the study called for by this legislation and, again, volunteers its technical assistance in the planning and implementation of the study.

MEMBERS OF SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE

Alliant Tech Systems; Beretta U.S.A. Corp., Blount, Inc., Browning Arms Co., Federal Cartridge Co., Fiocchi of America, Inc., H&R 1871, Inc., Hornady Mfg. Co., The Marlin Firearms Co., O.F. Mossberg & Sons, Inc., Remington Arms Co., Inc., Sigarms, Inc., Smith & Wesson, Sturm, Ruger & Co., Inc., Taurus International Firearms, Thompson/Center Arms, U.S. Repeating Arms Co., Weatherby, Inc., and Winchester Ammunition.

Mr. HYDE. Mr. Seitz, if I may, there has been testimony that adding urea to the ammonium nitrate mixture would render it, at certain levels of dilution, inert, but the bomb that was used in the World Trade Center bombing was urea mixed with nitric acid. If urea can be used as a blasting agent, why would we think that urea mixed with another blasting agency, ammonium nitrate would become inert?

Mr. SEITZ. Mr. Chairman, I have never heard of ammonia exploding. Likewise, one has to make a clear distinction between one organic compound, urea nitrate and urea per se. The sensitization of urea which is not an explosive involves its chemical transformation into entirely different compound. The problem of people starting with inert chemicals and making explosives out of them, is, of course, the generic problem we are dealing with today.

In order to effect the manufacture of the, perhaps, hundreds of pounds or hundred pounds of urea nitrate that was evidently involved in the World Trade Center bombing, many gallons of a cor-

rosive substance not readily available, nitric acid had to be obtained by the evidently skilled chemists responsible.

The thermodynamics of urea and urea ammonium nitrate mixtures have been looked into. And I must thank Mr. Hay for providing some data on that point.

Ammonium nitrate is a less energetic explosive than, for example, TNT or nitroglycerin. The amount of energy that can be released by its detonation is on the order of about 300 calories per gram.

A mixture that has an available free energy of less than 150 calories per gram cannot be readily detonated. Or if it is to be detonated, a very large quantity of explosives must be used in the first place. And I think it is moot if it takes a thousand pounds of high explosives to set off a thousand pounds of a sensitized ammonium nitrate urea mixture.

The experience of Europe should be looked into. They have obviously gone through all the technical hoops on this.

I am acutely aware that there have been unsuccessful attempts at inerting explosives, most notoriously one of the formulations initially used in Britain to prevent terrorism by the IRA, a composition of calcium carbonate and ammonium nitrate proved to be, in fact, detonate.

On the other hand, judging by what little data I have, and I emphasize as Mr. Hay stated, that more work needs to be done, it appears that at low concentrations practically any material containing carbon and hydrogen can be used to sensitize ammonium nitrate to make it more detonatable. But as the concentration of the diluent increase, the free energy starts to go down from its peak. When it gets below 150 calories per gram, it is problematical whether the material can be made to explode.

And if the probability of it detonating is very low at a 50–50 concentration, the end user will be, if not deterred, at least perplexed by what it is he is working with.

Mr. HYDE. Well, isn't it true that there is really no way, with our current knowledge, of adding things to ammonium nitrate to prevent the chemical bonds from separating and creating an explosive energy that is so damaging?

Mr. SEITZ. Well, as I say, the free energy has to be above a certain level which entails a certain concentration of ammonium nitrate to create a mixture that could be readily detonated or detonated as all.

Mr. HYDE. I haven't seen them but Mr. Murray, our staff counsel, has seen results of blasting tests done with ammonium nitrate and various forms of diluents, such as MAP and DAP, according to the Porter patent information, and they exploded with amazing force. Doesn't this tell us we need a lot more study in this field?

Mr. SEITZ. We may need more study, but we probably need more dilution, than was the case in the mixtures that exploded.

Mr. HYDE. Even if we added such chemicals to ammonium nitrate, there is a way, is there not, for the bomber or terrorist to remove the inert additives from the ammonium nitrate?

Mr. SEITZ. Given sufficient sophistication of chemistry and the availability of chemical process equipment, almost anything is possible. But the question in my mind is simply, what is the difference

between a situation in which anyone who possesses a blasting cap and a few feet of detonating cord, can drive anywhere in the Nation and buy tons of pure ammonium nitrate, and a situation in which the blended fertilizer would require virtually swimming-pool-sized operations in order to produce a product that would reliably explode. And I think the European experience clearly indicates that there is a large measure of deterrence in making the would-be bomber go through such operations.

Certainly, there ought to be some difference in psychology between whoever perpetrated the horror in Oklahoma City and a group of technically sophisticated individuals. Clearly, there are cases where cadres of technical expertise can be assembled to nefarious purposes. Witness the situation in Japan. At the same time, I doubt whether one individual or a few, could have put together the explosives used in Oklahoma City without some considerable risk of being observed and interdicted.

Mr. HYDE. Thank you.

And lastly, Mr. Hay, I know you were not asked to testify concerning taggants, but because of your experience, it appears Mr. Ronay and Mr. Delfay are less than enthusiastic about the use of taggants, and do you have any comment on their testimony in the area of taggants?

Mr. HAY. Mr. Chairman, our experience at the Bureau with taggants has been rather meager. We were involved in the program that came around, I believe, in the late 1970's. Our main interest at that time was from the mine safety point of view. We had just had a very large mine disaster as a result of the use of nonpermissible explosives in an underground coal mine where normally one is only supposed to use those explosives which have passed the appropriate safety standards and which are called permissible.

Our interest was primary in taggants which could be inserted into explosives to determine after detonation whether they were permissible or nonpermissible. And mainly to the question of whether or not they could be found after they detonation and identified.

The answer to those two questions was yes, which was to our satisfaction. We did not delve into the question of whether or not they destabilized the explosives, because in permissible explosives which already have a short shelf life and are not particularly overly sensitive anyway, it is not as much of a problem. So I cannot speak to the question of destabilization or to the much more manufacturing-oriented issues of what the economic effects are on the record-keeping, and so forth.

Mr. HYDE. Thank you, Mr. Hay.

Mr. Scott.

All right.

Mr. Bryant.

Mr. BRYANT of Texas. Thank you, Mr. Chairman.

Mr. Seitz, let me see if I can clarify what I think you were saying a moment ago. Is it a case that a person can go to the store and buy a large supply of ammonium nitrate and add an explosive booster and create an enormous bomb, at the present time?

Mr. SEITZ. As Mr. Hay has indicated, at the extreme, you don't need to add anything. Certainly, the ammonium nitrate is freely available, and by the ton.

Mr. BRYANT of Texas. I don't want you to get us confused. Let me get a straight answer to my question. Can a person go to the store and buy a large amount of ammonium nitrate today and simply add an explosive booster and create a bomb?

Mr. SEITZ. Yes, sir.

Mr. BRYANT of Texas. And that is the danger which you are testifying exists at the present time; is that correct?

Mr. SEITZ. It is, sir.

Mr. BRYANT of Texas. Is that also the danger that you say has been remedied in Britain and Germany where they will not sell ammonium nitrate in that form but instead sell only blended fertilizers across the counter?

Mr. SEITZ. It is my understanding that throughout the European Community, there are regulations that are in effect that render that the case.

Mr. BRYANT of Texas. Is there any practical reason why we could not do the same thing here in the United States?

Mr. SEITZ. I believe we could emulate what the Europeans are doing, yes.

Mr. BRYANT of Texas. Help me with any of the other testimony that I may not have fully understood. Has anyone suggested a practical reason why we could not do the same thing they are doing in the European Community?

Mr. SEITZ. Only the issue of uncertainty remains in my mind. As indicated, you can never be absolutely certain that the would-be perpetrators will not get a big enough booster charge to set off anything. But in that case, the booster charge is a bomb in its own right.

Mr. BRYANT of Texas. I think you are complicating your own testimony a little bit. You are saying that this British and the Germans will not sell ammonium nitrate over the counter because a person can make a bomb from it by simply adding an explosive booster. And instead all they will allow anyone to sell is a blended fertilizer rather than ammonium nitrate in the state in which it was used in Oklahoma City. Isn't that correct?

Mr. SEITZ. That is correct.

Mr. BRYANT of Texas. And so, my question to you is, is there any practical reason that has been referred to today by these witnesses or that has been raised in this hearing, why we couldn't do the same thing?

Mr. SEITZ. I believe we could, sir.

Mr. BRYANT of Texas. Now, you are saying that—I understood it—that it would make it safer if a person could only buy blended fertilizer rather than being able to buy ammonium nitrate, because it wouldn't make it totally safe because if a person bought enough blended fertilizer he could make a bomb out of that; is that correct?

Mr. SEITZ. By concentrating the ammonium nitrate, he could.

Mr. BRYANT of Texas. I don't know what you mean by concentrating ammonium nitrate.

Mr. SEITZ. Let me explain. If you take a look at fertilizers generically, three elements are required to feed the soil, the plants, nitro-

gen, phosphorous, and potassium. If you take equal parts of ammonium nitrate, potassium or ammonium phosphate and potassium chloride or sulfate and blend them together to produce a mixture that contains less than one-third ammonium nitrate, that material will be all but undetonatable.

Mr. BRYANT of Texas. I am talking about an unsophisticated person being able to go to the store and buy a product and make a bomb out of it. I think you said a moment ago that a person could go ahead and buy the ammonium nitrate that has been diffused due to blending, but he had to buy so much of it it would be a swimming-pool-sized bomb before he could do it and that would attract a lot of attention and that would therefore be a deterrent.

Mr. SEITZ. By "swimming-pool-sized" I was referring to the process of taking apart the blended fertilizer into its component parts.

Mr. BRYANT of Texas. Let me have Mr. Hay address the fundamental question I asked a moment ago. Mr. Seitz says it is the ability to buy ammonium nitrate across the counter that presents us with the greatest threat because anyone can buy it and add an explosive device to it and make a bomb out of it. And that in Great Britain and Germany, they prevent that by not permitting the sale of ammonium nitrate but only permitting the sale of blended fertilizers instead. Is that your understanding of the case today?

Mr. HAY. Yes, sir, it is. There are two different considerations here. One is that we presume that whatever you add to the ammonium nitrate to desensitize it, you have to add enough of that so that even with a large booster, it will not be detonable.

The other is the question of whether or not the terrorist can separate out the ammonium nitrate from whatever you have diluted it with and use it back in its virgin state, so there are two different issues there.

Mr. BRYANT of Texas. Is there any reason why we couldn't do the same thing that Britain and Germany are doing today? Is there any practical barrier to that?

Mr. HAY. There is no reason that I know of, except for the economic impacts on the people who have to use it for legitimate purposes.

Mr. BRYANT of Texas. Is that significant?

Mr. HAY. I would assume that if you would dilute it, ammonium nitrate, say, with 20 percent of something—what did they use, calcium carbonate?

Mr. SEITZ. Thirty percent of calcium carbonate.

Mr. HAY. You have reduced the nitrogen content proportionately, so you have to buy 30 percent more of it to get the same value as a fertilizer, and I would assume that would be a significant effect.

Mr. BRYANT of Texas. Thank you.

Mr. HYDE. The gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

I would like to ask a quick question about taggants and another ammonium nitrate question. But these are two different subjects, both very important.

In the taggant question, Mr. Ronay, you raised in your testimony the problem with mining. And I know Mr. Hay is sitting next to you in the mining world.

I am wondering if between the two of you, you could elaborate a little bit for me on the difficulties that might exist in using taggants in mining and then having a mined product in a building as part of the building material where an explosion occurs?

Would this cause confusion, or is that just something I am imagining?

Mr. Ronay, would you want to respond first, and then Mr. Hay?

Mr. RONAY. Yes, sir, I mentioned briefly that there would be a contamination eventually in building materials because they have been obtained using explosives with taggants in them in the industrial process. Certainly, that would be the case.

These taggants do not biodegrade. They do not go away, and they would be transferred from the rock quarries into the roads and into the building blocks, and so on, limestone quarries, and eventually, they would be incorporated into our structures and our roads. And they are going to be there.

And when you have a bomb and you recover or sift through the debris, and if you were looking for taggants, you would be finding them. You would be finding those that were indigenous to the scene and you would be finding perhaps some that were from the bomb itself, depending on the size of it.

Mr. MCCOLLUM. And the net result of that is going to be confusing for the law enforcement official and result in the inability to prove a case in court?

Mr. RONAY. Well, it would certainly affect a case in court if you were going to use it as part of your proof, but it can also be confusing in your leads. Explosives are stored for long periods of time and the terrorist might have it on hand for a long period of time, and so the time factor between the buildings use and the building block and the use of the explosives for the criminal act are not easily separable.

Mr. MCCOLLUM. And a separate issue but one which is related to mining, you raised the silica question and the need to have purity in that product line.

Mr. Hay, I see two different issues here: Taggants and mining are being raised by Mr. Ronay in two different ways, one problem is impurity and the other is a question of whether the materials used from the mining containing taggants would destroy the value of taggants in an explosive. Can you comment on either or both of those?

Mr. HAY. Not really, sir. Our experience with the taggants went to the point of very preliminary field trials in which we had done a few shots in our own experimental mine and, at that point, I believe the program lost its funding and so we have hardly any experience with the question of what effect the taggants have on either the product to be mined or subsequent operations in the mine.

Mr. MCCOLLUM. Well, I do have concerns about them. And I understand what Mr. Ronay is saying that we don't have data, and again this goes back to the absence of a lot of information and perhaps indicates that we ought to be looking at the study. I would like to come back and follow up on what Mr. Bryant was talking to you about.

Mr. Seitz, you responded that perhaps we could modify some blended fertilizer instead of a pure ammonium nitrate to reduce

the hazards that are involved. Information available to the committee indicates that although the British have required the addition of inert substances into their manufacturing process for ammonium nitrate for some time now, that the law has been largely ineffective. Do you have any information to the contrary on that?

Mr. SEITZ. I mentioned earlier that one of the formulations employed by the British using calcium carbonate was reportedly ineffectual under certain circumstances. But I would add that that experience teaches that other formulations clearly are of greater merit.

Mr. MCCOLLUM. I understand what you are saying. I know that we have had a report that replacing ammonium nitrate with calcium nitrate to alleviate the problem of bombings would be a good thing to do. But the British advise us that their last two terrorist bombs were calcium nitrate bombs. Does this information suggest to you, as it does to me, that the terms of requiring the replacement of ammonium nitrate with another fertilizer requires more than saying, Hey, we are going to do it?

Mr. SEITZ. I would like to see what the European Community has achieved in this area.

I would like to make a comment regarding taggants.

Mr. MCCOLLUM. Certainly.

Mr. SEITZ. I am perplexed that the Nation's semiconductor industry could be threatened by an incorporation of a small percentage of taggants into the explosives used in making silica. Silicon, per se, is produced by an elaborate process of multiple distillation of silicon tetrachloride and the taggants would disappear very early on in that process. And I don't think we should muddy the waters by injecting relatively exotic arguments about process technologies that really are not going to be effected.

Mr. MCCOLLUM. So that particular technology you don't think would be effective. But regarding Mr. Ronay's comments about the mixture of mined substances in the materials at the site of an explosion scene, I guess this is not a chemical question, but rather a pragmatic question.

Mr. SEITZ. I agree with them. There are a number of ways of affecting taggants, either by adding taggants from another source, or obviously, in the case of there being taggants on the scene, having enough ambiguity to raise questions of law.

Mr. MCCOLLUM. Typically when we have a building that has been destroyed, we are going to have building material that has been mined which might contain taggants?

Mr. SEITZ. That is correct. I think that one has to make a very clear distinction between mechanical particles and chemical or isotopic signatures that are dispersed at molecular or atomic level and cannot be removed.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

I want to follow through on the question of taggants.

Mr. Ronay, you showed us what they look like. Are there different kinds of taggants? Some that would leave material, some that might have a smell or radioactive process? There are different kinds or is everybody talking about the same thing?

Mr. RONAY. Yes, sir. There are different kinds of taggants. Notably, generically there are two different kinds of taggants, one for detection, which I mentioned in the ICAO Treaty, which is a chemical odorant, if you will, and that enhances the detectability of the product.

Mr. SCOTT. Before explosion?

Mr. RONAY. Before explosion. It goes toward prevention of the bomb going on the airplane with existing technology.

Another form of taggant is for identification, and that is the type we are talking about here. That is this layered microtrace chip which carries with it an identifying number, and is added to the explosive for postblast identification primarily.

Mr. SCOTT. Is there a difference between the two in terms of manufacturing, safety, and other issues that have come up?

Mr. RONAY. Oh, absolutely. The chemical odorant is a chemical which has been determined to not be affecting the product itself. In the ICAO Treaty process, five chemicals were identified which could be used by the signatory countries, and we chose one of those chemicals here in the United States.

The microtrace taggant was identified back in the late 1970's as the most practical taggant for identification after consideration of hundreds of technologies, and by a committee of many scientific people, the result of which was this microtrace taggant.

I would take issue with the conclusion that Mr. Seitz made about the silicate, because the industry, the Unimin Corp. has very adamantly conveyed to us with a letter, and I know they have conveyed it to their congressional delegation, that they are very concerned about their process being able to extract these metal and plastic chips and, therefore, contaminating the manufacturing process for the semiconductors. It is a very serious problem with them, and I think they should best articulate that.

One thing I would mention, lastly, in Mr. McCollum's and Mr. Bryant's questions about the European experience with fertilizers; I have been in close touch for many years with the European investigators. We have cooperated with the Northern Ireland police and forensic laboratories, and I am very conscious of the devices that the IRA has used and the many means that they have taken in that country to thwart the use of fertilizers.

I am currently in receipt of information from the Federation of European Explosives Manufacturers, who have done tests over there similar to what we do here to see the viability of that program. And the bottom line of all of that is, you can make these explode, even if they are diluted to a large degree, as long as they are usable in the agricultural industry, you can make them explode with a larger booster. And I would grant you, you need a larger booster or you can reconstitute them and make them explode.

Mr. SCOTT. Let me get back to the taggant.

Mr. Seitz, Mr. Delfay suggested that if you got a batch of fertilizer and by the time you have tried to track one little sale of it, you add about 15,000 people to track, and you have also got possible contamination with other batches. The fertilizer may have been stolen anyway. Taggants may have been put in, additional taggants from somewhere else. Is there any evidence that these

things have actually worked in tracking the source of a sale and have helped in finding a criminal?

Mr. SEITZ. Yes, there have been instances in which the taggants have been forensically useful.

Mr. SCOTT. Could you give us an example?

Mr. SEITZ. Virtually all of the plastic explosives currently available in Europe, owing to existing legislation, both there, and I believe this is also the case in the United States, contain taggants. They have been recovered on a number of occasions. There have been a number of aircraft bombings they have been instrumental in locating the source of the explosives.

Mr. SCOTT. In the fertilizer-type situations? Because the fertilizer is purchased for fertilizer, as I understand it, a lot of people buy ammonium nitrate for an explosive; is that correct?

Mr. SEITZ. That is correct. But ammonium nitrate is not tagged at this time.

Mr. MCCOLLUM [presiding]. Mr. Scott, your time is up.

Mr. Gekas.

Mr. GEKAS. I thank the Chair.

I would like to start off questioning about this little vial that looks like pepper that I can put on my salad during lunchtime. That is how fine, it is, it seems to me.

Mr. Ronay, how much of this quantity would have to be added to X—of gunpowder, is that what we are talking about here? This particular type of identification? Or to what elements would that be added?

Mr. RONAY. Well, that is one size of a number of sizes. It is about the middle range of the size particles. And has been prescribed in the previous study that was done, in the previous program, to be added to all explosive materials.

It has also been proposed to be added to the powders that Mr. Delfay referred to. It is the same product in all of those cases. That is a 30-mesh size, and I referred to an 80-mesh size in my testimony, because the equipment for manufacturing ammonium nitrate will only accommodate that small size. And the 80-mesh size is a powder. You can't even distinguish one fragment from another as you can in those. I brought those because they are more visually understandable.

Mr. GEKAS. As I understand it, this is blended into the major substance? Is that it?

Mr. RONAY. That is right. At the time of manufacture.

Mr. GEKAS. Can you give me a quantity? What percent—we have 100 percent original substance. How much of this is included in the 100 percent?

Mr. RONAY. Again, going back to the original structure of the study, the proposal was to include .05 percent by weight in the product.

Mr. GEKAS. All right. All right. And the problem that you posed about after an explosion, it would be difficult for an investigator to determine whether a substance in the structure of the building was already in there before the explosion, and what the explosion caused by way of remnants, that that would be a problem in the court system.

It seems to me it would be like the O.J. Simpson case with respect to blood on different sources, different ways that it might be contaminated. If we had a DNA possible in these things, we probably would have difficulty in proving one source or another; is that correct?

Mr. RONAY. Yes, the contamination factor cannot be overcomeable. It is confusing and difficult. You spend a lot of resources to work out the problems, where you can solve these cases, and they are solved generally, with the better application of resources in normal ways.

Mr. GEKAS. I have only one other question. You seemed to indicate that it might be useless to have the taggant process at all because all it really does is trace it back to—if you have a perfect investigation—to the last legal owner or legal handler of the substance; is that correct?

Mr. RONAY. That is right.

Mr. GEKAS. Now, I happen to believe that that might be too minimal a value, but isn't it of some value in investigations to determine the last legal source? Because as Mr. Seitz has indicated, it has been used over the years in other cases and knowing who last held it legally is helpful in investigations; is it not?

Mr. RONAY. There is a limited value to law enforcement. You certainly have to recognize that. However, to comment on one thing that you just mentioned that Mr. Seitz mentioned, I am unaware of any case where taggants of any kind have benefited or been used in law enforcement, except in one case back in 1979, or so, when ATF found taggants in a bombing during this pilot test program. And that has been given some publicity and that is a possibility.

But that is the only case that I am aware of. And I have been involved in every aircraft bomb that the United States has been involved with in the last 18 years.

Mr. GEKAS. I thank you.

I believe that the testimony that all of you have offered solidifies the basic premise in Mr. Hyde's bill that a study is in order. I am confused myself on the value, the relevant values of taggants and where and how they have been utilized. I, for one, need to know more. And I think the chairman would agree to that, that I need to know more. But in any event——

Mr. HYDE. The gentleman already knows enough, I would say.

Mr. GEKAS. In any event, I yield back the balance of my "nontime."

Mr. HYDE. Thank you.

The gentleman from Rhode Island, Mr. Reed.

Mr. REED. Thank you, Mr. Chairman.

I just have a few questions and I don't know precisely which panelist would be best to address them, so I hope you all feel free to offer your thoughts.

The chemical that was used in the Oklahoma City blast was ammonium nitrate, and there is some discussion about how to somehow make that less effective as an explosive. I wonder, without naming possible alternatives, are there other chemicals like that that could be used in a bomb?

And I ask the question because if we focus on one particular chemical and we try to make it less effective or efficacious for use

like this, are we simply taking care of one part of the problem, but are there then alternatives that could be used and are we really not addressing the problem?

Whoever wants to respond.

Mr. SEITZ. In addition to nitrate-based explosives, there are other inorganic compounds that form salts which are also explosives. As long as any nitrates are available, the problem will be with us. Gunpowder, of course, constitutes an ancient problem. It is based on potassium nitrate. As long as chemistry is part of our technical civilization, this problem will remain.

Mr. REED. Let me change the pace a bit. It seems to me that we are talking now about a technological fix. If there isn't some way that we could either mark the explosives or render the explosives ineffective to be used as they are now for bombmaking, if that technological fix doesn't work—and I think some of the testimony I have been told suggests that there are naysayers to that view—then that leaves us with some type of regulatory fix, some type of way of controlling more precisely how this material is moved through commerce and gets into the hands of people who might use it as bombs.

And I am wondering in a very general sense, in terms of the tradeoff between technology and administrative response—we have to do something, I think, and I wonder if anybody has any thoughts about this?

And I will finally conclude by saying that the issue of whether we mark explosives or not is not a question to be answered in isolation. It is answered I think in terms of what are the alternatives we can use to address this issue. And I would be curious, does anyone have any thoughts about that general topic?

Mr. RONAY. Yes, Mr. Chairman, may I?

Mr. HYDE. Sure.

Mr. RONAY. We have long proposed a number of safety and security measures for the control of explosives, and we are constantly vigilant in that area. And we would propose a number of things that would prevent bombings and get the materials out of the criminal's hands.

The issue of the fertilizers is a separate issue. While it remains on the forefront, it is not something that we have addressed in the past.

I think the licensing program that we have supported for many years is the least that we can do in requiring that a license be mandated or required to buy explosives. At the moment, that is just not the case.

And certainly other measures like mandatory sentencing or measures that can be regulated are in order prior to doing something as drastic as require a taggant or economically affecting a number of industries in our country for very, very little gain or benefit to the investigative procedure. That is after the fact.

Mr. REED. Anyone else have any comments on that?

Mr. SEITZ. Sir, I think we need to emphasize the distinction between taggants and detection agents. The current technology for detecting explosives at airports is based on detecting the nitrogen content by using atomic physics to produce a characteristic signature.

There are some isotopes of some elements, which, if added to explosives or fertilizers, could vastly enhance the detectability of those materials by a factor of a thousand or even a million. And so small are the quantities of these additives that their economics are vastly different from those of adding expensive taggants at a very considerable concentration.

And I would think that the study ought to take a look at the state of the art. A lot has happened since the introduction of mechanical taggants in the 1970's. With the simple observation by moving to physics, instead of mechanical particles or chemistry, we gain an enormous advantage and we gain the use of a whole spectrum of technologies that have not been employed in the past.

Mr. REED. Thank you.

Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the chairman.

Mr. Chairman, not unlike the gentleman from Pennsylvania, I, too, need to know more, and this is an hour of confession.

Mr. Seitz, I am neither chemist nor scientist, as probably is evidenced by the question I am going to put to you. But I want to revisit the question the gentleman from Florida asked you regarding the replacing of ammonium nitrate with calcium nitrate, presumably, in the effort to diminish the possibility of an explosion.

And I believe your answer to him was you wanted to find or learn more what the British and the Germans have found in their studies or investigations.

Is it your belief that replacing ammonium nitrate with calcium nitrate would, in fact, serve a desired purpose?

Mr. SEITZ. If you are referring to replacing ammonium nitrate 100 percent with calcium nitrate, that, obviously, would eliminate ammonium nitrate, but there is an economic matter. Ammonium nitrate is so cheap that the only nitrogen fertilizer that could compete would probably be urea.

Mr. COBLE. And then the cost soars.

Mr. SEITZ. Right. I think the economic displacement that would result from eliminating ammonium nitrate could be considerable and it is worthwhile to take a look at what works. The extent of our ignorance is very considerable and it is clear that the European solution is by no means a perfect one. Witness the fact that even in France, where you can only buy the inerted ammonium nitrate, the inerted material has to be accounted for by its wholesalers.

Mr. COBLE. So, here again, I am admitting my lack of expertise, but I suppose the desired result could not be reached by doing it in degrees. You would have to completely eliminate ammonium nitrate; would you not?

Mr. SEITZ. At the margin, you have to make a decision based on what an acceptable level of risk is. Certainly, if you took the ammonium nitrate content down to 10 percent, I think there would be little argument that you have eliminated the problem.

Mr. COBLE. But you still have the corresponding cost problem?

Mr. SEITZ. Yes, but when you dilute fertilizer with other fertilizer, it is different than with an inert material. Instead of adding 30 percent of calcium carbonate, if you added 30 percent of potash,

it would be a wash in terms of economics from the farmer's point of view.

Mr. COBLE. Mr. Ronay, I think you said earlier that most of these members of the criminal element usually steal the explosives or devices. As an aside, that is a feature that has never excited me about gun control laws, in that it is my belief that most criminals purchase their firearms one of two ways, they either steal them or buy them on the black market.

Having said that, I am in favor of some sort of registry, but with that built-in problem of knowing that they are going to steal it to begin with, or purchase them in some clandestine, illegal manner, I still would like to at least make the effort of some sort of log or some sort of register. Do you want to respond to that.

Mr. RONAY. A registrant for the ownership or purchase of explosives?

Mr. COBLE. Yes, I am just thinking aloud now.

Mr. RONAY. Well, it is of some benefit to be able to trace the explosive back to that last purchaser, certainly. But more importantly, if the seller of the explosives is assured of the identity of the person walking in, he is assured that that person has a license, and he is comfortable with the fact that he has no criminal record or other malady that would cause him to use it wrongly, and that would be required in the application procedure to be reviewed before a license would be issued. And currently, you can walk in and with a driver's license or some form of picture ID, walk out with a truckload of dynamite or explosive material legally for use in that state.

Mr. COBLE. One final question, gentlemen. I have been in and out. I had to go visit with some schoolchildren, so I may have missed this in my absence. But as each of us knows, the desired result would be to develop some sort of technique or technology that would be able to detect the explosive material before the fact. Has anyone discussed odorizing explosives that could thereby be detected by dogs properly trained? Has that been discussed during my absence? I don't recall having heard it while I was here.

Mr. RONAY. That has not been discussed.

Mr. COBLE. What do you think of that proposal?

Mr. RONAY. The current state of the art for detection by canines is pretty good. These animals and the equipment are sensitive to the commercial explosives that are made.

Where they fall a little short is in the plastic explosive area, because of the low vapor pressures of the materials that constitute plastic and sheet explosives. That is why the ICAO Convention, which we did discuss here, was enacted and agreed to by many countries who make plastic explosives, so that they would become more noticeable to the existing technologies.

Mr. COBLE. I see my time has expired, gentlemen. Thank you all for being with us this morning.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you Mr. Coble.

Mr. Hoke.

Mr. HOKE. Thank you, Mr. Chairman.

I would like to direct these questions to anybody that feels that they would like to take a stab at them.

I think that there is—my sense is that there seems to be—some concern generally that while taggants may well help in identifying, after the fact, the manufacturer of the particular explosive and perhaps as a result of that, the purchaser, and that this might have a criminal investigatory value and application, what I would like to know is do you think that we would do better to use Federal money to develop a technology that could actually detect the explosive materials before they blow up and before injury occurs?

And if you could speak to what kind of detection methods like that might exist and what sort of research could be conducted that could develop such detection methods.

Mr. RONAY. Well, certainly, that is the objective, I think, of IME and it is the objective of law enforcement to prevent the act from happening.

And there is detection equipment available and it is being updated and refined all the time, which could be used to prohibit a material, explosive material, from being brought into an area that is controlled or through an airport.

As I say, right now the equipment or the instruments are sensitive to commercial products, most of them. And they lack only in that plastic explosive area. However, that can be improved upon and I think that this study could certainly look at the possibilities of the prevention side of things as opposed to this postblast side that has limited benefit.

Mr. HOKE. To what extent do these devices exist today and maybe you can describe what there is that detects the explosives preblast and what is the proximity? In other words, how close do you have to be to the explosive to detect it?

Mr. RONAY. The proximity is probably the biggest shortfall at the moment. It can only sense or smell from a reasonable distance.

It has to be passed through the instrument or near the instrument or through a collection system, it could go through the room where the air is sampled, in this chamber or room, and then the instrument evaluates that air. It is a vapor trace type of instrument.

There is also instrumentation or technology out there that does various interrogation with—I don't want to say nuclear means, but it is a thermalneutron analysis instrument and they are quite expensive. But if the effort is put in that area, manufacturing companies will increase the research in those areas. And I know for a fact, as I have dealt with many of them over the years, they are always looking for research funds and movement in that area to enhance it.

Mr. HOKE. Just to get a better idea for myself on this, are you talking about a matter of inches or feet or how close do you have to be?

Mr. RONAY. Well, it would be a matter of inches or feet, perhaps, on a conveyor system. But if you passed luggage or people through a doorway or chamber and the air evacuation system moved the air through the system rapidly, it could be many, many feet, through the entranceways of buildings. Some of the technology claims to be able to detect a truck passing by on a freeway with explosive materials in it.

Mr. HOKE. Is there something that has to be put in the materials themselves in order to make them more detectable? Or are they naturally detectable by the instrumentation you are talking about?

Mr. RONAY. They are naturally detectable. The instruments are calibrated to detect certain elements or materials, but they can have false alarms.

So there is the possibility of putting some foreign material in what you are trying to detect which may be more unique and identifiable by an instrument, but I am not speaking with authority there. I just know that technology is capable of detecting almost anything it is programmed for.

Mr. HOKE. Is that an area that may be more fruitful than the other area of determining postblast origins?

Mr. RONAY. No question about it in my mind.

Mr. HAY. Sir, if I may make a comment, one of the problems with these detection technologies is that we advertise what they are. One of the main points of the thermal neutron apparatus is that it detects nitrogen. This has been so widely circulated in various articles in the public press that everybody knows that we are looking for nitrogen and it is perfectly possible to formulate explosives which contain no nitrogen and therefore bypass the detection technology.

It seems to me that if we are going to develop a detection technology, it would be best to keep it secret.

Mr. COBLE [presiding]. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

Some of you have alluded to the issue of safety to the lawful users if we go to a system of taggants and I wanted to explore that a little further, if you could.

Mr. Delfay, you have been quiet in the questioning. Have there been any studies done to show the result of taggants in black powder and their ballistic effect?

Mr. DELFAY. The OTA study, which was done in conjunction with several members of SAAMI, emphasized smokeless powder and the results were, as I indicated earlier, serious concerns were evidenced. I am not certain if black powder was addressed at that time or not. I could check that and get back to the committee.

Mr. BRYANT of Tennessee. Anyone else familiar with any studies?

What about the way these tracers affect the way the bullets shoot, the accuracy?

Mr. DELFAY. Well, there is no information on accuracy but, again, these are determinations that the powder may be more overly sensitive, or unstable, as a result of the combination with the taggant or might not develop sufficient pressure in the cartridge, thereby not pushing the projectile far through the barrel which causes a problem when the next shot is fired.

Mr. BRYANT of Tennessee. The only thing you are aware of is the OTA study of 1980 or so?

Mr. DELFAY. Precisely.

Mr. BRYANT of Tennessee. And your organization would support further study of particularly the inclusion in the powder?

Mr. DELFAY. Exactly, and we would assist in any way we could.

Mr. BRYANT of Tennessee. Mr. Seitz, do you have any opinion on that in terms of the potential safety risk involved in including taggants in powder?

Mr. SEITZ. The mechanical taggants or particles obviously could affect the ignition characteristics of materials. However, the state of the art in material science is such that one can imagine the production of taggants out of inert materials that would be less objectionable or unobjectionable.

Mr. BRYANT of Tennessee. Thank you. I will yield back the balance of my time.

[The prepared statement of Mr. Bryant of Tennessee follows:]

PREPARED STATEMENT OF HON. ED BRYANT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. Chairman, today we hold additional hearings on terrorism, a threat we all have been starkly reminded of by the tragic Oklahoma City bombing. These hearings are specifically geared toward H.R. 1710, the Chairman's bill titled the "Comprehensive Antiterrorism Act of 1995."

Assembled are a number of respectable witnesses who will testify over the next two days, including my former boss at the Justice Department, Attorney General William Barr. I look forward to hearing the pooled wisdom of these witnesses and to examining the bill before us.

While some steps need to be taken in order to enhance the criminal statutes pertaining to terrorism, the key step has already been taken by this committee and by the House of Representatives. That key step is habeas corpus reform.

Mr. Chairman, the habeas corpus reform that passed this House would limit the numerous, seemingly endless, and oftentimes frivolous appeals that convicted capital offenders put forth. This Congress listened to the American people, who are sick and tired of slow and uncertain capital punishment. We would give convicts their day in court under reasonable limits. And, of course, our habeas corpus reform would include convicted terrorists.

It would be for the good of the country, it would be in accord with the will of the American people, it would be in the best interests of combating terrorism for the Clinton administration to recognize this and support what we have already done. Mr. Chairman, if the President would get behind—strongly behind—our habeas reform, he would demonstrate to the American people and to this Congress that he means business when he claims he wants to do something about terrorism.

I urge the President and this administration to work for what we have already passed. I trust that Deputy Attorney General Gorelick, who is here to testify today, will convey to the President our call for his vigorous and vocal support with respect to habeas corpus reform.

Thank you, Mr. Chairman.

Mr. COBLE. The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Have any of the witnesses studied the action over in the Senate just recently? I know that the Senate is studying the same issue and, as a matter of fact, I think voted on it.

For example, Mr. Ronay, have you studied what the Senate has been doing and do you have any concerns about the action that they have taken?

Mr. RONAY. Yes, sir, we have studied it very closely. We note that the bill that came out of the Senate included a provision for a study on taggants. However, it seems to be premandated in that language that there is going to be a regulation requiring taggants even prior to the completion of that study.

It is mentioned in that bill that the results of the study must show that the taggant would not adversely affect safety or the quality of the product, or the environment. Those three tenets have been added on to that bill and we are glad to see them there.

But I think there is an additional concern of ours which has been expressed here already and that is the cost/benefit analysis that is missing from the Senate bill, we believe, that doesn't show a value for the law enforcement investigative effort that is commensurate with the costs that are going to go into this for our economy and the many industries that are affected.

Mr. BARR. And I think that those are very legitimate concerns, even though one of the witnesses I think expressed—I think the word was perplexity—that an industry would raise the question, I think that various industries raise very serious questions that need to be looked into.

The silicon industry, I believe, is one that I am not intimately familiar with. I do know that there are levels of purity in silicon that are used in silicon chips that are extremely high and causing them to interject outsider contaminants into that that I think clearly and logically would affect the process and the cost. And so I agree with you. I think these are very legitimate concerns.

I know that previously there was some discussion of the European model or the German or the British, and frankly those analogies don't excite me too much. I get tired hearing that the Japanese do something so wonderfully or the Europeans or the Germans or the British.

They have certainly more problems with terrorism than we have. And we do have a freer society and a freer economy over here. And even though we do know that there is a great deal of regulation that has added considerably to the cost of production and manufacturing and extraction of mining products in our country, that is still something that this Congress, we are looking at and weighing as you have indicated, a risk assessment and cost/benefit.

Are you familiar with the experiences in some of the European countries, and also a study that I saw recently or heard of recently by the United Nations Industrial Developing Organization that seems to indicate that, for example, urea and ammonium nitrate are incompatible for mixing because the mixture so generates moisture that results in caking that renders the mixture unusable as a fertilizer. Are you familiar with these kind of studies and experiences that I think indicate to us that we need to look very carefully at what may be nice-sounding and simplistic solutions?

Mr. RONAY. Congressman Barr, I would defer the latter part of your question to the gentleman on my left regarding the physical properties of those materials, but the initial question was the experience of the European Community from the criminal investigative point of view or preventing bombings by doing this.

We have found, and the Europeans have found, and communicated to the United States investigative people over the years, that the criminal still uses these materials. He can make these explode by various means that have been discussed here this morning. Altering the material or just using a bigger booster or bigger initiator, if you will.

There is some question among many investigators in Ireland and the U.K. as to even why they continue to do it, that is, dilute their fertilizers, because it doesn't seem to deter the terrorists at all from using those materials.

But, on the questions about the physical properties of those materials, I would turn to Mr. Hay.

Mr. HAY. We have noticed, sir, in our limited experience which we have just undertaken in the last few weeks to attempt to mix some ammonium nitrate and urea and determine the detonating properties, there is an increased tendency to caking in the ammonium nitrate/urea mixtures. But it may be possible that this could be solved by putting some sort of an antimoisture proofing coating around the prill, which is done anyway, even with pure ammonium nitrate, which also cakes in moist weather and the prills have a coating of some sort of clay-like material around them to retard that. It could be that an improvement of that coating material could solve the problem.

But I don't want to give the impression that we are wedded to the question of urea as the diluent of choice. This needs to be studied regardless of the particular diluent that it used.

Mr. COBLE. The gentleman's time has expired.

Go ahead, Mr. Seitz.

Mr. SEITZ. At present it is my understanding that large amounts of ammonium nitrates and urea are used together in solution in water as fertilizer.

The economics of fertilizer use are of macroeconomic dimension and you would have to get someone with expertise, probably at the Department of Agriculture, to address the issue of practicality and convenience from the point of view of the farmer.

Mr. BARR. Thank you.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you. I am recognizing Members in order of their appearance at this hearing. And I believe the gentlelady from California is next in line, Ms. Lofgren.

Ms. LOFGREN. I will pass on my questions at this time, sir.

Mr. COBLE. Do you have no questions?

I believe Ms. Jackson Lee is next in order, the gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you very much for the time and to the gentlemen here, thank you for your appearance. And having reviewed some of your testimony, I was not able to hear all of it because of prior meetings, but let me try to ask some concerns or express some concerns that I might have.

I believe, Mr. Delfay, you mentioned in this whole arena of taggants possibly about costs, if I want correct in terms—on the order of a cost/benefit analysis. But in any event do you have a concern or would it be difficult to have these taggants included in the manufacturing of these explosives?

Mr. DELFAY. First of all, safety is the primary consideration. And I indicated that if the safety concerns and problems could be overcome, there are problems of distribution and cost. OTA estimated or estimates of increased cost range from 12 to 30 percent.

Ms. JACKSON LEE. On the particular product?

Mr. DELFAY. On the pound of smokeless powder. Correct.

Ms. JACKSON LEE. What is the typical use of your product?

Mr. DELFAY. Sporting ammunition. Used by sportsmen or law enforcement agencies, whether for rifle, shotgun or handgun ammunition.

Ms. JACKSON LEE. Explain the safety factor that you are speaking of.

Mr. DELFAY. The tests indicated that just the very act of mixing the taggant with the smokeless powder would affect its performance. Either it would not perform sufficiently, as I mentioned earlier, to expel the projectile out of the barrel which obviously creates a very unsafe situation the next time the gun is fired. And also increases sensitivity or decreases the stability of the powder when it is mixed with the taggant by the manufacturer.

Ms. JACKSON LEE. Is the response or at least your analysis on safety an internal process or it has been an outside entity that analyzed this?

Mr. DELFAY. Basically everything I have said is based on the study of the Office of Technology Assessment done in the late 1970's or early 1980.

Ms. JACKSON LEE. In light of where we are today in looking at legislation prospectively or presently since we will be looking at this as closely and currently as tomorrow, would you not think that more current studies might be appropriate for concerns that are being expressed today?

Mr. DELFAY. Exactly. We support the provision of this legislation that calls for a further study on the use of detection and identification taggants.

Ms. JACKSON LEE. Would there be any balance of cost/benefit analysis that would encourage you to have support even in light of the increased costs when you would find that there would be a greater ability of saving lives and that would be balanced against what the individual would have to pay for the utilization of this ammunition?

Mr. DELFAY. Certainly there could be. Cost is not the key consideration right now. Safety is the key consideration.

The very real likelihood that with the objective of trying to detect who might have been involved or behind an explosion or bombing incident, we injure innocent people who might be involved in the production of explosives or sportsmen and law enforcement officers using them for hand loading or sports application.

Ms. JACKSON LEE. You are then comfortable with possibly findings that might show that the ability to save lives are so great that the cost increments would be worthy of expending? You would be willing to review that kind of data and accept it?

Mr. DELFAY. Yes.

Ms. JACKSON LEE. Any of you that might be able to answer and some of my colleagues might be able to answer, I just wanted to explore, and I think I heard Mr. Hay somewhat comment on this. And this is, of course, going back to the basic raw materials that were used in the tragedy of Oklahoma City.

And those of us who have followed it and still in the midst of receiving data know that a huge truck or a fairly decent sized truck was filled up with a certain basic garden resource. What guidance can we get or what—and I would appreciate anyone who wants to offer to answer this—with the ability of citizens to use a variety of nonthreatening elements that can ultimately then be threatening, as we look to legislation?

Mr. HAY. Well, I interpret your question to be whether it is possible to make explosives out of commonly available ingredients and what can we do about it? And my answer is, yes, it is and for the second part of that, I don't know.

Ms. JACKSON LEE. Good answer.

Mr. HAY. There are so many possibilities for making explosives out of chemicals. As a youngster, I used to make my favorite explosive out of Clorox. This is not something you would do all the time, but if you had to do it, you could do it.

And if you are trying to figure out all of the possible ingredients that could be used to make an explosive and eliminate them from the market or alter them in some form, it is actually mind-boggling.

Ms. JACKSON LEE. Mr. Chairman, could I get unanimous consent for an additional minute to pursue that, please?

Mr. HYDE [presiding]. You above all people can get unanimous consent for one additional minute.

Ms. JACKSON LEE. Thank you, Mr. Chairman. Thank you, very much. I will conclude with this.

Mr. Hay, you are interested in Clorox and we have seen fertilizer components and I was thinking about corn and whatever else might come about. Difficult as it is, we are all facing the magnitude of the tragedy. It is certainly one that we hope we will not face again.

We faced a situation that did not have the same components that the Twin Towers in New York. Would it be feasible to monitor the buying of large quantities by nonwholesalers or nonprofessionals?

Is that an option that could be reviewed? Would there be sufficient data, sufficient insight ability to review those kinds of purchases? I imagine as a young boy buying Clorox you didn't need to get an oil drum full or whatever else one might imagine.

Mr. HAY. I think it would be. Certainly, limiting the acquisition of materials in very large quantity, you would think would deter the production of very large bombs.

It doesn't deter, of course, the production of smaller bombs if you can buy the material still in smaller quantity or a very patient person could go to 100 different stores and buy 10 pounds in each store, perhaps, and accumulate the thousand pounds again. I would say it is a logistic problem. I don't think that I am well-qualified to talk about how much patience these terrorists might have in the pursuit of their goals.

Ms. JACKSON LEE. There again, that may yield itself as well to a cost/benefit analysis and may be worthy of further analysis on how you monitor those kinds of purchases.

I yield back the balance of my time, Mr. Chairman.

Mr. HYDE. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Delfay, I noticed that your organization does support the study. Do you have any alternative recommendations to putting taggants into various types of explosive materials?

Mr. DELFAY. Additional recommendations for detecting or preventing or helping to solve bombing incidents?

Mr. GOODLATTE. That is correct.

Mr. DELFAY. As I reviewed the legislation before us, I think there are several provisions in there. Mandatory sentencing and others, but none that might relate to the manufacture of smokeless powder or black powder.

Mr. GOODLATTE. The sentencing comes in after you have apprehended the person. Obviously the taggants are directed at attempting to assist in narrowing the field of investigation in order to detect who committed a particular crime. You don't have any recommendations along those lines?

Mr. DELFAY. None that I could think of that would relate to the production of smokeless powder, even in the detection or identification later on; no.

Mr. GOODLATTE. How about you, Mr. Ronay?

Mr. RONAY. I cannot think of an assistance to identification of the explosive product that could be included safely in the product without serious study and bringing in people who would be expert in that area.

I can say from my law enforcement experience that explosives carry a Federal code now. It has been required for many years.

And as long as they are in their original container or wrapper, they are easily identifiable with the manufacturer. Forensic instrumentation and chemists can identify products that are unconsumed, that is out of the wrapper but in bulk. The unique formulations are identifiable.

So, there are mechanisms in place already to assist law enforcement, even with residues which are not complete, as well as unconsumed products. After the detonation, forensic laboratories are capable of identifying the type of product and in many cases even the specific product.

Mr. GOODLATTE. Is that based upon the wrapper and so on that you are talking about or is that based upon the chemical content?

Mr. RONAY. Chemical analysis.

Mr. GOODLATTE. Different explosive manufacturers are utilizing different compounds?

Mr. RONAY. Yes, they do and even though they may be both making a dynamite or an emulsion, their formulations are different. Even from the same manufacturer, the formulation varies to some degree. And a good forensic laboratory can tell the difference and establish a fingerprint from an unconsumed amount of that explosive and tell you that it matches even a particular batch. They are very, very qualified to do that.

In a postblast situation it is harder because you have less to work with. But what I am getting at is that there are a lot of tools there for law enforcement already. And adding something to the explosives, aside from the considerations of that in itself, doesn't offer a whole lot more for law enforcement or the forensic laboratory.

Mr. GOODLATTE. Thank you very much.

Mr. Hay, you mentioned—and I think it is widely noted that there are a number of different chemical compounds that are explosive in nature, everything from gasoline we put in the tank of our car to the Clorox you mentioned and a number of other things.

Is there anything unique about ammonium nitrate in terms of its explosive character or capability that we should be aware of?

Mr. HAY. No, sir, the most unique thing about ammonium nitrate is the extremely low cost. And this is what makes it attractive as the commercial blasting agent; the other thing which goes along with the low cost is its wide availability because of its use as a fertilizer as well as an explosive ingredient.

In those two respects it is unique but if you take ammonium nitrate off the market entirely there are still various ways to make other explosives or even in fact to make ammonium nitrate. If you have nitric acid and ammonia, you can make ammonium nitrate yourself. If you have nitric acid you can make nitrates out of an inconceivably large list of substances, all of which would have some explosive properties.

Mr. GOODLATTE. Mr. Seitz' testimony seems to point to the enormous size of an explosive that you can create with ammonium nitrate from a very low cost and you pointed out that inexpensive cost. What are we talking about in terms of a differential between the costs of making a bomb the size of the one utilized in Oklahoma City from ammonium nitrate compared to some of the other materials you have mentioned? Is it just a slight difference or is it several times?

Mr. HAY. It is a large difference. When we buy ammonium nitrate, the cost is rather more than 8 cents a pound, but it is not much more than 10 cents a pound. And most laboratories—it depends on where you buy.

If you buy your reagent grade chemicals from your local scientific chemical supply house, you are going to pay several dollars a pound. Whether these materials can be obtained in lower purity from some chemical supplier, I don't know if you can buy nitric acid in bulk cheaper than you can buy it in a laboratory supply house, but I suppose that you can. But we might be talking about a factor of 10 or more in increased price.

Mr. HYDE. The gentleman's time has expired.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. HYDE. The Chair wants to thank this panel for a very informative presentation on a subject that is complicated and difficult. And I think that we all agree on the need for a study and effective, intensely focused study on taggants as well as additives, we would all be better off and we need to update what studies exist and collate them.

So we thank you very much and the committee will stand in recess until 1:30, when the sixth and last panel will be present to testify.

[Recess.]

Mr. HYDE. The committee will come to order.

The Chair apologizes for the delay. We are some minutes late, but we had some votes on the floor and some conferences about the votes and votes to follow. And, so, the best laid plans of mice and the Judiciary Committee often don't work out the way we had hoped.

We have panel six, a very distinguished panel which will be the last panel for these hearings concerning counterterrorism legislation.

First, Mr. Khalil Jahshan is the executive director of the National Association of Arab Americans whose membership is com-

prised of both Muslim and non-Muslim Americans. Mr. Jahshan served as chairman of the Council of Presidents of National Association of Arab Americans, an umbrella organization representing a majority of the 3 million Americans of Arab ancestry.

Next we have Dr. Azizah al-Hibri, an advisory board member of the American Muslim Council, a nonprofit sociopolitical organization dedicated to serving the interests of the Muslim community with over 10,000 members. Dr. al-Hibri is an associate professor of law at the University of Richmond, T.C. Williams School of Law, is a member of the Virginia State Advisory Committee to the U.S. Commission on Civil Rights.

Ruth Lansner is the chair of the National Legal Affairs Committee of the B'nai B'rith Anti-Defamation League.

John H. Shenefield is the chairman of the American Bar Association's Standing Committee on Law and National Security. He is a partner at Morgan, Lewis & Bockius, and chairman of their antitrust and trade regulation section.

Formerly he served as Assistant Attorney General in charge of the Antitrust Division and Associate Attorney General with specific responsibility over Intelligence and Intelligence Oversight.

And so, would you gentlemen please take your places. I am sorry, Dr. al-Hibri is a female, for which I apologize for referring to her as a gentleman.

We will go from my right to left and will be your left to right. So, first, Khalil Jahshan, we are pleased to hear from you.

Would you put the little switch on and put it toward you?

Thank you.

STATEMENT OF KHALIL E. JAHSHAN, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF ARAB AMERICANS

Mr. JAHSHAN. Thank you, Mr. Chairman. I am honored to present testimony before this distinguished panel today on the subject of counterterrorism legislation on behalf of the National Association of Arab Americans.

As Arab-Americans, we welcome efforts in Congress to strengthen the counterterrorism capabilities of law enforcement agencies in the United States. Like all Americans, we want to ensure that acts of terrorism can be prevented and, when such acts do occur, that the perpetrators, regardless of their identity, can be apprehended and severely punished.

Strong and effective legislation, however, must ensure an equitable balance between the Nation's legitimate and very pressing security needs and the constitutionally protected freedoms and individual rights on which our democracy is based.

Immediately after the tragic bombing in Oklahoma City on April 19, 1995, NAAA was among the first American organizations together with other Arab and Muslim organizations to condemn that barbarous act and express horror and disgust at the wanton destruction of human life that resulted from that tragic event.

At the same time, Arab-Americans were concerned with the tendency of certain media outlets and so-called "experts on terrorism" to speculate prematurely at the identity of the perpetrators of the Oklahoma City bombing, thus giving way to endless speculation that the perpetrators were of Arab or Muslim or Middle Eastern

origin. No apologies, of course, were proffered when the speculation proved erroneous.

By reinforcing stereotypes and implying collective guilt, the rumors induced a backlash against Arab and Muslim communities and caused considerable anguish and pain for many Americans of Arab descent.

It is precisely this tendency to blame ethnic groups rather than individuals for acts of terrorism that causes members of our community to oppose certain provisions regarding fundraising and deportation of aliens that are found in the Comprehensive Antiterrorism Act of 1995, H.R. 1710, introduced by the distinguished chairman of this committee and the Comprehensive Terrorism Prevention Act of 1995, S. 735, introduced by the Senate majority leader and the administration-backed Omnibus Counterterrorism Act of 1995.

We believe that certain provisions in each of these bills would tip the balance in such a way as to invite abuse.

We, therefore, urge this committee to resist the temptation to rush to enact counterterrorism legislation without serious and thoughtful deliberation to avoid swinging the pendulum too far in the opposite direction.

Mr. Chairman, we believe that certain provisions in H.R. 1710, S. 735 and/or S. 761 should be opposed in their current form. Among these are provisions that would, one, broaden the definition of terrorism to include constitutionally protected activities, including the right of association, which would otherwise be legal, two, violate the Constitution by permitting the U.S. Government to deport aliens without due process, based on secret evidence that is not fully disclosed to the defendant; three, invite selective enforcement based on political considerations such as opposition to the Middle East peace process that targets certain ethnic or religious groups including Arab-Americans, Muslim-Americans, and Arab and Muslim immigrants; four, permit the President to designate organizations as terrorist without review by the courts; five, enable the President to bar fundraising for humanitarian and other lawful activities of organizations that may be politically affiliated with the organizations designated as terrorist; and finally, allow foreign governments to carry out surveillance in the United States on U.S. citizens in some circumstances.

Frankly, Mr. Chairman, these are practices which prompted some of us immigrants to leave our native lands to find refuge in the United States from such abuses. It is indeed worrisome to face such practices here at home.

In terms of fundraising, we believe that the fundraising provisions of much of the counterterrorism legislation under consideration by Congress, including H.R. 1710, are overly broad and violate the Constitution by prohibiting fundraising for lawful humanitarian and philanthropic activities.

Arab-Americans, like members of all ethnic communities in the United States, send funds to their countries of origin. Many Arab-Americans contribute to humanitarian and philanthropic nongovernmental organizations, NGO's, in the West Bank and Gaza and in Lebanon.

Most, if not all of these NGO's are politically affiliated and are a function of political factions. Thus, groups like the PLO, Fatah, Hamas, DFLP, and PFLP—some of which are designated as terrorist organizations in the President's Executive order of January 24, 1995—engage in a host of educational, health, social, and other humanitarian activities that are desperately needed, particularly in Palestinian society.

Cutting off fundraising to the legitimate nonterrorist and nonviolent activities of such groups will deprive Palestinian society of vital services that cannot easily be provided by the Palestine National Authority or any outside source at this time. Such an economic disruption will destabilize the region, undermine the already precarious peace process and threaten the democratic institutions that are currently emerging in the West Bank and Gaza.

Because fundraising for terrorist activities is already proscribed under current law, we urge that the provisions that would ban fundraising for legitimate humanitarian and philanthropic activities be totally dropped from the legislation under consideration.

With regards to the deportation of aliens, we are puzzled as to why the U.S. Government would seek to deport rather than to prosecute any individuals suspected of committing or conspiring to commit terrorism in the United States. Deportation of such individuals would merely allow them to conduct their activities elsewhere and could impede efforts to prevent or to punish terrorism.

We believe that all individuals engaged in terrorism should be prosecuted to the fullest extent of the law, but to ensure that innocent individuals are not wrongly prosecuted and convicted, the term "engaged in terrorism activity," must be defined as referring only to those who specifically intend to support an individual, organization, or government in conducting terrorist activities.

Mr. Chairman, the Arab-American community is particularly troubled by provisions which allow the Government to deport aliens without due process based on secret evidence that is not fully disclosed to the defendant or his or her attorney.

H.R. 1710 would also unduly broaden grounds for exclusion of aliens from the United States. Aliens are currently excludable if they have engaged in terrorist activity or if the Attorney General has reasonable grounds to believe that they are likely to engage in such activity in the United States should they gain entry into the country.

Under H.R. 1710 exclusion would be permitted if the alien is a representative or merely a member of an organization designated by the President to be terrorist, even if the alien personally had never engaged in or supported terrorism or terroristic activity. Such broad exclusionary powers will serve to bar innocent aliens with legitimate reasons for entering the country.

It will also tend to limit debate in the United States on controversial issues. Just as an example, even though the U.S. Government deals with the PLO directly today, still technically the PLO is considered a terrorist organization and members of its executive committee are still barred from entering the United States.

For example, until recently, Mr. Mahmoud Darwish, a famous Palestinian poet not known for violence or violent views, has been barred from entering the United States to even read his poetry. A

prominent businessman, Jaweed Al-Ghussein, a member of the Executive Committee of the PLO with extensive business interests in the gulf and Europe has been barred from entering the United States for the same reason. Anglican Bishop Iliya Khouri, not known as an advocate of terrorism, has also been barred on that same basis for, again, membership in an organization deemed as terrorist in this country.

With regard to surveillance by foreign governments, we were astonished to find provisions in the original version of S. 735, which would give personnel of a foreign government the right to participate in interceptions of communications in the United States.

The Arab-American community is utterly and unalterably opposed to any foreign government being legally entitled to intercept communications of American citizens in the United States under any circumstances. It is a fundamental violation of the constitutional rights of every American to permit a foreign government, which is not bound by the requirements of the Bill of Rights of our Constitution, to conduct surveillance lawfully and legally in the United States against ethnic communities or individuals it despises or disagrees with.

Mr. Chairman, we urge this committee and the members of any conference committee that may be formed in the future to consider counterterrorism legislation to reject provisions that would permit foreign governments to conduct surveillance in the United States. Lawful surveillance activities should be conducted by the U.S. Government and not by foreign governments.

And, if you will allow me here to offer a personal note, I am speaking of my own personal experience, having suffered 5 years of personal surveillance and harassment by agencies of the U.S. Government when I was in college based on disinformation submitted to them by a foreign government which happened to disagree with my personal political point of view.

In conclusion, Mr. Chairman, Arab-Americans join all Americans who want to ensure that acts of terrorism can be prevented and, when such acts do occur, that the perpetrators are punished. Because the Arab-American community is often targeted or "scapegoated" at times of international crisis or terrorist incidents, however, Arab-Americans have a special interest in ensuring that counterterrorism legislation provides an equitable balance between the Nation's legitimate security needs and constitutionally protected freedoms.

As a community with a large proportion of immigrants, we are concerned about the artificial distinctions that are being drawn between domestic and international terrorism. We note in particular that many of the provisions of the proposed counterterrorism legislation seem designed to restrict or deny due process to aliens to facilitate deportation and to broaden the definition of terrorism activity to such a point that it infringes upon constitutionally protected rights of association, particularly for aliens or foreigners.

It is essential that, in our eagerness to ensure that terrorism can be prevented or punished, we preserve the rights not only of U.S. citizens but also of resident aliens who contribute much to this society and obey its laws. We have the responsibility to ensure not

only that the guilty are prosecuted and punished, but that the innocent are protected whether they are citizens or aliens.

I would also like to bring to your attention and to your colleagues on the committee, a statement that NJCRAC, the National Jewish Community Relations Advisory Council and NAAA, the National Association of Arab Americans, issued on May 4, 1995, with regard to this legislation, basically (1) condemning unequivocally all terrorist acts—defined as politically motivated acts against civilians whatever their origin—and urging more vigorous U.S. Government efforts to combat the scourge of international and domestic terrorism; (2) recognizing the need for enhanced U.S. governmental capabilities to conduct the battle against terrorism; (3) rejecting all forms of stereotyping and discrimination based on the actions of individual members of religious or ethnic groups; (4) urging that U.S. constitutional safeguards for civil rights and liberties must be respected and maintained in the development of antiterrorism initiatives.

So the feelings I presented to you here today do not simply reflect views in the Arab-American or Muslim-American communities. NJCRAC represents 13 national and 117 local Jewish agencies throughout the country.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Jahshan follows:]

PREPARED STATEMENT OF KHALIL E. JAHSHAN, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF ARAB AMERICANS

The National Association of Arab Americans (NAAA) is pleased to present testimony before this distinguished panel on the subject of counter terrorism legislation. As the principal lobbying organization of the Arab American community, we welcome efforts in Congress to strengthen the counter terrorism capabilities of law enforcement agencies in the United States. Like all Americans, we want to ensure that acts of terrorism can be prevented and, when such acts do occur, that the perpetrators—regardless of their identity—can be apprehended and severely punished. Strong and effective legislation, however, must ensure an equitable balance between the nation's legitimate and very pressing security needs and the constitutionally protected freedoms on which our democracy is based.

NAAA and its members throughout the United States join the rest of the nation in mourning the dead and consoling the survivors of the tragic bombing in Oklahoma City on April 19, 1995. NAAA was among the first Arab-American organizations to condemn that barbarous act and express horror and disgust at the wanton destruction of innocent human life that resulted. We are confident that the perpetrators and masterminds of the attack in Oklahoma will be brought to justice.

At the same time, Mr. Chairman, Arab Americans were extremely concerned at the tendency of the media and many so-called experts on terrorism to speculate prematurely at the identity of the perpetrators of the Oklahoma City bombing. Early reports that the attack might have been linked to the incident in Waco, Texas, two years before gave way to endless speculation that the perpetrators were "Middle Eastern" in origin. No apologies were proffered when the speculation proved erroneous.

The public was not served by these race-and-religion-based innuendoes. By reinforcing stereotypes and implying collective guilt, the rumors induced a backlash against the Arab and Muslim communities and caused considerable anguish and pain for many Americans of Arab descent.

It is precisely this tendency to blame ethnic groups rather than individuals for acts of terrorism that causes our community to oppose certain provisions regarding fundraising and deportation of aliens that are found in the Comprehensive Antiterrorism Act of 1995 (H.R. 1710), introduced by the distinguished chairman of this Committee, the Comprehensive Terrorism Prevention Act of 1995 (S. 735), introduced by the Senate Majority Leader, and the Administration-backed Omnibus Counter terrorism Act of 1995 (S. 761). We believe that certain provisions in each of these bills would tip the balance in such a way as to invite abuse.

Let me make one thing perfectly clear. We hold the current director of the Federal Bureau of Investigation and the Attorney General in the highest esteem. We were heartened that, in the aftermath of the Oklahoma City bombing, Administration and law enforcement officials, including President Clinton, declined to encourage media speculation as to the identity of the perpetrators.

Nevertheless, the legislation that Congress is considering should be designed to be in force and effective long after the current officials are replaced. As has been seen in the past, the nation's top law enforcement officers have on occasion violated civil liberties and severe restrictions of their powers were imposed upon them as a result. We therefore urge this Committee to resist the temptation to rush to enact counter terrorism legislation without serious and thoughtful deliberation to avoid swinging the pendulum too far in the opposite direction.

Mr. Chairman, we believe that American citizens or resident aliens in the United States who engage in or conspire to commit terrorist activities should be punished to the fullest extent of the law. We are concerned, however, that the legislation being considered in this Congress contains provisions which are designed not to prevent or punish terrorism but to criminalize activities which are not only protected but guaranteed by the Constitution. We believe that certain provisions in H.R. 1710, S. 735 and/or S. 761 should be opposed in their current form. Among these are provisions that would:

Broaden the definition of terrorism to include constitutionally protected activities, including the right of association, which would otherwise be legal.

Violate the Constitution by permitting the U.S. government to deport aliens without due process, based on secret evidence that is not disclosed to the defendant.

Invite selective enforcement based on political considerations, such as opposition to the Middle East peace process, that targets certain ethnic or religious groups, including Arab Americans, Muslim Americans, and Arab and Muslim immigrants.

Permit the President to designate organizations as terrorist without review by the courts.

Enable the President to bar fundraising for humanitarian and other lawful activities of organizations that may be politically affiliated with the organizations designated as terrorist.

Allow foreign governments to carry out surveillance in the United States on U.S. citizens in some circumstances.

FUNDRAISING

We believe that the fundraising provisions of much of the counter terrorism legislation under consideration by Congress, including H.R. 1710, are overly broad and violate the Constitution by prohibiting fundraising for lawful humanitarian and philanthropic activities. Current law already prohibits the providing of funds for terrorist activity and should be vigorously enforced. The broad prohibition under the pending legislation, however, penalizes individuals for providing funds, even unknowingly, to groups that the President deems to be terrorist. Although there are certain exemptions that may be granted the requirements to obtain these exemptions are almost impossible to fulfill and are therefore illusory.

Arab Americans, like members of all ethnic communities in the United States, send funds to their countries of origin. Many Arab Americans contribute to humanitarian and philanthropic non-governmental organizations (NGOs) in the West Bank and Gaza and in Lebanon. Most, if not all, of these NGOs are politically affiliated and are a function of political factions. Thus, groups like Fatah, Hamas, DFLP, and PFLP, some of which are designated as terrorist organizations in the President's executive order of January 24, 1995, engage in a host of educational, health, social and other humanitarian activities that are desperately needed in Palestinian society.

Cutting off fundraising to the legitimate non-terrorist and non-violent activities of such groups will deprive Palestinian society of vital services that cannot easily be provided by the Palestine National Authority or any outside source at this time. Such an economic disruption will destabilize the region, undermine the already precarious peace process, and threaten the democratic institutions that are currently emerging in the West Bank and Gaza.

We are also concerned that the broad prohibitions of the fundraising provisions will have a further chilling effect on humanitarian and philanthropic fundraising in the United States because of their vagueness. Individuals will be reluctant to contribute to any organization dealing with the Middle East because they cannot be sure that at some time they may face prosecution. Ironically, resident aliens could

face prosecution for contributing to the Palestine Liberation Organization in support of the peace process, even though the U.S. government, including the President himself, has urged Arab Americans to support the Palestine National Authority in the reconstruction of Palestinian society.

Because fundraising for terrorist activities is already proscribed under current law, we urge that the provisions that would ban fundraising for legitimate humanitarian and philanthropic activities be dropped from the legislation under consideration.

Deportation of Aliens

Certain provisions of the counterterrorism legislation seek to facilitate the deportation of aliens charged with terrorism activity. *We are puzzled as to why the U.S. government would seek to deport, rather than to prosecute, any individual suspected of committing or conspiring to commit terrorism in the United States.* Deportation of such individuals would merely allow them to conduct their activities elsewhere and could impede efforts to prevent or to punish terrorism.

We believe that all individuals engaged in terrorism activity should be prosecuted to the fullest extent of the law. But, to ensure that innocent individuals are not wrongly prosecuted and convicted, the term "engage in terrorism activity" must be defined as referring only to those who specifically intend to support an individual, organization, or government in conducting terrorism activity. As we have noted, individuals who wish to support humanitarian or philanthropic activities should not be considered to be engaging in terrorism activities.

The Arab-American community is particularly troubled by provisions which allow the government to deport aliens without due process, based on secret evidence that is not disclosed to the defendant or his or her attorney. While we understand that there are times when the U.S. government must decline to make public certain classified information in order to protect the source of that information, we believe that the government should and must be required to produce, as it is under the Classified Information Procedures Act, summaries that will allow the defendant the opportunity to defend him or herself.

H.R. 1710 would establish a "special removal court" to preside over hearings to deport terrorist aliens from the United States and would create a panel of attorneys with security clearances who could review classified information relating to removal cases. A member of such a panel could represent the accused alien and challenge the veracity of the classified evidence in an *in camera proceeding*, but could not disclose the classified information either to the accused or to his or her attorney. Since summaries of classified evidence against the accused are not required to be made available to the alien, he or she can be effectively denied the ability to conduct an adequate and effective defense.

We believe that current law already permits the Immigration and Naturalization Service to detain aliens charged as deportable. Provisions that would expedite immigration cases concerning terrorism activity would allow such cases to be disposed of in a timely fashion, even if there is a backlog in normal cases. But the U.S. government should not be relieved of its burden of providing due process to defendants simply because they are aliens.

H.R. 1710 would also unduly broaden grounds for exclusion of aliens from the United States. Aliens are currently excludable if they have engaged in terrorism activity or if the Attorney General has reasonable grounds to believe that they are likely to engage in such activity in the United States should they gain entry. Under H.R. 1710, exclusion would be permitted if the alien is a representative or merely a member of an organization designated by the President to be terrorist, even if the alien had never engaged in or supported terrorism activity. Such broad exclusionary powers will serve to bar innocent aliens with legitimate reasons for entering the country. It will also tend to limit debate in the United States on controversial issues.

Surveillance by Foreign Governments

We were astonished to find provisions in S. 735 which would give personnel of a foreign government the right to participate in interceptions of communications in the United States. *The Arab-American community is utterly and unalterably opposed to any foreign government being legally entitled to intercept communications of American citizens in the United States under any circumstances.* It is a fundamental violation of the constitutional rights of every American to permit a foreign government, which is not bound by the requirements of the Bill of Rights of our Constitution, to conduct surveillance lawfully and legally in the United States against ethnic communities or individuals it despises.

Mr. Chairman, we urge this Committee and the members of any conference committee that may be formed to consider counterterrorism legislation to reject provisions that would permit foreign governments to conduct surveillance in the United States. Lawful surveillance activities should conducted by the U.S. government and not by foreign governments.

CONCLUSION

Arab Americans join all Americans who want to ensure that acts of terrorism can be prevented and, when such acts do occur, that the perpetrators are punished. Because the Arab-American community is often targeted or "scapegoated" at times of international crisis or terrorist incidents, however, Arab Americans have a special interest in ensuring that counter terrorism legislation provides an equitable balance between the nation's legitimate security needs and constitutionally protected freedoms.

As a community with a large proportion of immigrants, we are concerned about the artificial distinctions that are being drawn between domestic and international terrorism. We note in particular that many of the provisions of proposed counter terrorism legislation seem designed to restrict or deny due process to aliens, to facilitate deportation, and to broaden the definition of terrorism activity to such a point that it infringes upon constitutionally protected rights of association, particularly for foreigners.

It is essential that, in our eagerness to ensure that terrorism can be prevented or punished, we preserve the rights not only of U.S. citizens, but also of resident aliens who contribute much to this society and obey its laws. We have the responsibility to ensure not only that the guilty are prosecuted and punished but that the innocent are protected, whether they be citizens or aliens.

Mr. HYDE. Thank you very much. I appreciate your statement. I do not wish to cut short anybody and tell us what you want to tell us. But if you could hold your general statement down to 5 minutes or so, that would give us an opportunity to question you and not prolong the hearings. But I do not want to curtail any messages that you have to communicate to us.

Ms. Lansner.

STATEMENT OF RUTH LANSNER, CHAIR, NATIONAL LEGAL AFFAIRS COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Ms. LANSNER. Thank you. Thank you very much. Good afternoon. My name is Ruth Lansner and I chair the National Legal Affairs Committee of the Anti-Defamation League. Accompanying me here are Jess Hordes, ADL's Washington, DC., representative, Michael Lieberman, ADL's Washington counsel, and Stacy Burdett, ADL's assistant director in the Washington office.

On behalf of the league we want to thank you, Mr. Chairman, for your leadership in introducing the Comprehensive Antiterrorism Act of 1995 and for expeditiously convening these hearings. We appreciate the opportunity to discuss the legislation and its effectiveness in broadening U.S. capabilities and jurisdiction to combat terrorism both here and abroad.

I would like to submit ADL's full statement for the record and summarize that in my remaining time.

Mr. HYDE. Without objection. So ordered.

Ms. LANSNER. Thank you.

Some organizations, we believe, have wrongly criticized the legislation as an unnecessary and unconstitutional response to what they perceive as a rare and declining problem, yet the number of civilian casualties of terrorism is actually on the rise. Way before the tragic Oklahoma City bombing, incidents like the World Trade

Center bombing, the murder of two Americans in Karachi, Pakistan, the death of an American student in a suicide bombing in Gaza, the plot to bomb American airliners in the Philippines, the bombing of Pan Am 103 and the murder of Leon Klinghoffer, all demonstrate that Americans are unquestionably the targets of choice, that terrorism can and will occur both within and outside our borders.

In fact, attacks against American citizens and interests over the past 5 years account for roughly 40 percent of the total incidents worldwide.

As terrorism conditions unabated and aims at more vulnerable civilian targets like the Tokyo subway system and the Alfred P. Murrah Federal Building, it is clear that law enforcement agencies and the criminal justice system must be better equipped to confront a new level of sophistication and danger posed by terrorist groups.

As one of the Nation's oldest civil rights and human relations organizations, the Anti-Defamation League is committed to helping ensure that efforts to crack down on terrorism are sensitive to civil liberties and due process concerns.

As just noted by the prior speaker, in May, we joined other Jewish- and Arab-American organizations in issuing a joint statement condemning terrorism and urging a vigorous U.S. response which protects constitutional freedoms. Mr. Chairman, we support the broad policy objectives articulated in the Comprehensive Antiterrorism Act of 1995 and also reflected in the administration's proposal as a significant component of America's national and global strategy against this escalating terrorist threat.

We would like to focus on three important provisions of H.R. 1710.

The first is fundraising. With increasing indications that terrorist organizations may be using this country as a base to organize and finance terrorist acts here and abroad, there is a need to establish a framework to stop the transfer of funds to terrorists. The Anti-Defamation League strongly supports H.R. 1710's broad ban on fundraising for presidentially designated terrorist groups.

The league supports criminalizing an individual's knowing contribution of material support to a terrorist organization, regardless of whether this support is provided directly or indirectly.

While the right to associational freedom includes the right to donate money, it is well established that the Government may restrict this right when it has a compelling interest in doing so.

The act's prohibition of fundraising is also narrowly tailored since it applies to only presidentially designated organizations and only to individuals who knowingly contribute to those groups.

Since money is fungible and it is virtually impossible to determine the final destination or ultimate use of funds, a broad, broad ban is essential, notwithstanding any intended or claimed nonviolent purposes of a presidentially-designated group.

Similarly, we believe any ban on fundraising must cover all subgroups, including domestic conduits or affiliates of designated terrorist groups. A broad ban also provides an incentive for legitimate, nonviolent groups to disassociate from or disband terrorist wings.

The league supports the inclusion of a review procedure of the Presidential designation of terrorist organizations barred from both entering the United States and raising funds. We firmly believe that some form of review is essential to ensuring accountability, but that the review procedure must not impede the Government's ability to act expeditiously.

The Senate-passed antiterrorism bill included an impractical and onerous review process that renders the provision unworkable. The Senate procedure would require the Government to locate and prove that an organization's control group had actual knowledge that the funds were being used for terrorism activities.

Separately, we would support a freezing of terrorist assets as provided for in the Senate and administration proposals, as well as the involvement of U.S. financial institutions in restricting financial transactions of terrorist organizations.

Mr. Chairman, our second area of focus relates to the provisions on access to the United States.

The ADL strongly supports the act's ban on entry into the United States for representatives of presidentially designated terrorist groups. It is well-established that admission to the United States is a privilege, and that aliens outside the United States have no due process rights. The Government unquestionably has the constitutional right and the duty to keep our country from being used as a base to organize terrorist activity here and abroad.

While known terrorists are already excludable under current law, representatives of terrorist groups should bear the burden to prove and demonstrate that the aim of their visit is unrelated to support for terrorism activities.

However, Mr. Chairman, we are troubled by the inclusion of membership in a terrorist organization as grounds for denying entry into the United States since we hold that exclusion should be based on an individual's conduct and not on his affiliations or associations.

Furthermore, since most terrorist organizations do not have card-carrying members, it will be difficult to determine what constitutes membership. If the definition of membership is too broadly interpreted, aliens may be erroneously associated with terrorist groups.

We do believe that a broad ban on access for officials, spokespersons, activists and influentials of terrorist groups effectively expands the universe of excludable individuals while helping to ensure that conduct and not beliefs or ideology are the standard for exclusion.

ADL supports in principle the expedited exclusion hearings for alien terrorists seeking political asylum. Admission to the United States is a privilege which shouldn't be abused by individuals who come to this country to engage in acts of terror. However, any expedited procedure must include adequate review procedures to ensure that individuals seeking political asylum are granted a fair hearing.

Finally, the third area we would like to address relates to alien terrorists' deportation proceedings. According to law enforcement officials, there are known alien terrorists in the United States today who cannot be deported because revealing the full range of

evidence required by normal deportation proceedings would endanger intelligence sources and methods.

ADL clearly recognizes the unique government interests in these cases, including the risk to national security and the significant need to avoid revealing confidential sources. The ADL also strongly supports the safeguards contained in the act since we recognize that due process concerns are raised when defendants are provided with less than full disclosure of evidence.

In certain limited circumstances where full disclosure would pose a risk to national security, ADL supports H.R. 1710's requirement that aliens in these special proceedings receive a summary of the classified evidence against them which must be sufficient to permit the alien to prepare a defense against deportation.

ADL recognizes the serious due process concerns raised in those even more limited circumstances in which providing even a summary would likely cause serious and irreparable harm to national security or death or serious bodily injury to any person.

We, therefore, welcome the new provision in H.R. 1710 which establishes a panel of attorneys with security clearance empowered to act as an advocate on behalf of permanent resident aliens who would not otherwise have access to even a summary. We believe this provision is a creative means of balancing the Government's legitimate securities with the defendant's right to due process.

Mr. Chairman, however, we do believe that this provision should be expanded to cover permanent as well as nonpermanent resident aliens who also have procedural due process rights.

Mr. Chairman, tragedies such as the World Trade Center bombing illustrate the critical needs for strong American leadership in worldwide counterterrorism efforts. Terrorists have struck at the heart of America killing innocent people and instilling fear among private citizen.

As terrorists use increasingly sophisticated weapons and seek out softer civilian targets, the American criminal justice system must be better equipped to confront a new level of danger posed by terrorist groups. There is no doubt that we must be cautious against alarmism and the ensuing panic that could lead to the erosion of fundamental freedoms.

At the same time, we must recognize that we live in an era in which destructive technology gives those who use violence to advance their cause the capability to take hundreds of lives in a single incident.

What is called for is a balanced, cautious approach which avoids both extremes and implements tough, appropriate measures to prevent future attacks. Through this approach, the American people and their policymakers can maintain a high level of awareness, preparedness and serve as a model for effective counterterrorism policy worldwide.

Again, we applaud your commitment and that of Representative Schumer who introduced the Omnibus Counterterrorism Act and other Members of Congress who have demonstrated resolve to take forceful action on this critical issue. In conclusion, you may be sure that the ADL will continue to work with you in support of this important legislation.

Thank you.

[The prepared statement of Ms. Lansner follows:]

PREPARED STATEMENT OF RUTH LANSNER, CHAIR, NATIONAL LEGAL AFFAIRS COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Good afternoon, my name is Ruth Lansner and I chair the National Legal Affairs Committee of the Anti-Defamation League. On behalf of the League, I want to thank Chairman Hyde for his leadership in introducing the Comprehensive Antiterrorism Act of 1995 and for expeditiously convening these hearings. I appreciate the opportunity to discuss this legislation and its effectiveness in broadening U.S. capabilities and jurisdiction to combat terrorism both here and abroad.

ADL, through its Leon and Marilyn Ninghoffer Memorial Foundation and the Gorowitz Institute on Terrorism and Extremism, works to combat international and domestic terrorism through educational, political and legal means. The League publishes materials on the origins and backgrounds of international and domestic terrorist groups which threaten U.S. interests.

In the last Congress, ADL supported a number of new provisions enacted as part of the 1994 crime bill and the State Department authorization bill which enhance the profile, resources and capabilities of U.S. counterterrorism efforts. In November, the League developed a Counterterrorism Action Agenda for consideration by the Administration and the 104th Congress which outlined a range of legislative proposals which are addressed in this bill as well as a number of multilateral steps that could be taken. We look forward to working with Congress and the administration to promote improved international coordination to enactment of complementary legislation in other countries as well.

Some organizations have criticized the legislation as an unnecessary and unconstitutional response to a rare and declining problem. Yet, the number of civilian casualties of terrorism is actually on the rise. As terrorism continues unabated and aims at more vulnerable civilian targets—like the Tokyo subway system and the Alfred P. Murrah Federal Building—it is clear that law enforcement agencies and the criminal justice system must be better equipped to confront a new level of sophistication and danger posed by terrorist groups.

As one of the nation's oldest civil rights and human relations organizations, the Anti-Defamation League is committed to helping ensure that efforts to crack down on terrorism are sensitive to civil liberties and due process concerns. In May, we joined other Jewish and Arab American organizations in issuing a joint statement condemning terrorism and urging a vigorous U.S. response which protects Constitutional freedoms.

We support the broad policy objectives articulated in the Comprehensive Antiterrorism Act of 1995, and also reflected in the Administration's proposal, as a significant component of America's national and global strategy against this escalating terrorist threat.

As the legislation moves through the House and goes to Conference, we look forward to working with Members and with the Conferenees to strive for an appropriate balance between the need for an aggressive response to this danger and necessary Constitutional safeguards.

Well before the tragic Oklahoma City bombing, incidents like the World Trade Center bombing, the murder of two Americans in Karachi, Pakistan, the death of an American student in a suicide bombing in Gaza, and the plot to bomb American airliners in the Philippines demonstrated that Americans were unquestionably the targets of choice and that terrorism can and will occur within our borders. In fact, attacks against American citizens and interests over the past five years account for roughly 40 percent of the total incidents worldwide.

Statistics alone cannot adequately measure the magnitude of human suffering that result from even a single terrorist incident such as the tragedy that befell the families of the victims of Pan Am 103 or of the American hostages in Lebanon. Fortunately, most terrorist plots are prevented or fail, but had those averted attacks been carried out, the potential casualties are estimated in the tens of thousands.

In addition to state-sponsored or well-established groups, small fragmented cells have emerged which make tracking and countering them more difficult and complex. Activists and supporters of some terrorist organizations have found sanctuary in the U.S. where they take advantage of democratic freedoms to organize violent activities here and abroad. Their motives and methods present new challenges for prevention and counteraction by law enforcement that this legislation addresses.

The chairman's bill includes essential provisions that provide legal and investigative means to confront these challenges. Among them are: expanded federal jurisdiction to prosecute terrorist acts, expanded restrictions on access to the U.S. for representatives of terrorist groups, a ban on fundraising for designated terrorist organi-

zations, provisions expanding nuclear materials prohibitions and implementation of the Convention on Plastic Explosives, and increased penalties for explosives conspiracies. The bill also includes an array of useful tools to enhance U.S. investigative capability to pro actively counterterrorism within the U.S.

FUNDRAISING

With increasing indications that terrorist organizations may be using this country as a base to organize and finance terrorist acts here and abroad, there is a need to establish a framework to stop the transfer of funds to terrorists.

The Anti-Defamation League strongly supports the bill's broad ban on fundraising for presidentially designated terrorist groups. The League supports criminalizing an individual's knowing contribution of material support to a terrorist organization, regardless of whether this support is provided directly, or indirectly. While the right to associational freedom includes the right to donate money, it is well-established that the government may restrict this right when it has a compelling interest in doing so. The Act's prohibition of fundraising is also narrowly tailored since it applies only to presidentially designated organizations and only to individuals who knowingly contribute to those groups.

Since money is fungible and it is virtually impossible to determine the final destination or ultimate use of funds, a broad ban is essential, notwithstanding any intended or claimed nonviolent purposes of a presidentially designated group. Similarly, we believe any ban on fundraising must cover all subgroups including domestic conduits or affiliates of designated terrorist groups. A broad ban also provides an incentive for legitimate, non-violent groups to disassociate from or disband terrorist wings.

The League supports the inclusion of a review procedure of the presidential designation of terrorist organizations barred from both entering the U.S. and raising funds. We firmly believe that some form of review is essential to ensure accountability, but that the review procedure must not impede the government's ability to act expeditiously.

The Senate passed antiterrorism bill included an impractical and onerous review process that renders the provision unworkable. The Senate procedure would require the government to locate and prove that an organizations "control group" had "actual knowledge" that the funds were being used for "terrorism activities." Separately we would support a freezing of terrorist assets as provided for in the Senate and administration proposals, as well as the involvement of U.S. financial institutions in restricting financial transactions of terrorist organizations.

ACCESS TO THE U.S.

The ADL strongly supports the Act's ban on entry into the U.S. for representatives of presidentially designated terrorist groups. It is well established that admission to the U.S. is a privilege and that aliens outside the U.S. have no due process rights. The government unquestionably has the constitutional right—and the duty—to keep our country from being used as a base to organize terrorist activity here and abroad. While known terrorists are already excludable under current law, representatives of terrorist groups should bear the burden of proof to demonstrate that the aim of their visit is unrelated to support for terrorism activities.

However, we are troubled by the inclusion of "membership" in a terrorist organization as grounds for denying entry into the U.S. since we hold that exclusion should be based on an individual's current conduct, and not on his affiliations or associations. Furthermore, since most terrorist organizations do not have card-carrying members, it will be difficult to determine what constitutes membership. If the definition of membership is too broadly interpreted, aliens may be erroneously associated with terrorist groups.

We do believe that a broad ban on access for officials, spokespersons, activists and influentials of designated terrorist groups effectively expands the universe of excludable individuals while helping to ensure that conduct and not beliefs or ideology are the standard for exclusion.

The ADL supports, in principle, the expedited exclusion hearings for alien terrorists seeking political asylum. Admission to the U.S. is a privilege which should not be abused by individuals who come to this country to engage in acts of terror. However, any expedited procedure must include adequate review procedures to ensure that individuals seeking political asylum are granted a fair hearing.

EXPEDITED DEPORTATION PROCEEDINGS

According to law enforcement officials, there are known alien terrorists in the U.S. today who cannot be deported because revealing the full range of evidence required by normal deportation proceedings would endanger intelligence sources and methods.

ADL clearly recognizes the unique government interests in these cases, including the risk to national security and the significant need to avoid revealing confidential sources. The League also strongly supports the safeguards contained in the Act since we recognize that due process concerns are raised when defendants are provided with less than full disclosure of evidence. Among the due process safeguards proposed in both the chairman's bill and the Administration proposal, are the establishment of a special court composed of five federal district court judges, the Attorney General or Deputy Attorney General's required approval of the proceeding, and the right to counsel, including at government expense for any alien unable to afford counsel. In addition, the special removal hearings are open to the public.

In certain limited circumstances where full disclosure would pose a risk to national security, ADL supports the bill's requirement that aliens in these special proceedings receive a summary of the classified evidence against them which must be sufficient to "permit the alien to prepare a defense against deportation."

ADL recognizes the serious due process concerns raised in limited circumstances in which providing even a summary "would likely cause serious and irreparable harm to national security or death or serious bodily injury to any person." We therefore, welcome the new provision in the chairman's bill which establishes a panel of attorneys with security clearance empowered to act as an advocate on behalf of permanent resident aliens who would not otherwise have access to even a summary. We believe this provision is a creative means of balancing the government's legitimate security interests with the defendant's right to due process. We believe, however, that this provision should be expanded to cover permanent as well as non-permanent resident aliens who also have procedural due process rights.

CONCLUSION

Tragedies such as the World Trade Center bombing illustrate the critical need for strong American leadership in world-wide counterterrorism efforts. Terrorists have struck at the heart of America, killing innocent people and instilling fear among private citizens. As terrorists use increasingly sophisticated weapons and seek out softer civilian targets, the American criminal justice system must be better equipped to confront a new level of danger posed by terrorist groups.

There is no doubt that we must be cautious against alarmism and the ensuing panic that could lead to the erosion of fundamental freedoms. At the same time we must recognize that we live in an era in which destructive technology gives those who use violence to advance their cause the capability to take hundreds of lives in a single incident. What is called for is a balanced, cautious approach which avoids both extremes and implements tough, appropriate measures to prevent future attacks. Through this approach, the American people and their policy-makers can maintain a high level of awareness, preparedness and serve as a model for effective counterterrorism policy world-wide.

Again, we applaud your commitment and that of Representative Schumer who introduced the Omnibus Counterterrorism Act, and other Members of Congress who have demonstrated resolve to take forceful action on this critical issue. You may be sure that the Anti-Defamation League will continue to work with you in support of this important legislation as it moves forward.

Mr. HYDE. Thank you very much.

I think the House is in recess for a memorial service for Les Aspin, so we need not, unless Members wish to attend that, we need not interrupt our hearing.

Mr. Shenefield.

STATEMENT OF JOHN H. SHENEFIELD, CHAIRMAN, STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, AMERICAN BAR ASSOCIATION

Mr. SHENEFIELD. Mr. Chairman and members of the committee, I am delighted to be testifying once again before this great committee and in this committee room.

I will summarize my statement and ask that it be printed in full in the record, Mr. Chairman.

Mr. HYDE. Without objection, so ordered.

Mr. SHENEFIELD. In general, members of our committee support the Comprehensive Antiterrorism Act of 1995, because they believe that it strikes an appropriate balance between the prevention of terrorism and the detection, efficient apprehension and conviction of terrorists on the one hand and the protection of civil liberties on the other.

The bill does grapple with some extremely vexing issues and it does so in an admittedly aggressive way. But there can be no question that credit is due both the Congress and the executive branch in their efforts to bring the full weight of Federal law enforcement subject to constitutional limitations to bear on terrorism.

Let me offer, Mr. Chairman, an appropriate analytical context within which to consider proposals in H.R. 1710 or indeed any other proposals. First and foremost, as Americans, we live in an open society undergirded by the rule of law.

In seeking to combat terrorism, we are defending that way of life. It is what we are fighting for. Therefore, in seeking to deal effectively with the problems of terrorism, domestic and international, we must be vigilant to preserve and maintain the openness of our society and the legality of our counterterrorism policies and practices. Our citizens must be clear and have confidence in that essential point. So also our security officials.

How then to deal with the immense variation in terrorist activity? How best to develop a sufficiently flexible response so that the serious threats can be investigated without impinging unduly on civil liberties? To these questions there are no simple answers, but I believe that the key concepts for this committee to have in mind as it assesses these provision and proposals are balance and proportion.

Not all terrorists are created equal. Not all terrorists' acts are equally threatening, yet some terrorism can strike at the very heart of an open society.

Government must, therefore, have at hand capabilities to deal with conspiracies of the most dreadful import where loss of time or investigative effectiveness risks catastrophe. At the same time, not all investigative powers need to be used in every case. Certain of the most intrusive techniques should be thought of and regulated within the Government as techniques of last resort.

In part, the judgment of balance and proportionality is a legislative one. Powers that can never be used in our society should never be legislated into existence. That is not to state the obvious, a justification for failing to provide society and its government with the ability to use powers in times of emergency or need. The investigative tool kept in reserve is nevertheless available for use when needed. To put it beyond use, even when needed, would be both unwise and immoral.

But the judgment on balance and proportionality is also a question for the executive branch, for the implementors of the policy, for the security officials. It is not at all common in Washington these days to be reassured by such a statement, and yet it must be the case.

Our Government, especially our law enforcement agencies and most especially the Department of Justice, are operated by men and women of great competence and dedication who work long hours, mostly without recognition to protect and defend our open society under the rule of law.

Until the contrary is demonstrated as to any individual, I strongly believe that a presumption of integrity and legality should be accorded our law enforcement community, and it is that presumption that must ultimately guide the Members of Congress in assessing the proposals in this bill.

That is not to say that mistakes will not be made. Of course, they will. That is the price we pay for living in the real world, but they will certainly be infrequent, and when they are made, they are more often than not failures of the system rather than examples of the system gone bad.

The overheated rhetoric about government conspiracies to deprive citizens of their rights is wrong. The notion of investigative agencies straining at the leash to break the law is wrong.

The fear that government officials when given great power will always, or sometimes, or ever abuse that power is mostly wrong. We must always be alert to that possibility. We cannot be immobilized by it.

And so the question to ask of any proposal in H.R. 1710 is whether on balance it is proportional to the danger it targets, flexible enough to be available when necessary and under appropriate safeguards and regulation, and what are the ways to ensure that these great powers are actually used only in appropriate cases?

Mr. Chairman, the rest of my statement then picks out several specific provisions of H.R. 1710 and offers support, in some cases, and suggestions for your consideration as improvements, in others.

For instance, with respect to section 102, the prohibition on the provision of support and resources to terrorist organizations, we offer for the consideration of the committee the exception for funding intended exclusively for religious, charitable, literary or educational purposes was contained in some earlier versions.

No doubt the problems of policing and enforcement inherent in any such licenses regime persuaded the drafters that it risks being essentially unworkable. Nevertheless, it may help in defending against constitutional attack. If you are inclined to go in that direction after consideration, we have in mind a number of technical changes to the versions incorporated in earlier statutes and we would be happy to work with the staff.

Sections 104 and 105 strike us as sensible efforts to make a coherent antiterrorist prosecutorial framework for use by prosecutors, and we put particular emphasis on subsection D of section 104, which provides the limit requiring the critical exercise of judgment as to balance and proportionality. And that is the provision that requires that no indictment or information may be sought unless certain findings are made.

It is my experience, Mr. Chairman, that the fixing of individual responsibility for certification, as in other similar situations, is an effective method of ensuring the integrity of the implementation of the statute's clear intention that section 104 is used only to prosecute terrorism. That is quintessentially the kind of judgment we

expect our highest Federal law enforcement officials to make, and the certification process and retrospective congressional oversight can combine to make certain that such judgments are carefully made.

In pausing at title III, we support the expansion of the authority of Federal law enforcement to investigate terrorism or engage in foreign counterintelligence investigations.

We think sensible section 301 is sensible. We think also quite sensible section 308, which expands the authority for temporary emergency wiretaps in connection with crimes of terrorism. The judgment as to proportion and balance is built into the statutory framework, which we applaud.

We also believe section 309, providing for expansion of authority for multipoint wiretaps, is appropriate and it more than adequately meets the fourth amendment requirements for specificity in the issuance and the process of issuing warrants.

We applaud, also, the broadening of access to information relating to foreign counterintelligence investigations. It seems paradoxical, if I can put it that way, to have criminal law enforcement have access to information that foreign counterintelligence investigations do not.

Finally, in connection with title VI, the immigration law improvements, we believe that section 601, which establishes the special removal procedures for alien terrorists is, first of all, clearly defensible and clearly constitutional. We think that the utilization of a special court similar to the kind used under the Foreign Intelligence Surveillance Act is entirely appropriate here where you are dealing with the most sensitive kind of information.

We believe that it is entirely appropriate as this version—as H.R. 1710 does, as others did not—to provide for special procedures for access to classified information and challenges to the use of such information by what I take to be a panel of special attorneys with security clearances retained precisely for such purposes.

I suggest that that general procedure, as my colleague to my left also did, I believe, that special procedure would be a useful addition to the other provisions. It provides for a sort of a guardian ad litem, if you will, pursuant to which perhaps a government lawyer separated from the hearing staff would be statutorily assigned the responsibility of assessing items of confidential information and helping the court to test their sufficiency and making appropriate arguments on behalf of the alien.

We also support sections 611, 12, and 13, and believe that those are entirely appropriate responses to the terrorism problem.

In short, Mr. Chairman, the Comprehensive Antiterrorism Act of 1995 is a measured step to provide the Federal Government, and in particular, the investigative and law enforcement agencies, with adequate tools to deal with the terrorist conduct. The provisions are not excessive. They particularly do not deserve the hysterical reaction of some critics that see in them the destruction of civil liberties.

The bill is, in section after section, designed in fact to protect civil liberties as a substantive matter. Internal departmental regulation and congressional oversight can ensure that our society is

served both by effective law enforcement and the protection of vital civil liberties.

Thank you, Mr. Chairman.

Mr. HYDE. I thank you very much.

[The prepared statement of Mr. Shenefield follows:]

PREPARED STATEMENT OF JOHN H. SHENEFIELD, CHAIRMAN, STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee, I am pleased to testify in connection with the Comprehensive Antiterrorism Act of 1995, H.R. 1710.

I serve as Chairman of the American Bar Association's Standing Committee on Law and National Security, which is composed of eleven senior lawyers with expertise and experience in dealing with the legal aspects of national security issues. The Standing Committee sees its role as educating America's lawyers on the importance of the rule of law in the national security arena This testimony, however, is not delivered on behalf of the American Bar Association and does not purport to represent its official policy or position. Nor can it represent in any official way the position of the Standing Committee. Instead the testimony does reflect a rough informal consensus of members of the Standing Committee, which has been analyzing several legal issues related to terrorism in recent years, and seeks to make available to the Congress some of the lessons distilled from that analysis.

In general, I support the Comprehensive Antiterrorism Act of 1995. I believe it strikes an appropriate balance between the prevention of terrorism and the efficient apprehension and conviction of terrorists, on the one hand, and the protection of civil liberties on the other. The bill undertakes to resolve some extremely vexing issues, and it does so in an admittedly aggress he way. I applaud the determination of the Executive Branch and the Congress to bring the full weight of federal law enforcement, within constitutional limitations, to bear on terrorism.

At the outset, let me suggest the appropriate analytical context within which to consider the proposals contained in H.R. 1710, or indeed any other proposals. First and foremost, as Americans we live in an open-society undergirded by the rule of law. In seeking to combat terrorism, we are defending that way of life—it is what we are fighting for.

Therefore, in seeking to deal effectively with the problems of terrorism, domestic and international, we must be vigilant to preserve and maintain the openness of our society and the legality of our counterterrorism policies and practices. Our citizens must be clear on this essential point; so also our security officials.

How then to deal with the immense variation in terrorist activity? How best to develop a sufficiently flexible response so that truly serious threats can be investigated without impinging unduly on civil liberties? To these questions, there are no simple answers.

The key concepts are balance and proportion. Not all terrorists are created equal. Not all terrorist acts are equally threatening. Yet some terrorism can strike at the very heart of an open society. Government must therefore have at hand capabilities to deal with conspiracies of the most dreadful import, where loss of time or investigative effectiveness risks catastrophe. At the same time, not all investigative powers need to be used in every case. Certain of the most intrusive techniques should be thought of, and regulated within the government, as techniques of last resort.

In part, the judgment of balance and proportionality is a legislative one. Powers that can never be used in our society should never be legislated into existence. That is not, to state the obvious, a justification for failing to provide society—and its government—with the ability to use powers in times of emergency or need. The investigative tool, kept in reserve, is nevertheless available for use when needed. To put it beyond use, even when needed, would be both unwise and immoral.

But the judgment on balance and proportionality is also a question for the Executive Branch, for the implementers of the policy, for the security officials. It is not common in Washington in these days to be reassured by such a statement, and yet it must be the case. Our government, and especially our law enforcement agencies, and most especially the Department of Justice, are operated by men and women of great competence and dedication who work long hours, mostly without recognition, to protect and defend our open society under the rule of law. Until the contrary is demonstrated as to any individual, I strongly believe that a presumption of integrity and legality should be accorded our law enforcement community. And it is that presumption that must ultimately guide the members of Congress in assessing the proposals in this bill.

That is not to say that mistakes will not be made. Of course they will—that is the price we pay for living in the real world. But they will certainly be infrequent, and when they are made, they are more often than not failures of the system rather than examples of the system gone bad.

The overheated rhetoric about government conspiracies to deprive citizens of their rights is wrong. The notion of investigative agencies straining at the leash to break the law is wrong. The fear that government officials, when given great power, will always or sometimes or ever abuse that power is mostly wrong. We must always be alert to that possibility; we cannot be immobilized by it.

And so, the question to ask of any proposal in H.R. 1710 is whether on balance it is proportional to the danger that it targets—flexible enough to be available when necessary, under appropriate safeguards and regulation. And what are the ways to ensure that these great powers are actually used only in the appropriate cases?

I. Substantive Criminal Law Enhancements (Title I)

The purpose of this title is to provide a surer and more comprehensive basis for the response of federal law enforcement to acts of international terrorism both within the United States and overseas. It establishes, really for the first time, a coherent statutory framework that would permit the federal government to attack complicity in acts of international terrorism across a broad front of jurisdictional rationales, regardless of the sit us of the terrorist acts or the nationality of the offender. It also enhances our ability to deal with extraterritorial terrorist acts.

Section 102 prohibits the provision of support and resources to terrorist organizations so designated by the President of the United States, pursuant to an amendment to the Immigration and Nationality Act found in proposed section 611. Unlike some earlier versions (e.g., H.R. 896), H.R. 1710 makes no exception for funding intended exclusively for religious, charitable, literary or educational purposes. No doubt the problems of policing and enforcement inherent in any such licensing regime persuaded the drafters that it was essentially unworkable. Nevertheless, the Committee might be well advised to consider whether inclusion of some such exception and regulation, which might bear some resemblance to that of the International Emergency Economic Powers Act, 50 U.S.C. 1701–06, together with certain legislative findings to undergird the reach of the prohibition, would improve the ability of the statute to withstand constitutional challenge without detracting from its effectiveness. If the Committee were so minded, we would suggest a number of technical changes to the versions incorporated in earlier statutes, and would be happy to work with the Committee's staff to produce the optimal statutory language. I am confident that any such provision will be upheld by the courts on national security grounds and as within the foreign affairs powers of the Executive Branch. See, e.g., *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

Section 104 creates a new violation of federal law, "Acts of Terrorism Transcending National Boundaries." It is important that the law contain the most complete exercise of federal jurisdiction possible in connection with terrorist acts within the United States, as well as establish stringent penalties. Subsection (b) contains a catalog of jurisdictional bases currently approved by federal courts.

Subsection (d) provides an important limitation on prosecution, and requires the critical exercise of judgment as to balance and proportionality. Under this provision, no indictment or information may be sought unless the Attorney General, or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions, has made a written certification that the offense, or any act of preparation or concealment, is terrorism as defined in proposed section 315. The fixing of individual responsibility for the certification, as is true in other statutory contexts, is an effective method of ensuring the integrity of the implementation of the statute's clear intention that section 104 is used only to prosecute terrorism This is quintessentially the kind of judgment we expect our highest federal law enforcement officials to make. The certification process and retrospective congressional oversight can combine to ensure that such judgments are carefully and correctly made.

Proposed section 105 ("Conspiracy to Harm People and Property Overseas") would substantially expand the very limited federal jurisdiction that now exists in section 956 of Title 18 to prosecute conspiracies carried out in part within the United States to commit terrorist acts overseas. Section 105 complements section 104, dealing with international terrorist acts within the United States, so that federal prosecutors have the flexibility and scope to investigate and prosecute those who conspire to commit, as well as those who actually commit, terrorist acts both within the United States and around the world. The technical amendments of 106–111 are wholly appropriate, as are the increased penalties provided for in Title II.

II. Investigative Tools (Title III)

Title III contains a number of enhancements to the capability of federal law enforcement to investigate terrorism or engage in foreign counterintelligence investigations. Each of these provisions seems a sensible but limited expansion of current authority. Each also employs an implicit balance between the government's investigative needs and the individual's right of privacy. Running throughout is the requirement that responsible officials exercise the critical judgment as to balance and proportionality.

Section 301 expands the federal authority to seek court-ordered electronic surveillance in connection with terrorism-related offenses. This section engages not just the panoply of internal Justice Department regulation, but also requires a 15-day report to the appropriate federal judge. Wiretaps should of course be available in connection with the most serious crimes, and there can be little doubt that those added to 18 U.S.C. §2516, which would include protection of U.S. officers and employees, murder of foreign officials, presidential assassination, terrorist acts abroad and within the United States, fall within that category. It is hardly persuasive to argue that existing authority is used infrequently; indeed, that should be a basis of reassurance that electronic surveillance is an investigative technique to be used as a last resort.

Section 308 sensibly expands the authority for temporary emergency wiretaps in connection with crimes of terrorism. Objection to this provision has been raised on the ground that existing law, permitting emergency wiretaps where the emergency involves immediate danger of death or serious physical injury to any person, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime, already provides sufficient legal basis. But international and domestic terrorism can take unforeseen forms with unpredictable consequences, and may not easily fit existing legal categories. The provision assumes that the Attorney General has made a reasonable determination that an intercept must be made before an order can be obtained in the ordinary course, even with due diligence. This provision, giving federal law enforcement flexibility in exigent circumstances, seems particularly wise.

Section 309 provides for expanded authority for multi-point, or roving, wiretaps. Under current law, roving wiretaps are permissible only upon a showing that the subject's use of different telephones is intended to thwart law enforcement investigations. The new provision removes that inefficient requirement, and substitutes instead the more practical requirement that senior law enforcement officials and the judge to whom the application is made find that specification of the telephone to be tapped is impractical the same standard that exists in current law for multi-point listening devices.

The fourth amendment requires that in its request for a search warrant the government particularly describe the premises to be searched. In the case of wiretaps, traditionally the fourth amendment's particularity provision has been construed to require the government to specify the location of the telephone to be tapped, unless the special finding of an attempt to evade can be made.

In theory, removal of the special finding for oral communications has the potential for giving inadequate emphasis to the constitutional particularity requirement, which is designed to avoid the surreptitious interception of the telephone calls of wholly innocent people. As a matter of practice, constant physical surveillance guarantees that the subject of the investigation—and no one else—is actually using the telephone to be tapped. As a practical matter, therefore, the provision is constitutionally sound. Nevertheless, to avoid any doubt and to align the statutory provision more completely with actual practice, we suggest the insertion of a standard requiring a very high degree of probability that the subject is at the time using the telephone to be tapped. As part of the legislative history, we would suggest that the current practice of confirmation be cited as an example of adequate probability.

Title III also includes a variety of provisions relating to foreign counterintelligence investigations. There seems to be little reason why tools such as pen register and trap and trace devices available to criminal law enforcement should not be equally available to foreign counterintelligence investigations. In addition, access to certain consumer information, under proper safeguards, should be eased. Section 303 and section 304 relating to common carriers, public accommodation facilities, vehicle rental facilities and the like seem to be sensible and constructive expansions of foreign counterintelligence authority.

Much has been made of section 312's provision for military assistance with respect to offenses involving weapons of mass destruction. The controversy is largely baseless, inasmuch as the assistance provided is of a purely technical and logistical nature in circumstances where the absence of such assistance could be catastrophic.

To wall off technical expertise possessed by one arm of the United States government from its employment in a law enforcement context by another branch of the United States government seems perverse, particularly where the results of such compartmentalization could be so dire.

III. IMMIGRATION LAW IMPROVEMENTS (TITLE VI)

Title VI creates procedures for dealing with alien terrorists under the immigration laws.

Section 601 establishes special removal procedures for alien terrorists. The provision is an eminently sensible effort to deal with the problem of the need of the federal government both to avail itself of sensitive classified information in connection with alien terrorist removal procedures and to avoid disclosing such information where that would pose a risk to the national security of the United States. The proposal utilizes a special court similar to that recognized in the Foreign Intelligence Surveillance Act context, and entrusts a specially appointed federal district judge with the authority to police the process and make the ultimate decision as to removal. Section 601 likewise provides for representation by counsel who may introduce evidence, examine witnesses, and procure the attendance at the hearing of witnesses or the production of documents.

Classified information can be used, either in connection with the application for the special removal hearing or in connection with the substantive removal decision itself Section 601 in these circumstances establishes special procedures to be employed to safeguard especially sensitive classified information. Such information is to be presented to the court *ex parte and in camera.* In connection with the actual hearing, written summaries of such classified information that do not pose a risk to national security are to be made. If no such summary is possible without revealing enough to cause serious and irreparable harm to the national security or death or serious bodily injury to any person, the judge can permit the special removal hearing to continue and can consider the classified information in camera and ex parte even though it is not supplied to the alien.

H.R. 1710 improves on earlier versions in cases involving lawful permanent aliens with a provision in section 506(c) establishing special procedures for access to classified information and challenges to the use of such information by special attorneys with security clearances retained precisely for such purposes. I suggest that a useful addition to the procedure for removal proceedings in other cases would be to establish a similar *guardian ad litem feature,* pursuant to which a government lawyer, separated from the hearing staff, would be statutorily assigned the responsibility of assessing the items of confidential information, helping the court to test their sufficiency, and making appropriate arguments on behalf of the alien.

Sections 611, 612 and 613 that provide for special treatment of alien terrorists are also commendable. In general, the law should protect the United States from having to open its borders to those who are members of terrorist organizations that threaten the national security of the United States.

The Comprehensive Antiterrorism Act of 1995 is a measured step to provide the federal government, and in particular the investigative and law enforcement agencies, with adequate tools to deal with terrorist conduct. The provisions are not excessive; they particularly do not deserve the hysterical reaction of some critics that see in them the destruction of civil liberties. In fact, the bill is carefully designed to protect civil liberties as a substantive matter. Internal departmental regulation and congressional oversight can ensure that our society is served by effective law enforcement and by the protection of vital civil liberties.

Mr. HYDE. Dr. al-Habri.

STATEMENT OF AZIZAH Y. AL-HIBRI, J.D., PH.D., NATIONAL ADVISORY BOARD, AMERICAN MUSLIM COUNCIL

Ms. AL-HIBRI. Thank you, Mr. Chairman and members of the House Judiciary Committee for allowing me to speak on the Comprehensive Antiterrorism Act of 1995. I am, too, summarizing my statement and would like it printed in the record in full.

Mr. HYDE. Without objection, so ordered.

Ms. AL-HIBRI. I speak on behalf of the American Muslim Council.

I would like to note that this testimony is of historical significance to the American-Muslim community. It represents the first

time ever that Muslims, qua Muslims, have been invited to present their views in this House on matters that are of concern to them. It is however quite surprising that it took American Muslims this long to be invited since they have been present in America at least since the 16th century.

On behalf of millions of American Muslims, I would like to join our fellow Americans in expressing support for measures that would protect this country and its citizens from the threat of terrorism and all other forms of violence. We also join other fellow Americans in demanding that these measures be reasonable, appropriate, and not overly broad in order not to run afoul of the fundamental constitutional guarantees that have made this country so great.

The specter of terrorism and violence in their myriad forms and sources haunts all of us. Anyone could become its unwanting victim, unfortunately. However, we American Muslims know this fact only too well. In the emotionally charged days that followed the Oklahoma bombing, Muslim-Americans all over the country suffered doubly and intensely.

Like their compatriots, they agonized over the senseless death of the Oklahoma victims, but unlike their compatriots, they were denied the opportunity to mourn in dignity.

Instead, they were immediately viewed as suspect and subjected to both official and unofficial acts of harassment, intimidation and discrimination. These acts included detention and interrogation of Muslims by law enforcement officials, by media broadcasts of opinions, by so-called experts, which conflated the latter's political views with a negative stereotype of Islam, also individual scorn and mob reprisal attacks. One such mob stoned a Muslim house. As a result, baby Salam carried by his mother almost to full term, died. He is thus another innocent victim of the Oklahoma bombing.

For a full 60 hours, our community was denied its most basic constitutional right by being presumed and even declared by some guilty collectively until proven innocent. Some Muslims were afraid to go to work. Even young children feared going to school because of unrelenting attacks accusations and other expressions of hostility by their classmates. These children too are secondary victims of the Oklahoma bombing.

This is truly unfortunate in a country which prides itself on its religious tolerance. Islam, after all, is a world religion with over a billion followers. It is a religion that has inspired some of the world's greatest civilizations that actually contributed to our American civilization today. It is also one of the three Abrahamic religions, Christianity, Islam, and Judaism.

In particular, Islam is a religion which says that the killing of a single innocent person is tantamount to the killing of all of humanity. It is a religion which recognizes not only human rights but animal rights and environmental concerns 1,400 years before these issues became fashionable.

It is, therefore, with great sorrow that Muslims witnessed the daily misrepresentation of their religion, the silencing of their voices, and the erosion of their civil rights. We are finally speaking out because we think it patently unfair to brand a whole religion by the actions of a few, just as it is patently unfair to judge Chris-

tianity by the Inquisition, Judaism by Jewish extremist groups or the worth of a person by the color of the skin.

We Muslims, Christians, and Jews in these United States stand for the proposition that the era of religious strife is a bygone era and that our day is the day of interfaith dialog based on mutual respect, equality and justice. Let not those who live in the past succeed in destroying our promising American vision.

H.R. 1710, the antiterrorism bill has been proposed against this backdrop of prejudice and hostility we described. This fact concerns us because it can affect the final form and use of the bill. Yet, while there are many problematic provisions in the bill, given its accelerated status, we have no choice but to focus your attention on two sections that raise constitutional issues.

Under this bill, the INS is permitted to use undisclosed secret evidence in special court proceedings to deport aliens who are merely accused of engaging in or supporting terrorist activities. The secret evidence can only be reviewed by court-appointed attorney who would represent the accused with respect to the secret evidence.

The problem is that the accused has no input in choosing this attorney nor can the attorney disclose the evidence to either the accused or her counsel. This makes a proper defense extremely unlikely. Thus, the procedure denies an alien her right to due process, one of the most basic and cherished American legal rights.

Additionally, the bill provides that if an alien is deemed a risk to national security, or if she is regarded as one who would seriously harm another, then no summary would be provided. While the contemplated threat in this case is significant, it must still be balanced against the right of the accused for an effective defense.

For in this country, we have the presumption of innocence deeply ingrained in our legal system. In our rush to protect ourselves from terrorism, let us not trample on our principles.

As Benjamin Franklin said: "They that give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

We urge that if classified information is involved, then the alien be always provided with at least an adequate summary of the evidence, regardless of the nature of the charges. This way she could have some possibility of an effective defense.

Title VII addresses fundraising. Its provisions are troublesome because they permit political factors to be injected in decisions involving the constitutional rights of American citizen. It gives the President the ability, subject to congressional review, to designate certain groups as terrorist.

We have already seen how much the attitude toward various political groups around the world can be influenced by the political views of the American administration that is in office at the time. Several groups have already been elevated from a pariah status simply because the present administration changed its position on certain policy matters or reached a political understanding with these groups.

This is to some extent quite legitimate. But we do need to keep in mind that the President and Congress are more susceptible to political pressure by special interest groups than, for example, are

courts. Perhaps, we should therefore depoliticize this matter by placing the power to designate with the judiciary or at least giving the judiciary power to review such presidential designation.

Otherwise, the procedure for designation as it presently stands invites serious abuse of power and could result in restriction of legitimate fundraising for humanitarian purposes.

For example, many Muslim Good Samaritans and many Muslim groups and charitable organizations in the United States, like their Christian and Jewish counterparts, donate funds to help those who are less fortunate or who have been ravaged by war and/or hunger. These include, for example, wounded civilians or orphaned children in Bosnia, Afghanistan, Kashmir, or Somalia. These areas have been engulfed in conflict and turmoil recently, but while their political picture changes almost daily, the suffering of their innocent remains constant.

Under this fundraising provision, the Good Samaritans and charitable organizations are criminally prosecutable if the President decides to designate the hospital receiving their donations as a terrorist-affiliated hospital. The designation may be based on the tenuous belief that the hospital treats a large number of individuals who are members of a politically disfavored group and on an even more tenuous conclusion that the hospital therefore engages in activity that threatens the national security of the United States.

Nevertheless, the bill doesn't provide a politically neutral mechanism to contest this designation. As a result, the poor, the elderly, the sick and the hungry all go without further assistance and the humanitarian Americans face criminal charges.

Our concern is that this section of the bill will be used and will be effective not in preventing terrorism but in preventing fundraising for political viewpoints that are unpopular. This is antithetical to our American democratic values and our American system of justice. Again, let not our fear smother our humanitarian principles for, "What does a man benefit if he gains the whole world and loses his own soul?"

We urge you therefore to eliminate this very controversial provision from the bill altogether. It violates the first amendment right of association. Indeed, we believe that a court of law is likely to find such a provision unconstitutional.

Thank you.

Mr. HYDE. Thank you very much, Dr. al-Hibri.

[The prepared statement of Ms. al-Hibri follows:]

PREPARED STATEMENT OF AZIZAH Y. AL-HIBRI, J.D., PH.D., NATIONAL ADVISORY BOARD, AMERICAN MUSLIM COUNCIL

Thank you, Mr. Chairman, and Members of the House Judiciary Committee for allowing me to speak on the "Comprehensive Antiterrorism Act of 1995." I speak on behalf of the American Muslim Council. I would like to note that this testimony is of historical significance to the American Muslim community. It represents that first time ever that Muslims, qua Muslims, have been invited, since they have been present in America at least since the 16th century.

Speaking of behalf of no less than six million American Muslims, I would like to join our fellow Americans in expressing support for measures that would protect this country and its citizens from the threat of terrorism and all other forms of violence. We also join other fellow Americans in demanding that these measures be reasonable, appropriate and not over-board, in order not to run afoul of the fundamental constitutional guarantees that have made this country so great.

The specter of terrorism and violence in their myriad forms and sources haunts all of us. Any one could become its unwitting victim. Unfortunately, however, we American Muslims know this fact only too well. In the emotionally charged days that followed the Oklahoma bombing, Muslim Americans all over the country suffered doubly and intensely. Like their compatriots, they agonized over the senseless death of the Oklahoma victims, but unlike their compatriots, they were denied the opportunity to mourn in dignity.

Instead, they were immediately viewed as suspect. They were subjected to both official and unofficial acts of harassment, intimidation and discrimination. These acts included detention and interrogation of Muslims by law enforcement officials, media broadcasts of opinions by so-called "experts" which conflated the latter's political views with a negative stereotype of Islam, individual scorn and even mob reprisal attacks. One such mob stoned a Muslim house. As a result, baby "Salam," carried by his mother almost to full term, died. He is thus another innocent victim of the Oklahoma bombing.

For a full 60 hours, our community was denied its most basic constitutional rights by being presumed, and even declared by some, guilty collectively until proven innocent. Some Muslims were afraid to go to work. Even young children feared going to school because of unrelenting attacks, accusations and other expressions of hostility by their classmates. These children too are secondary victims of the Oklahoma bombing.

This is truly unfortunate in a country which prides itself on its religious tolerance. Islam after all is a world religion with over a billion followers. Islam has inspired some of the world's greatest civilizations that actually contributed, directly or indirectly, to our American civilization today. It is also one of the three Abrahamic religions: Christianity, Islam and Judaism. In particular, Islam is a religion which says that the killing of a single innocent person is tantamount to the killing of all of humanity. It is a religion which recognized not only human rights but animal rights and environmental concerns fourteen hundred years before these matters became fashionable.

It is therefore with great sorrow that Muslims witness the daily misrepresentation of their religion, the silencing of their voices and the erosion of their civil rights. We are finally speaking out because we think it patently unfair to brand a whole religion by the actions of a few, just as it is patently unfair to judge Christianity by the Inquisition, Judaism by Jewish extremist groups, or the worth of a person by the color of the skin. We, Muslims, Christians and Jews in these United States stand for the proposition that the era of religious strife is a bygone era and that our day is the day of interfaith dialogue based on mutual respect, equality and justice. let not those who live in the past succeed in destroying our promising American vision.

H.R. 1710, the antiterrorism bill, has been proposed against the backdrop of prejudice and hostility we described. This fact concerns us because it can infect the final form and use of the bill. Yet while there are many problematic provisions in the bill, given its accelerated status, we have no choice but to focus your attention on only two sections. These sections involve the use of secret evidence in alien removal proceedings and the imposition of fundraising limitations. Each provision presents serious constitutional concerns.

The Use of Secret Evidence in Alien Removal Proceedings

Under this bill, the Immigration and Naturalization Service ("INS") would be permitted to use undisclosed secret evidence to deport aliens who are *merely accused* of engaging in or supporting terrorist activities. The INS would create a special court and permit the government to introduce secret evidence to the court proceedings. The bill allows for the creation of a panel of attorneys with security clearances to review *in camera* evidence and challenge its validity on behalf of the accused. The problem, however, is that these attorneys cannot be chosen by the accused, nor can they disclose to her or her counsel the evidence they have reviewed. We find it extremely unlikely that a proper defense can be prepared when an attorney cannot release to her client the evidence against her. This procedure simply denies an alien her right to due process, one of the most basic and highly cherished American legal rights.

Additionally, the bill provides that if an alien is deemed a risk to national security or if she is regarded as one who would harm another person, then no summary would be provided. While the contemplated threat in this case is significant, it must still be balanced against the right of the accused for an effective defense; for in this country we have the presumption of innocence deeply ingrained in our legal system.

In our rush to protect ourselves from terrorism, let us not trample on our principles. As Benjamin Franklin said, "They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." We urge that if classified information is involved, then the alien be always provided with at least an adequate summary of the evidence, regardless of the nature of the charges. This way, she could have some possibility of an effective defense.

FUNDRAISING

This provision is troublesome because it permits political factors to be injected in decisions involving the constitutional rights of American citizens. It gives the President the ability to designate, with no effective recourse, certain groups as terrorist. We have already seen how much the attitude towards various political groups around the world can be influenced by the political views of the American Administration that is in office at the time. Several groups have already been elevated from a pariah status, simply because the present American Administration changed its position on certain policy matters or reached a political understanding with these groups. This is to some extent quite legitimate; but we do need to keep in mind that the President is more susceptible to political pressure by special-interest groups than, for example, the courts. Perhaps we should therefore de-politicize this matter by placing the power to designate with the judiciary or at least giving the judiciary power to review the fairness of such presidential designation. Otherwise, the procedure for designation as it presently stands is so flawed that it invites serious abuse of power. This could lead in turn to a restriction on legitimate fundraising for humanitarian purposes.

For example many Muslim Good Samaritans and many Muslim charitable organizations in the United States (like their Christian and Jewish counterparts) donate funds to help those who are less fortunate or who have been ravaged by war and/or hunger. These include, for example, wounded civilians or orphaned children in Bosnia, Kashmir, Afghanistan and Somalia. These areas have been engulfed in conflict and turmoil recently, but while their political picture changes almost daily, the suffering of their innocent remains constant. Under this fundraising provision, the Good Samaritans and charitable organizations are criminally prosecutable if the President decides to designate a hospital receiving their donations as a terrorist affiliated hospital. The designation may be based on a tenuous belief that the hospital treats a large number of individuals who are members of a politically disfavored group and on an even more tenuous conclusion that the hospital therefore engages in activity that threatens the national security of the United States. Nevertheless, the bill does not provide an adequate mechanism to contest this designation. As a result, the poor, elderly, the sick and hungry, all go without further assistance, and the Good Samaritan or charitable organization face criminal charges!

Our concern is that this section of the bill will be used and will be effective not in preventing terrorism—but in preventing fundraising for political viewpoints that are unpopular. This is antithetical to our American democratic values and our American system of justice.

We do not believe that a box of Band-Aids, penicillin, prescription drugs or medical equipment can be equated with aiding and abetting terrorism. We have heard the argument over and over again from the Administration and the State Department that money is fungible. We agree. However, in the absence of convincing proof that the funds are being used to support terrorism, lawful humanitarian activities should not be criminalized. Again, let not our fear smother our humanitarian principles. For, what is a man profited if he gains the whole world and loses his own soul?

We urge you therefore to eliminate this very controversial provision from the bill altogether. It violates the First Amendment right of association. Indeed, we believe that a court of law is likely to find such a provision unconstitutional.

Thank you.

Mr. HYDE. Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I feel so badly about the bill, and so uninspired by most of the testimony, that I would like to ask permission to delay any questions.

Mr. HYDE. Well, certainly, Mr. Conyers.

Mr. Frank.

Well, all right.

Mr. Schumer, the distinguished gentleman from New York.

Mr. SCHUMER. Well, thank you, Mr. Chairman.

And first, I am sorry I was not here yesterday for these hearings. As you know, I spoke to you on the phone. I had scheduled to speak at a graduation knowing that there were no votes.

Mr. HYDE. I hope you got your diploma.

Mr. SCHUMER. Many diplomas were given out, none to me, but very successfully.

I would make two points. One about the morning's hearings which focused on the issue of taggants. I must say I found the proposal in the bill pitifully weak, much weaker than the Senate bill. And I intend tomorrow to introduce an amendment that would strengthen things dramatically in terms of requiring taggants on all explosives, including black powder.

Mr. HYDE. Would the gentleman yield?

Mr. SCHUMER. Yes. Happy to yield.

Mr. HYDE. I know the gentleman has long been interested in this subject. The testimony this morning was from four, I believe experts——

Mr. SCHUMER. I am aware.

Mr. HYDE. And taggants are not much of a home run according to the state of the art. What we are trying to do is have a commission, a study committee set up by the Attorney General.

Mr. SCHUMER. I know.

Mr. HYDE. To focus. So I think your amendment might be premature. But I thought I would——

Mr. SCHUMER. I think I am aware of what is in the bill, and I don't intend to get into a debate here on taggants. I wanted the committee members to know that I intend to introduce the amendment, which would go further, as I say, than the bill that passed the Senate because it would include black powder.

But just like the bill in the Senate, it would say that if they find it is worthwhile, they could implement it without coming back to us, which I think is important.

As well, I would ask that they do the same thing for explosive materials such as the ammonium nitrate fertilizers.

Mr. HYDE. Additives as well as taggants?

Mr. SCHUMER. Right.

Now, I have a question on the subject matter here. Which is, I guess, I would like to ask Mr. Shenefield first.

As was mentioned, as you know, I have been basically a supporter of this type of legislation and introduced the previous bill that the President had which was somewhat narrower than this one. But one of the concerns I had even in that bill was the designation of terrorist organizations.

My worry was, and still is, that you could get politics involved in this. That, for instance, one administration might declare—might have declared the Contras a fine organization, which would come here and raise money, and a second organization—and the same administration would say the Sandinistas are a terrorist organization. And then a different administration might do it the other way around.

I am not saying that either the left or right would have any—they would have mirror biases, but not that one was more biased than the other.

So, what I intend to do tomorrow is introduce an amendment to this bill that would require some kind of judicial review and allow judicial review in terms of what is a terrorist organization.

I don't think there would be much dispute about that. And, in fact at one point, the administration said that is what they intended in their legislation, although it is not explicit there.

I would be interested in knowing, Mr. Shenefield, particularly, because I can imagine that Mr. Jahshan and Dr. al-Hibri would be for that amendment and their organizations have spoken to it. I would also be interested in Ms. Lansner's view of that.

Mr. SHENEFIELD. Mr. Schumer, let me suggest that it would be difficult to make a finding of the kind that you suggest, it seems to me, based on the language now in the bill.

Mr. SCHUMER. Correct.

Mr. SHENEFIELD. What makes it difficult is the requirement that those organizations engage in activity, quote, "that threatens the national security of the United States."

So, it seems to me, though politics might be that powerful, it would seem to me awkward.

Second, this provision, this bill——

Mr. SCHUMER. Are you saying that this language is too broad or——

Mr. SHENEFIELD. No, I am saying that this standard is quite high. It is quite high.

Mr. SCHUMER. Why that would then make court review difficult?

Mr. SHENEFIELD. I was coming to court review third.

Second, this bill, H.R. 1710, provides as the others did not, I believe, for participation by the Congress in the process. So that if, from the point of view of the Congress, the President's specific finding is inappropriate, it can change it.

Third, I am very leery, just as a philosophical matter, of getting judges into the business of determining whether they agree or don't agree with the foreign affairs or national security judgment of the executive branch. One can do it. It is not what they are well suited for. They don't much care for it. And the question is what sorts of standards and what sorts of information would you have?

And so I would advise going slow on that.

Mr. SCHUMER. Right.

Let me just ask you, Mr. Shenefield, and then I will ask Ms. Lansner, if you are worried about the politicalization of this designation, which I consider to be a very serious designation. I completely disagree with Mr. Jahshan.

If a group is involved in terrorist activities and they are also raising money for nonterrorist purposes, I would prohibit them from raising any money here. Let someone else do it who is not engaging in terrorist activities. They don't come before the, quote, "court of America" with any kind of clean hands. So if you are involved in terrorist activities, you don't get the benefit of the doubt.

And so I have no problem with the mainstay of the provision. My worry is the manipulation for political purposes of what is a terrorist group, and, for instance, I don't have much doubt that an organization like Hamas or Hezbollah is a terrorist organization. They profess it and take claims for blowing up people, innocent civilians and all of that.

My concern is that in certain instances it could be politicized that what one group does is not true of what another group does, or is true of what another group does. And because of the biases of the particular administration, it is not equal.

And Congress would not be—we would be as subject to the same political vicissitudes as a popularly elected President, where the courts, an article III judge, would be somewhat insulated from that. So I don't consider the Congress to be a safeguard for that.

Mr. HYDE. Will the gentleman yield again?

Mr. SCHUMER. I would be happy to yield.

Mr. HYDE. There is a doctrine called the "political question" and the courts run away from deciding political questions. This seems ideally suited for just that disposition. This is a political question.

Where the President makes a designation, if that is off the wall, if that is wrong, Congress, under this bill, has the authority to overturn the President's decision by a resolution or taking some action. So, we 435, plus the other 100, have the last word.

Mr. SCHUMER. Although, if the President vetoed it, it would take two-thirds.

Mr. HYDE. Well, sure, but if you get into that kind of a tennis game—I just don't see that happening. You have to come to some kind of closure. If you go into court, you are talking years, you are talking appeals.

Mr. FRANK. Will the gentleman yield?

Mr. HYDE. Certainly. The gentleman has the time.

Mr. SCHUMER. I will yield.

Mr. FRANK. I appreciate the point.

I think the two-thirds makes it, in fact, beyond congressional practical change, because it says by law, which is all it could do under the legislative veto decision.

But the point is it may take years, but there is nothing automatic about a stay here. The President's designation would be in effect. The burden of changing it would be on the appellant. So that while it might take years, it would presumably take years while it was in effect.

And you might even want to address that. You might make injunction a harder standard. But we are not talking about suspending the designation until the courts have decided it, but giving the courts some chance to appeal the designation, which presumably, in most cases, it would stay in effect.

Mr. SCHUMER. Reclaiming my time, that is exactly what I intend.

Mr. HYDE. How do you overcome the political question problem?

Mr. SCHUMER. I think, again, and I would have to go back to my law books on this, I think when Congress explicitly designates something to an article III judge, the political question doctrine is not a problem. It is the question of when the courts are mixing in things that probably was not their purview.

Mr. FRANK. Will the gentleman yield?

Mr. SCHUMER. Yes, happy to yield.

Mr. FRANK. When Mr. Shenefield and I were teaching constitutional law together 32 years ago, I would have tried to go first, but I saw him nodding and he has had much more legal practice than I since then, so I defer to him.

Mr. SCHUMER. Do you agree with that?

Mr. SHENEFIELD. I agree if there is a specific legislative provision, I think the political question doctrine is not a problem.

Mr. SCHUMER. But it was a good try by the chairman, wouldn't you say?

Mr. SHENEFIELD. I still believe this is not the kind of question that courts are well suited for and I doubt that they add that much to this kind of determination.

Mr. GOODLATTE. Will the gentleman yield?

Mr. SCHUMER. I would be happy to yield.

Mr. GOODLATTE. Would you not agree that the reason that the doctrine has arisen is for good purpose to keep the courts out of what would be political questions. This is analogous to situation of the President and the Congress being involved in our diplomatic relations for the country.

Mr. SCHUMER. Well, reclaiming my time, I think the doctrine as I recall it—and admittedly my memory of it is a bit rusty—was to prevent the courts from overreaching; from reaching into areas where, you know, political—it wasn't that they should not have politics involved in any decision that they make, because we know it happens all the time. Look at the decision yesterday. If you would have told me it was a 5 to 4 decision, I could have guessed without knowing which judges were the 5 and which judges were the 4. That is not the issue.

Mr. FRANK. Will the gentleman yield?

Mr. SCHUMER. I will be happy to yield as soon as I finish my point.

The issue is that the courts can sometimes tend to overreach and take the purview of this—of what should be a political decision from another branch. And in this case since we designate to them it would not be overreaching.

Mr. FRANK. I thank the gentleman.

My view is that the political question doctrine has existed to let the courts do what they want to do and give them an excuse of staying out of what they want to stay out of. And I think its history has been somewhat indistinguished.

Witness the fact that the major example of the political question we used to hear 30 years ago was redistricting. And the biggest political question was redistricting and that was overturned in 1964 and I think most Americans are very glad that the political question doctrine was substantially diminished by the redistricting decision.

Mr. HYDE. Will the gentleman yield?

Mr. SCHUMER. Be happy to yield.

Mr. HYDE. The War Powers Act was as recent and the courts have never wanted to get near that. It is a political problem. You are going to assign to the Federal courts foreign policy responsibility.

Now, the President has it. Congress has it. You are going to give it to the courts now. And what standards are they going to apply? Are they going to have the FBI in camera testify as to wiretaps and as to——

Mr. FRANK. They do that in this bill and a number of other places. Why not in this one?

Mr. SCHUMER. Wiretaps, Mr. Chairman, I realize it is not as political an issue, but wiretaps—article III reviewers worked very well. Both plaintiffs and the Government and the defendants think it has been a pretty good system.

Anyway, could I just—I know we have discussed this.

Mr. HYDE. Your time has expired, but finish.

Mr. SCHUMER. I would simply like to know Ms. Lansner's view.

Ms. LANSNER. Thank you. I will be brief. I am sensitive to the political question raised. We certainly are gratified to see that there is a review procedure, but, in fact, we would prefer seeing a judicial review procedure.

And maybe one compromise which would be acceptable is a judicial review procedure that is not a de novo procedure, but one that is patterned after the APA where the standard of review provides assurances against designations that are arbitrary or contrary to constitutional right or lacking substantial support. That may provide the type of compromise that would be helpful.

Mr. SCHUMER. Reclaiming my time. That is exactly the type of amendment we intend to introduce. It would not be de novo. There would have to be an arbitrary and capricious——

Mr. HYDE. Mr. Shenefield, what is your opinion of that suggestion?

Mr. SHENEFIELD. I would oppose that. I think it is unwise to have judges and courts involved in what are essentially foreign affairs and national security decisions. They have reluctance to get into it. Time and time again they say we do not have the basis for making judgments on this. They give great deference to the President on these issues and I don't think there is much of a role for them.

Mr. SCHUMER. This is not simply a foreign affairs decision. This is not a decision on whether we simply recognize a foreign power or even send troops to use the chairman's example. This has first amendment implications. This has implications on freedom of association. This has other implications.

Now, there is a foreign affairs dimension to it, no question. And I, for one, as you know, feel pretty strongly that we need better tools to deal with terrorism, domestic and international. But I don't see how this kind of review, just looking at it practically as opposed to doctrinally, gets in the way of doing those kinds of things.

But, again, my comment is this is not exclusively—again the political doctrine is, but this is not exclusively a decision relating to foreign affairs. It has domestic Bill of Rights implications.

Mr. SHENEFIELD. But the crucial question that the President has to decide is whether the organization engages in or has engaged in terrorist activity that threatens the national security of the United States. That seems to me quintessentially a national security judgment.

Mr. SCHUMER. But if that were just affecting things beyond the borders of the United States and did not affect the rights of citizens or others in this country to exercise rights, I would agree with you. But it has other implications, number one. And number two, even that type of standard, when it has such other implications, shouldn't be used arbitrarily or capriciously.

Mr. SHENEFIELD. I would refer you to the *Dames* and *Moore* case.

Mr. SCHUMER. I just read it last night.

Mr. SHENEFIELD. We all do. In which attachments in the wake of the Iranian hostage exercise were nullified and funds ordered transferred from United States banks to the Iranian Government based on International Economic Emergency Powers Act, if that is the right term, where the court specifically said we simply cannot get into this. This is not the kind of thing that, as judges, we prefer to engage in, notwithstanding the fact that enormous numbers of people were affected and hundreds and hundreds of millions of dollars removed out of this country. So the implications are maybe less significant than——

Mr. SCHUMER. I have two questions on that. One, was there a statutory grant?

Was there some kind of statutory grant of powers in that case?

Mr. SHENEFIELD. Yes, there was.

Mr. SCHUMER. There was. To the courts?

Mr. SHENEFIELD. No, to the President.

Mr. SCHUMER. That is I think one difference that makes a difference as the law professors say.

And secondly, did that decision affect—I mean the intent of that decision was affecting noncitizens, not exercising any rights here in the United States. It is about people who lived overseas, were overseas and had money here; isn't that right?

Mr. SHENEFIELD. It has effects on American citizens and non-Americans and had effects of many different kinds.

Mr. SCHUMER. To be continued, Mr. Chairman. But I thank you for the indulgence of the extra time.

Mr. HYDE. The gentleman is welcome.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I know that we will have the opportunity to continue that debate tomorrow, but let me say I think the idea of having the elected representative of the people of the country, the President, trumped by a nonelected judge in a matter which is clearly and predominantly the foreign policy, that obviously there may be other implications to it, but it is primarily our Nation's relation to groups primarily outside of this country and primarily noncitizens, would be a dramatic step in a different direction, and I certainly would not support it.

Mr. Jahshan, you had indicated earlier that you felt that there was a problem with our deporting or excluding somebody suspected of being engaged in terrorist activities or intended to be engaged in terrorist activities and asked the question, why it is we would not prosecute them as opposed to deport them.

What do you do in a case where we have the suspicions but we don't have the proof sufficient to prosecute? Are you saying that we should ignore that potential threat?

Somebody is known to have been engaged in activities in the past or belongs to an organization that has been engaged in those activities or has done something else which would give an indication that they might engage in those activities, but we have no proof that they are either conspiring presently or have engaged or intend to engage. Are you saying that under those circumstances we should make no effort to exclude them?

Mr. JAHSHAN. The answer to your question is twofold. No. 1, my understanding of the current situation is that, if the authorities in this country are suspicious of a person's involvement or possible involvement in terrorist activities, there are enough legal venues to pursue a case against that person. The problem we have is the politicization of this issue.

Mr. GOODLATTE. But it is political. The political decision of who is a citizen of the United States and who is not is one that is clear-cut. But as soon as you get beyond that, you are making political decisions. We make political decisions all the time about who will be allowed to come to this country for temporary or permanent reasons or not. Those are political decisions.

Mr. JAHSHAN. And the other aspect of that question is due process. This is an institutionalized legal practice that distinguishes our system from others. And to get rid of it in cases of this sort I think is very unwise.

There is due process, and if we suspect someone in terms of actually participating or planning to participate in illegal acts, we have to give that person due process. And if we can't do that, maybe, yes, the answer to your question is we have to pursue the evidence and then go after that person.

Mr. GOODLATTE. So it is your position that we are obligated to provide the same due process requirements for people over which we have very little control, certainly no control when they are outside of this country. But when they are in this country, we have to give them that same due process right that a U.S. citizen has?

Mr. JAHSHAN. I don't know what you mean by people we have very little control over.

Mr. GOODLATTE. People who are citizens of another country and are primarily living in another country we have no control over them.

Mr. JAHSHAN. I do not think so. People who do not happen to be physically here and are not involved in things in this country and are not a threat to our national interest, I don't see why we have to be concerned about their activities or their legal status. They are not here or under our jurisdiction.

Mr. GOODLATTE. I understand that. But I don't think just by virtue of somebody coming to this country for a brief period of time, that would vest them with all of the protections that the U.S. citizen has against improper prosecution when we are not going to prosecute them. We are simply going to say leave the country because we are concerned that you might do something that we don't want done here.

Mr. JAHSHAN. The problem with that approach is that, after all, at one point or another all of us, or our parents or grandparents or great-grandparents were in that position. We were recent immigrants and for all kinds of political reasons. Therefore, to start making exceptions at this point in a highly politicized issue, you would have an open road to abuse.

Mr. HYDE. Will the gentleman yield?

Mr. GOODLATTE. Sure.

Mr. HYDE. It may be that you would not say that the gentleman might do something. Maybe he is doing something, but you cannot reveal your sources of information or our methods of that. But this

is a bad guy. He has no right to be in this country under those circumstances.

Deportation is not a criminal penalty. It is a civil penalty.

And if you find it very difficult to adduce the proof, it is enough to satisfy a judge, I mean, that is a reason for going ahead with it rather than letting the situation continue dangerously; because you cannot really produce your source or your method.

Mr. GOODLATTE. Thank you.

Ms. Lansner, let me ask you a question along similar lines. You had made the comment that you felt that people might be erroneously associated with terrorist groups and, therefore, you were concerned about finding that a person was associated with or a member of a particular group.

How do we handle that? We have right now, all of these due process concerns have virtually no application when the person is in another country and they go to the U.S. consulate and they seek to come to this country. We have people who want to come here to be school students and if the consular officers finds, as they very, very often do, that their intent is something else, which might be a perfectly legal intent, but it includes doing something contrary to what the purpose of the visa is, they will exclude them on nothing more than a mere suspicion for which there is absolutely no appeal, there is no judicial review whatsoever of that.

Why do we need to be concerned when somebody enters the country on a temporary basis that we—and we are fearful that they may do something of great magnitude that is going to be a harm to the country, why do we concern ourselves with this situation? Why not simply say we have this concern? We are going to ask you to leave our country.

Ms. LANSNER. I think if there is documented concern, then there is probably a basis under the law to exclude them. What we are saying is that their mere membership in an organization, absent some other evidence of wrongdoing, should not be the basis alone for their exclusion, because what we should be looking at is not just association. We should be looking at conduct. So if, in fact, there is conduct that is problematic, then I think there is probably a basis under the law to exclude them.

Mr. GOODLATTE. But, again, if we wait until we see, and given the limited resources that we have, if we wait until we see some evidence that somebody may be taking a harmful step, it may well be too late to do something.

Ms. LANSNER. We would certainly be unhappy about that. We are supportive of the legislation because it is intended to be preventive. Right now the law permits exclusion and deportation of known alien terrorists. This bill would enhance that ability by saying that those people who are representatives of terrorist organizations could also be excluded.

A "representative" is fairly broadly defined. It includes anyone in any kind of leadership role; someone who directs or supervises members; anyone who is an officer or maintains some kind of official role. That might well cover any of those people as to whom there is some documented concern. Therefore, that might be broad enough to cover the individuals that the United States has a legitimate interest in trying to exclude.

Mr. HYDE. The gentleman's time has expired. But on the assumption that it hadn't expired, would the gentleman yield to me?

Mr. GOODLATTE. I will certainly yield.

Mr. HYDE. I want to express my gentle disagreement with the gentlelady. Membership implies support. Otherwise, what are you a member for? You belong to, you are a member of a terrorist organization.

Now, since admission to this country or a visa is not a matter of right, it is a matter of grace, this Congress can decide that your membership in an organization that is terrorist is helping that organization, if only statistically, by saying that there are so many people that belong—must be a big, great organization. It has 2 million members.

So, membership is support. It is not a nothing. It is not a nullity. Since you have no right to a visa, and since we are concerned about terrorism, we feel that your membership disqualifies you. That seems to me to be perfectly constitutional. You may suggest it is unwise policy, but I see no constitutional inhibition.

I yield to Ms. Lansner.

Ms. LANSNER. I would respectfully say that perhaps one of the difficulties is that as far as I know there is no definition of membership in the bill itself, and if membership was defined in some way so as to include a mens rea, such that there is knowing support or some kind of conduct attached to membership, then there may be some sufficient affirmative act that can be identified so that it could be brought within the purview.

But organizations where there is not, as I said in the testimony, any card-carrying type of membership gives rise to our concerned with due process, with due regard for civil liberties.

Mr. HYDE. The fact of membership is a fact. Whether it is provable, it is determinable. I was arguing about the wisdom of the policy of not granting admission to people who are members. Now, I assume we would know of the membership, even if they don't carry a card, we would have some intelligence information. But if you wait for an overt act, sometimes, it may be too late. And that is our problem.

Ms. LANSNER. That is why we are certainly very supportive of the bill. We look at it as preventive. That is why we want it.

Mr. HYDE. You don't mind, Mr. Scott has been here early—I am sorry, did the gentleman want to proceed?

Mr. GOODLATTE. I was just going to reclaim my expired time to say that membership is certainly something obviously to be determined in the proceedings and in the findings so there would have to be some mens rea in order to establish that.

Mr. HYDE. Mr. Scott, the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. I think the discussion of whether somebody is a leader or representative or member is somewhat going to be a matter of semantics. It isn't going to make any difference. If we look at what we have done with the drug kingpin statute and what you conjure up as a drug kingpin and look at who has been convicted under that, I think member and leader is probably hard to distinguish.

Mr. Chairman, I think I disagree with a lot of the suggestion that this is a political issue. What we are talking about is who has

rights and what groups contributing to what other groups, what individuals, American citizens—maybe I missed something. Can American citizens be convicted under this for contributing to the organizations that have been put on this list, if an American citizen contributes to an organization on the President's list?

Mr. JAHSHAN. My understanding is that under the current legal setup as an American citizen I am entitled to contribute to the nonviolent or nonterrorist activities. But the proposed legislation would criminalize this type of activity.

Mr. SCOTT. An American citizen?

Mr. JAHSHAN. Yes.

Mr. SCOTT. You have American citizens contributing to whatever groups they want, based on what is clearly a political decision, virtually unreviewable in court, the President can designate which American citizens will be criminals for their activities and which will not.

The suggestion by the gentleman from New York that you have some APA-type standard still doesn't get to the question, because if somebody is on the list, the burden of proof for getting off the list would be on the organization trying to prove its innocence.

Let me ask a question. Is that right?

Mr. JAHSHAN. That is our understanding of the list that was produced by the White House. And it is even more complicated. It gets so politicized. Take, for example, one group that was listed by the President in January known as the DFLP, the Democratic Front for the Liberation of Palestine.

A couple of years back, that group split into two factions. One group supports the peace process and one group doesn't. Their supporters in this country haven't split necessarily across that line and their institutions that carry out NGO-type of work, nonviolent work, have not split either.

And so when you ask the administration, are you criminalizing DFLP or FIDA, the other faction? They say no, FIDA is fine, it supports the peace process. This is another example of how you politicize an issue of this sort. If part of a terrorist group supports a policy that we like, then it is "kosher." The other one is not. It is a very complicated issue.

Mr. SCOTT. Let me ask some of you to respond about the problem of criminalizing some activities for American citizens and a group having to prove its innocence, which is under this circumstance, just about impossible.

Mr. SHENEFIELD. Let me offer a slightly different way of looking at that question.

The question of proving innocence arises only in connection, as I gather, with the congressional removal authority. Once the President has made the decision and informed Congress, Congress then has the option to do something about it. And if there is a case to be made, I would assume Congress is the place to make it.

Now, once——

Mr. SCOTT. I am trying to get out of the political process, because I would hate for our rights to be an up-or-down vote by a bunch of politicians. And that would be a frightening——

Mr. SHENEFIELD. I have more faith in you than that. My only point is this: Once the President has designated the organization,

then section 102 prohibits anybody within the jurisdiction of the United States to knowingly provide material support or resources to that organization, which is by definition a terrorist organization that engages in activity that affects the national security of the United States.

Mr. SCOTT. And if they are, in fact, not involved, but the President thought they were involved, when do they have the opportunity to be heard to get off the list?

Mr. SHENEFIELD. If the President is consistently wrong, he is not going to last in office long.

Mr. SCOTT. He can put some politically unpopular people on the list and wouldn't be adversely hurt one bit and would probably be helped, when in fact they are not engaged.

Mr. SHENEFIELD. The question is whether you have no confidence in the Congress' ability to right that wrong. That is the crucial question.

Mr. SCOTT. That is why we have courts to protect people's rights. You don't subject rights to a political up-or-down vote.

Ms. LANSNER. While this may not totally satisfy you, there is a 2-year limit, so that after 2 years, the designation does disappear unless it is again proposed.

Mr. JAHSHAN. In addition to that, what I think the President is trying to do, for example, is that if NAAA Foundation is contributing to a certain humanitarian function in the West Bank or Lebanon that is affiliated somehow, directly or indirectly, with one of the groups that appears on that list, I am required now to get a license from Treasury to prove that the $100 that I am sending at the end of the month is not going directly or indirectly—and here comes the issue of fungibility—to any type of terrorist activity.

So the burden of proof is placed on me as an American citizen, exercising my constitutionally protected rights to donate and associate with anybody I care to associate with, to produce not only political information, but also bring in the budget, the accounting records, of that group to show where the $100 went.

What kind of crazy group anywhere in the world is going to show up in an American court and produce its books to prove that I am sending them $100 legally?

Ms. AL-HIBRI. I do not take much comfort in the 2-year sunset provision, because it can be renewed again several times and could go on forever until the political situation changes and somebody looks more favorably on a group that has been viewed disfavorably.

So the problem that you are raising, I think is still there, regardless of that provision.

Mr. SCOTT. Let me ask another question. For those who support the bill, could you comment on the right to due process, if the powers that we think someone who is a noncitizen, if they think they are involved in criminal terrorist activity, when, in fact they are not; in that situation, when would the person have an opportunity to be heard to defend themselves in one of these ex parte proceedings?

Mr. SHENEFIELD. Are you referring to title VI?

Mr. SCOTT. The deportation. I don't know what number it is.

Mr. SHENEFIELD. The special removal proceeding provides for a hearing before a Federal district judge for the precise purpose of defending himself.

Mr. SCOTT. Now, what about this evidence that is ex parte in chambers?

Mr. SHENEFIELD. If it is sensitive information that cannot be revealed, the bill provides for, in the case of lawful permanent residents, a special panel of attorneys to try to preserve as much as possible of the subject's right to challenge.

I suggested in my testimony that that be broadened to go beyond permanent resident aliens. But at the end of the day, the uncomfortable fact is that there might be very valuable information that is dispositive on the issue that would be immensely persuasive to the Federal district judge that you simply can't make public.

Mr. SCOTT. If it looks dispositive, but it is not accurate, and the person if presented with the evidence could explain it away, that he was not the one, it was a mistaken identity, or it was somebody else, or the person is flat-out lying, and I can prove it because they were not even there, if you have dispositive evidence to contradict that, you don't get a chance in these ex parte proceedings to bring it up.

Mr. SHENEFIELD. My view is, my belief is, that you are talking about a one-in-a-million situation. And you cannot build a system of enforcement based on chances that are about one in a million.

Mr. SCOTT. Yes, ma'am?

Ms. AL-HIBRI. At a minimum, although I am very unhappy with this provision, I don't see why the accused could not choose an attorney who has security clearance or choose one of those on the panel; or even ask for expedited clearance for her counsel.

All of these kinds of considerations would give the accused some input into who is going to represent her. But at the same time would preserve the security interests.

I don't see why this is not part of this proposal at minimum, even though I am critical of it.

Ms. LANSNER. If I may, I think that we have to put this in context. As Mr. Shenefield has just said, in the majority—overwhelming majority of circumstances these provisions of H.R. 1710 are not even going to come into play.

You are only going on to have these provisions come into play when there is classified information that is necessary in order to prove the deportation case.

This bill is providing for those exceptional circumstances where there was no prior provision for a deportation hearing because there was no way of having the classified information come into court.

You have a long elaborate system here which really provides for a number of safeguards to the defendant, including the right to a summary of the classified information, and if the summary is insufficient to enable the preparation of defense, there will be no deportation hearing at all based upon that information, if they cannot give, unless the judge finds and, it is a very narrow exception, that the continued presence of the alien and the provision of the summary would likely cause serious and irreparable harm to the national security or death or seriously bodily injury to the person. So

you are talking about a very narrow exception within an already very narrow set of circumstances.

Mr. SCOTT. Mr. Chairman, I know my amount of time has expired.

Mr. HYDE. I thank the gentleman.

And the gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Mr. Shenefield, I would like to just ask you kind of a general question, and then I start with you simply because you have addressed some of the issues that I have been paying particular attention to in your written testimony, and the other panelists may wish to comment also.

But, the two most recent acts of what I think all of us would view as terrorist acts, the World Trade Center bombing and the Oklahoma City bombing most recently, have been or will be prosecuted under existing laws that we have, and at least in the case of the World Trade Center bombing, since it has already pretty much concluded, under existing regulations and policy decisions of our Government.

In that case, the perpetrators were apprehended very quickly, based on phenomenal and probably very lucky law enforcement investigative tools and expertise that we have. And the case went through the judicial system relatively speedily with the appropriate conclusion, I think.

In the case of Oklahoma, although we are at a much earlier stage, we certainly seem to be on track in terms of gathering information and evidence, already having made a couple of arrests. The Government has already indicated to the court that they are for the process of pulling together a much more comprehensive charging document and seeking some additional time within which to obtain the indictment, so it seems to be pretty much on track.

Given the fact—and the Deputy Attorney General yesterday in answer to the same line of questioning indicated that there was nothing that the administration feared or had concluded would not allow them, they anticipated certainly—that would not allow them to prosecute this case, the Oklahoma City case successfully.

That being the case, my point is our Government seems to have fairly strong and clearly adequate tools to address at least from an investigative and prosecutorial standpoint, terrorist activities.

Why, then, other than making it easier for the Government to do certain things, why then do we need the legislation that really if you looked just at some of the definitions in it is very, very broad and even though—and I don't use this term disparagingly, you almost cavalierly dismiss the posse comitatus provisions in the bill. I think they are a little more broad than you seem to indicate, as well as some of the wiretap legislation.

Why is it that we need, as opposed to making it easier for law enforcement, is there any case that could be made that we really need these additional tools?

Mr. SHENEFIELD. I think it is a perfectly appropriate question and a difficult one for someone outside the Government who is not privy to secret information really to answer persuasively to you, I think. But it seems that if you take the electronic surveillance authorities given in the statute, that each one taken on its own basis

for the purpose for which it is apparently intended, makes some sense.

Take the multiple point wiretap or electronic surveillance. It doesn't take a lot of imagination to see why that would be extremely useful for investigation and detection of terrorist activity.

In the current——

Mr. BARR. But even that would be of somewhat limited use. You never know which phones the person intent on evading surveillance would be using.

Mr. SHENEFIELD. Unless you have established enough physical surveillance to know that there is a pattern.

Mr. BARR. In which case, under existing laws and procedures, a good prosecutor would be able to obtain an appropriate warrant even under existing procedures.

Mr. SHENEFIELD. But a judge might be pleased to receive this application instead of the one under current law, because this application would be limited to conversations by the subject himself, whereas the one under current law is valid for any conversation on that phone, regardless of who it is.

So in a sense, the minimization procedures in this proposal are greater that under current law and, therefore, more protective of civil liberties than exist now.

Mr. BARR. I am not sure I agree with that. But aside just from that one particular aspect of the bill, can you make the case as to why we need an expansion of Federal jurisdiction?

Mr. SHENEFIELD. It seems to me the way I would think of it is in dealing with terrorist activity, you are dealing with a phenomenon that is very largely unpredictable, hard to define in advance, comes in all different shapes and sizes, and conventional law enforcement activity may not be effective to deal with those kinds of problems.

I believe from what I read in the press, that the World Trade Center arrests were as much a result of carelessness of various perpetrators as the result of good detection technique.

Mr. BARR. But the same could be said of virtually any criminal case. The reason we are able to prosecute any case is that somewhere along the line, the perpetrators make mistakes.

Mr. SHENEFIELD. And the point I would make, particularly where terrorism is concerned, maybe more than most other kinds of activity of a criminal nature, prevention needs to be the watch word of the Government. So I would err on the side of effective prevention.

And it seems to me that standard law enforcement techniques based on criminal conduct may not go far enough for the prevention purposes that I would see as useful here. That is my mindset in approaching this kind of a set of proposals.

Mr. BARR. Thank you, Mr. Chairman. I know that the time has expired but if the other panelists would care to respond, would that be OK?

Mr. HYDE. Without objection, the gentleman is granted an additional minute or 2 minutes.

Mr. BARR. Thank you, Mr. Chairman.

Mr. HYDE. Or such time as the gentleman may consume in answering.

Mr. JAHSHAN. Thank you. I think terrorism is a continuously changing and emerging practice involving all kinds of technology associated with it. There is no doubt in my mind that refining or expanding Federal jurisdiction to account for that is justified. So we have no problem with that part of the bill that deals with the technological aspects of terrorism and how to combat that.

However, what I think we ended up with here, when you look at the history of this piece of legislation in its various versions, is a shopping list or dream list by the law enforcement agencies for things that they haven't been able to get together in one bill since the inception of this Republic.

And it is very important to distinguish between what is needed to account for some specific developments in terrorism techniques and the ability of law enforcement agencies to face or respond effectively to these changes, and between things that I would consider a wish list whereby we are making it easier for certain Government agencies to respond to these types of situations at the expense of individual rights.

Mr. BARR. Thank you, Mr. Chairman.

Mr. CONYERS [presiding]. You are welcome.

Mr. FRANK. Mr. Chairman, would amendments be in order with you in the chair?

Mr. CONYERS. Of all bills for me to be ending up being asked to be temporary chairman, I cannot believe this is happening.

Mr. FRANK. If we have Republican, we have the gentleman from Georgia——

Ms. LOFGREN. Mr. Chairman. I have an amendment at the desk.

Mr. CONYERS. Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. Let me begin with Mr. Shenefield.

The objection you had to giving the court the right to review the designation, would that also extend to the designation as to an individual on page 93 that specifically says that the determination by the Secretary of State or the Attorney General that an alien is a representative of a terrorist organization shall be controlling and shall not be subject to review by any court. Would you similarly exempt the designation of an individual who presumably is here as an alien in the United States?

Mr. SHENEFIELD. Well, my philosophical view doesn't change. It is hard for courts to engage in that kind of examination. But where you are asking of a particular individual whether he fits a particular profile. That is more like——

Mr. FRANK. The examination here presumably—whether or not—the status of the organization is not at issue here. That would not be raised. But this is a question whether someone in the United States has that role and it is not a Presidential determination, it is the Secretary of State or Attorney General. I would say I find the case weak in both points, but particularly weak here because someone is an alien.

I agree that there are different constitutional standards but I don't like the notion of human beings in the United States not subject to some basic protections and I do not understand why you would not allow a court, what the policy reasons would be for not allowing somebody to go to court.

The Attorney General and the Secretary of State, I like them both. They are really nice people. There have been very few Attorneys General and Secretaries of State who seem to me to be not such good people. There were a couple, but they can make mistakes. And why we would say in the case of an individual designation you could not go to court troubles me.

I would like to respond, the chairman is absent now, but, Ms. Lansner, I was particularly impressed by your effort to do a balance here and I appreciate the ADL's effort to deal with this in a sensible way. I think it reflects the feeling that many of us have any wanting legislation but wanting it to be done in a reasonable fashion. The question is why do we worry about kicking somebody out because he or she is a member of an organization, after all it is not prison.

And we worked very hard in this committee and it was bipartisan, because Senator Simpson was a strong collaborator in it and many other Republicans had worked on it. We worked very hard to clean up the American immigration law that we inherited from the McCarthy period which excluded a lot of foreigners from America because people didn't like their opinions. And our argument was not a human rights argument for them as much as it was our interest as Americans in living in a very free and open forum.

And when we begin to penalize people because of their views, even if they don't have a constitutional right to protection, we diminish ourselves and we diminish our forum here. And if you say to someone, simply because he is a member with no—after all, in some cases, the designation can be that the organization—reading from what the President designates we have a Presidential designation not subject to the judicial review if this goes through—the organization engages in or has engaged in terrorist activity.

It is possible for you not being terribly sophisticated to join an organization not knowing of its past terrorist activity and find yourself thus jeopardized. And that doesn't seem to be an appropriate posture for the United States to be in. And I understand they don't have a constitutional right, but I think we err in a way that damages ourselves if we do that.

Finally, on the political question doctrine, I have to say that I don't think that is an obstacle here, even theoretical. And Mr. Shenefield has graciously pointed out if you make a statutory commitment of that to the courts it is not a jurisdictional issue in that sense.

And for this reason, I think what we would be talking about, we are not asking that the courts have the right to designate an organization as terrorist independent of the President. Now that would interfere with the foreign policy process.

That is, the President might very well decide that there was an organization that met the definition of terrorism but it was kind of on our side and we have had a few of those. During the cold war they had their terrorists and we had our terrorists. And our terrorists, I do believe they were morally superior to theirs because they were fighting for a better end ultimately.

On the other hand, it was not always so clear. I am not sure between Savimbi and others that I would draw any moral distinctions. And I can see saying you will not compel the President to

designate a terrorist organization, because there might be foreign policy reasons that you would want to withhold it.

But that doesn't apply equally to saying the President might have a foreign policy reason why he has to designate somebody as a terrorist or that damage would be done if a court said you are erroneous on a factual ground. So I think we are not talking here about giving the courts—and we could write this—the courts do not question the President's foreign policy judgment but they do question factual issues.

Finally, you raised a question what would they do if they hear testimony in camera. This bill has a lot of testimony in camera.

We are saying for purposes of deportings—I am going to vote for that part. That part doesn't bother me. The more I watch the way the press is mangling the O.J. Simpson trial, the less sympathetic I become to them. But it would certainly be the first time we said this particular issue might be litigated privately that we would be doing that in this very bill.

Mr. SHENEFIELD. May I respond?

First of all, it seems to me striking that your concern about the bill is premised on the fact that the President and the Congress, though they have to take the same oath of offices as a judge to uphold the Constitution and to obey the laws of the land, though they have greater expertise than a judge in dealing with these kinds of issues, that the premise of your concern is that somehow we cannot entrust the President and the Congress with the judgment of designating these organizations. It is surprising to me and I don't share your cynicism about that process.

Mr. FRANK. Let me take severe exception to cynicism. Believing that you should not have judicial review because well intentioned people make a mistakes is not cynicism, and you know, I think you know better than that, John. I just said I think they are good people but not perfect people. Saying that there should a judicial review to correct an error is nonsense.

Mr. SHENEFIELD. I withdraw the word "cynicism." Your skepticism that that procedure will be efficacious.

Mr. FRANK. So you think it will be perfect?

Mr. SHENEFIELD. No procedure is perfect, Mr. Frank.

Mr. FRANK. I do not see much foreign policy harm done if I fail to designate. I can see foreign policy harm done if you precipitously—the courts take the same oath of office on anything and we say, yeah, they will have the last resort, but it is easier it seems when you are talking about a specific factual determination.

Mr. SHENEFIELD. I am comforted by my experience in dealing with the Foreign Intelligence Surveillance Act which has some of the same problems that you are concerned about here, and to note the way in which those applications are staffed.

Mr. FRANK. By the court?

Mr. SHENEFIELD. No, by the Department of Justice. The immense care with which those applications are fashioned, the way in which civil liberties questions are asked and answered, the delicacy of the judgment that the Attorney General at the end of the day has to make. Judges, of course.

Mr. FRANK. That is throughout American history through the cold war period?

Mr. SHENEFIELD. Since 1978 when the statute was enacted. I don't share your concern that the President and the Congress will make so many mistakes that this procedure will ride roughshod——

Mr. FRANK. I didn't say they will make so many mistakes.

Could I ask some for additional time?

Mr. HYDE [presiding]. Yes, if the gentleman would yield to me for a question.

Mr. FRANK. I didn't say it was riding roughshod. I didn't say that.

You are rebutting unmade statements. I am arguing that there should be that reserve capacity.

I doubt in many case it would be exercised and for instance under the Foreign Intelligence Act there is a capacity that is rarely exercised, but not having it exist at all is hard for me to understand and I would yield to the chairman.

Mr. HYDE. I thank the gentleman for yielding. I would suppose that members of this organization would have the standing to bring the suit to court. I suppose it would come after Congress has failed to reverse the President's decision.

And I would assume that there would be an appeal from the district judge, unless it was a matter of original jurisdiction with the Supreme Court. But you have to consider appealing the judge who is an imperfect human being, too. And, so, where does it end?

Mr. FRANK. It is a question to me, it ends—I think the chairman is teasing me because I think he knows the answer. It ends at the Supreme Court of the United States a couple of blocks over that way. We have an appellate procedure and it ends there. The designation could very well be in effect in that period.

Mr. HYDE. But we waive not appealing to the court at The Hague.

Mr. FRANK. Yes, I do not think you could appeal to the court at The Hague. And the notion that somehow there is something odd and unknown about an appeal procedure just baffles me.

And I will say this. I was here during this period under virtually every Democratic and Republican President. The ability to exclude people from the United States because we didn't like what they thought was unfortunately exercised by every President and it was an embarrassment and it diminished us.

So yes, I have seen—we are not talking about sending people to prison. We are talking about this is a basis for exclusion and deportation and not just deportation but exclusion.

You are calling into question some successes in 1990 in undoing that McCarran Act which was a national embarrassment which made it look like America was afraid of some people's ideas. And I saw that done.

A guy in Canada said he was going to shoot down a B–1 bomber and we kept him out; Graham Greene, we kept him out; Garcia Vargas. We kept out a lot of people and I am afraid of that.

Mr. SHENEFIELD. I can just respond to that, because I agree with you and as you may remember I testified before this committee in support of your legislation.

Mr. FRANK. Yes.

Mr. SHENEFIELD. I would draw a distinction between keeping people out for what they view or believe or what their thoughts are and keeping them out because they are members in a political organization that has engaged in terrorism that damages the national security of the United States. Those are not even close to being equivalent.

Mr. FRANK. They are not close to being equivalent. They unfortunately overlap and this is what Ms. Lansner alluded to. There are people who were duped.

We had people who were accused of being duped that joined organizations run by the Communists in the 1940's that sounded wonderful and some people joined organizations that sounded like very good organization not knowing that they were being manipulated by Stalinists. And under this law they could be kicked out and excluded.

And it is precisely because we are dealing with a lowest threshold punishment here, simply exclusion and deportation and not imprisonment, but they are worried about being misused. If we were talking about imprisonment, there would be court sanctions and that is what bothered me.

Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman.

The gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman. I have similar concerns to Mr. Frank's, although I think the due process rights of someone lawfully here in a deportation proceeding, certainly exceed whatever due process rights might attach at all in an exclusionary proceeding.

I guess I am eager for the professor, if you have ideas, if you assume for purposes of discussion that there may be instances where behavior or membership in a terrorist organization is sufficient to form the basis of a deportation under the Immigration Act, that the standard of proof required under that act should apply, and that information from overseas sources that needs protection should be available, what means can you suggest that would allow for that and yet provide and protect the due process rights of the person to be deported. Do you have something to suggest?

Ms. AL-HIBRI. Well, let me first say that I share very much with my colleague the desire for balancing. Both issues are important, national security and constitutional rights.

I also think that, coming from a legal point of view, we should not totally abstract the issue and talk on a very abstract level. People's experiences are different, depending on where they come from, and if you come from a group or a minority that feels that consistently evidence is usually interpreted disfavorably with respect to you, then you are more inclined to balance towards constitutional rights as opposed to national security. And maybe, while we agree on the principles, what we are really seeing here is the question of balancing based on experiences and where we come from.

I think the issue you raise is very important, and I think it is worth a great deal of discussion. I don't think that right here I would genuinely be able to propose a solution that would be satisfactory, but I do think we should take the time and we should be involved in discussions that would help us develop these due proc-

ess kind of guarantees and not rush into something because of our concern about national security when other laws, as Mr. Barr has already pointed out—Congressman Barr—are already in place and can help the Government do what it needs to do for the time being.

Ms. LOFGREN. All right. We are doing markup tomorrow morning, and I agree that more time would be useful.

Let me ask you——

Ms. AL-HIBRI. Well, perhaps then the ability to choose one's attorney who has a security clearance is very important. Because I could imagine as a minority person I would feel that the deck is stacked against me. Somebody, you know, inadvertently perhaps chose a panel of attorneys that does not see eye to eye with you at all.

Ms. LOFGREN. Actually, I think that that is a very useful suggestion. And I can't come up with a reason—perhaps Ms. Lansner can suggest—I think you had indicated that you didn't—unless I misunderstood you, you didn't think that would be necessary. Necessary or not, what would the objection be so long as the attorney selected did, in fact, have a security clearance?

Ms. LANSNER. I don't think there is any objection. I think that this bill might well pass constitutional muster in its present form, but if there is a way still of continuing to achieve the objectives of the bill and, at the same time, have procedural due process safeguards, then that is acceptable. One of the things we noted is that fact, there should be the same rights for permanent resident aliens as for nonpermanent resident aliens.

Ms. LOFGREN. Absolutely.

I would suggest, then, Mr. Chairman, that that be something that we could accept on a bipartisan basis tomorrow, noting also that whenever we think about it, if we pass a law that doesn't meet constitutional muster, we are going to be creating a whole set of other problems for law enforcement agencies as they proceed. And, clearly, this is something that should—I am not convinced it is sufficient, but it is certainly something that should be done and is an improvement.

If I could just very quickly ask one additional question. I have talked to many people in my district who have raised the issue of the chilling effect on first amendment rights of speech and association connected with the limitations on fundraising and donating to charitable groups. Now, again, if you agree that there are instances where our country would have a right to prohibit donations to certain organizations that are engaging in terrorism—and I do believe that that is true—what safeguards other than those we have already extensively gone through, the court review, could you suggest, Professor, that would protect the first amendment rights involved and do so proactively?

Because the chilling effect, frankly, is going on right now with the bill just being penned. And not just for aliens or permanent residents but for American family members who have an alien spouse or relative, it has had a dramatic and, I would say, not positive impact in the participation and debate and the civil life of the community.

Ms. AL-HIBRI. Let me be even more specific about these concerns and speak from the heart about my particular experience. As Presi-

dent of Karama, a Muslim women lawyers committee for human rights, one of the things that I am concerned about is the rights of women in various Third World countries, in particular Muslim countries. And I personally have tried to donate money for educational reasons for certain groups in northern Lebanon which were trying to help some of these people.

Unfortunately, recently, I got a report from them reporting on the boy that I was trying to support and not on the woman, on the girl, and my feeling is that they are probably having scarce resources, and they are allocating those resources to boys and not to girls.

Now I—as a woman committed to women's rights, I feel that, as an American, I have essentially a human duty to go in and say, wait a minute, I am going to give you the money that you need to educate the girl, and I want to make sure that the little girl is being educated. So the issue is very important for humanitarian considerations of this kind as well as of the broad kind you have mentioned.

First of all, I think that the burden of the proof as to whether somebody is knowingly giving money to a terrorist organization should be on the Government and not on the accused. And, second of all, I really think that the issue of judicial review is very important.

I know we went back and forth on that issue, but perhaps the kind of review that the court would supply would be narrowly defined so that it will, among other things, for example, be procedural on certain issues and also ensure that there is nondiscriminatory application of this kind of designation by the President. And the designation itself should be guided by certain specific criteria, not very broad criteria, that would make illegal even activities that we at home would regard as acceptable, or criminalize them, but very well defined criteria.

I think by filling in, fleshing out, you know, this kind of information in the bill, even though at this late date we cannot redo the whole structure, we can at least put more safeguards within it so that from the very beginning the designation does not get made a little bit too quickly and then we spend our time in court trying to reverse it when, in fact, it is in effect all that time.

Ms. LOFGREN. Thank you.

Mr. SHENEFIELD. Could I say a word about——

Ms. LOFGREN. I would love to hear it, but my time has expired. Will the chairman allow?

Mr. HYDE. The gentlelady is certainly yielded 2 additional minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

Mr. Shenefield.

Mr. SHENEFIELD. It seems to me that maybe the concern that you expressed is adequately met by section 102, which is the criminalizing provision. Under that provision, the burden of proof would be on the U.S. Government in its prosecution to make the case or not that whoever is involved satisfies—has violated that provision of the law. The only thing that would not be the Government's burden of proof would be the terrorist organization designation about which we have spoken earlier.

Ms. LOFGREN. But if I may just follow up—I mean, here is the scenario where, you are right, there is some—you have just gone over it in section 102.

But if you have, let's say, a U.S. citizen who has an opinion, and is active, and donates to a charitable cause overseas and they have a spouse who is a permanent resident, which is not an unusual situation, and it is a community property State, you have got a concern that the organization could be designated, and maybe you couldn't be prosecuted, but your spouse could be deported in a star chamber proceeding if you erred with your donation from a community property account. This will have a tendency to suppress your feeling that you have a right to free speech and free association that we think we have under the first amendment.

Mr. SHENEFIELD. With respect, I think this provision doesn't say that. What it says is that in order to be convicted of the crime you have to have knowingly provided material support or resources—knowingly is the scienter requirement—to an organization designated by the President as an organization that engages in terrorism that jeopardizes or affects the national security of the United States, which is a different—it seems to me a very different point.

In my own written testimony—and I didn't go into it in great detail—I suggested that the committee might wish to consider an addition here of the kind that is in the Senate bill that permits—I believe it is in the Senate Bill—that permits a licensing of charitable or educational or religious donations.

Now, Mr. Jahshan raised the quite sensible objection that some organizations don't want to open their books to the Treasury Department. If that is the case, so be it. That doesn't bother me.

Ms. LOFGREN. Isn't that the licensing of your first amendment rights really?

Mr. JAHSHAN. Exactly.

Mr. SHENEFIELD. No, I don't think it is when you are talking about giving money to what is, on the face of it, a terrorist organization. I don't know that there is any first amendment right to give support to a terrorist organization.

Mr. JAHSHAN. That is not the case. The fact of the matter—this whole campaign from day one was initiated because of Israeli concerns. And all of these organizations, all of the NGO's that are recipients of aid and funds from this country, from the Arab and Muslim communities, are all licensed by Israel. And if Israel is so concerned about any of these organizations, Israel can outlaw these organizations at the source. Why are they asking the United States to do their dirty work for them at the expense of civil rights in this country?

All of these organizations, all of the NGO's are not associated or not affiliated with terrorism and they are all licensed by Israel to function. All their transfers of funds are done through Israeli banks. Israel knows what comes in and what goes out. And they are asking us to do something that is—I don't understand what their motive is—but they are asking us to do their dirty work for them.

Ms. LOFGREN. If I may—and I understand your point of view. We also have a letter from the Ancient Order of Hibernians in America, so this is an issue that is international in scope. And, really,

our interest here is to protect our Constitution and the freedoms for those of us who are in the United States that that Constitution guarantees. And I am concerned that the bill falls short in a couple of areas in that regard. And whether or not this is related to an external dispute this isn't the Foreign Affairs Committee. Perhaps they ought to look into that. But that is not within our purview.

Ms. LANSNER. If I might just respond, I think we should get back to basics. We are here trying to balance civil liberties, due process rights with what is a real—not just a perceived, but a real threat of terrorism.

The broad ban that is proposed in this bill is necessary because funds are fungible. And if, in fact, there are legitimate and humanitarian uses for certain funds, this will, in fact, as my testimony stated, promote the use of other organizations for use of funds for humanitarian purposes.

But, as Mr. Shenefield said, we can see no reason why the Constitution doesn't prevent the United States from saying that, because of compelling interest, fundraising for terrorist organizations is prohibited.

Ms. LOFGREN. But the issue really is about protecting the freedoms of Americans. And I agree with you that this country has a right to prevent funding of terrorists who would attack us, but the issue is how is that reviewable so that the first amendment rights of Americans who are here are protected? And what I am searching for is a way to accommodate both legitimate issues, and I don't think this bill quite does it, and I am not sure that it is impossible to do.

Ms. LANSNER. Well, again, it is a question of whether you can feel satisfied, as we do, that you have a Presidential designation. It is discretionary, but it is reviewable in some form. And we have discussed here, there are various possibilities for that review, so there isn't a designation unless it passes muster upon review.

And then, as Mr. Shenefield has pointed out several times, there is the scienter requirement. There must be knowing material support provided in order for you to come within the purview of the criminal statute.

Mr. HYDE. The gentlelady's time has expired.

Ms. LOFGREN. Thank you.

Mr. HYDE. The gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you very much.

I do thank the panelists for their presentation.

I think it is appropriate that I comment probably in the atmosphere that we are in that I would have hoped, and characterizing my presence here—I am a new Member—I have a great desire to determine what the status of militia are in this country, how pervasive they are, how threatening, how violent directed they may be and whether or not you can collectively label them as terrorists under this proposed legislation.

And, for me, it would have been certainly appropriate that we had hearings on militia because I have a great interest in them. Of course, this is a climate of which this particular legislation received such momentum.

I would ask Mr. Shenefield, just in terms of his practice—I noticed that he is chairman of the ABA's Committee on Law and Na-

tional Security. Is your practice comprised of representing foreign nationals or representing other countries on the issue of crime and national security or in what manner is it directed?

Mr. SHENEFIELD. I have the pleasure of having a practice that has almost nothing to do with that subject. I am at heart an antitrust lawyer; and, therefore, my interest in this subject comes from my experience in government and my experience as a lawyer interested in the subject. My practice doesn't touch this at all.

Ms. JACKSON LEE. Then please forgive me for maybe my lack of understanding about your past background. What is your background that gives you interest in this area?

Mr. SHENEFIELD. I had the privilege of serving in the Department of Justice for 4 years in the late 1970's, first as Assistant Attorney General in charge of the Antitrust Division, then as Associate Attorney General of the United States.

Ms. JACKSON LEE. Then in the course of your committee's meeting on these issues do you also engage in discussions about constitutional protection, constitutional rights as balanced along with your concern, I assume, about national security? Is that my understanding?

Mr. SHENEFIELD. That is correct. We were set up by Mr. Justice Powell years ago, before he became a member of the Court, because of his conviction that it was important for the legal profession in this country to understand the rule of law in the national security arena.

Ms. JACKSON LEE. With that in mind, would you comment for me on your sensitivities to the involvement period of the military in domestic terrorism activities, which is one of the proposals of this legislation? And are we not stepping beyond the line in engaging the military in domestic activities?

Mr. SHENEFIELD. I didn't have the reaction—although what Congressman Barr said registered with me. He used the adverb cavalierly. I didn't think the provision was really that broad.

It seemed to me that the provision in section 312 which provides specifically for assistance of a technological or logistical nature rather than law enforcement assistance of a broader kind was precisely the kind that we ought to welcome. They, after all, are trained to deal with certain kinds of weapons. Normal law enforcement agencies are not trained to deal with those weapons. And it would seem perverse to shut out the expertise that we have paid to develop.

Ms. JACKSON LEE. It does specifically point to chemical and biological. I am, however, mindful that you make one step and you follow it with another step.

Let me characterize my comments as recognizing that we are in an era where we should be particularly sensitive and responsive to frightening changes in America, and I am one who is not hesitant to try to address the concerns.

As I said, I have a great interest and hope that we will have hearings on the militia, to determine the extent of their pervasiveness. I do want to keep, however, a constant hold on the Constitution.

My fear is only—and I guess I am questioning you; I haven't come to a conclusion—that this minimal involvement always opens

the door for massive involvement. And I am asking you as a lawyer, who I imagine the course of this committee's work does—you do have the Constitution there at your fingertips—whether or not we see any jeopardy, as you can perceive it, as it relates to the Constitution.

Mr. SHENEFIELD. Well, I share your concern, and it seems to me any lawyer who examines the issue would share your concern. And that is why it would seem to me important for the Congress rigidly to enforce what seems to me to be the narrow category there to assure by means of oversight and otherwise that the executive branch doesn't move down that slippery slope about which you are concerned but nevertheless is able to avail itself of the undoubted technical and logistical expertise that exists in the military forces.

Ms. JACKSON LEE. Mr. Chairman, if I can have unanimous consent for an additional 2 minutes, I would appreciate it.

Mr. HYDE. The gentlelady is, without objection, granted 2 additional minutes.

Ms. JACKSON LEE. Thank you very much.

Let me ask all of you—another red herring for me or red flag—and I certainly have a great deal of respect for Federal employees, county employees, State employees and city employees, and I asked this question to the Justice Department, but give me your sense on what a thousand persons added under this particular legislation, what kind of atmosphere are we now attempting to create?

I don't want to see another Oklahoma City, God forbid; and the emotion and the devastation of that is something all of us, I think, gather around and say no to. It is just that how do you perceive, even reading the legislation, the effectiveness of a thousand individuals? Are they creating havoc? Are they seeing things that don't exist? Will they be able to be—will there be a preventative aspect to their work or will there be an aspect of their work that will be, if you will, devastating to one's civil liberties in terms of not allowing any association or any opportunity for a dissent?

I am stretching it as well, but I am trying to determine what that will mean in terms of what we are ultimately trying to reach. I would appreciate comment on that.

Mr. HYDE. Would the gentlelady yield to me just as an addendum to her question?

Ms. JACKSON LEE. Yes, Mr. Hyde.

Mr. HYDE. I remember when we had the 1 day of Waco hearings—back in the good old days in the previous regime, we had 1 day of hearings right here in this room. And I remember listening to the FBI tell us they had one hostage rescue team, and God help us if there were two hostage situations one on the east coast and one on the west coast, and we needed trained, resourceful people, law enforcement people to help us with the rescue of those hostages.

One of the problems at Waco was they got tired. You hold a gun like this for a couple hours, you get tired. And they didn't have the trained personnel to handle that situation, much less two situations which could occur.

So I am not necessarily a booster of adding another thousand people, but if the professionals who run the FBI and the Justice Department think they need more people, I am inclined to give

them the benefit of the doubt in view of what we heard at the Waco hearings.

And the gentleman from Michigan, the gentlelady will yield to him?

Ms. JACKSON LEE. I certainly will, Mr. Chairman.

Mr. CONYERS. Thank you very much.

That was their excuse. I mean, to have an attack because one squad got tired of holding their weapons up to me almost begs the question.

Ms. JACKSON LEE. To both the chairman and the ranking member, I think these points are worth discussing.

I am a supporter of readiness. And I think you mentioned the fact that we certainly seem to be on skin and bones if we are having one hostage team. The number of a thousand, though we are a country of 200 million plus, and I recognize the magnitude and the size, it just seems large. And I would be concerned and possibly want to see what just citizens perceive that size constituency that would focus on nothing but terrorism.

Readiness is something that I am very much concerned with and certainly would adhere to and certainly would adhere to the ability to substitute in those who are well prepared and not tired, but I also want to balance and see this legislation be able to last beyond the era in which we are in right now, which is certainly on the heels of a very tragic situation.

And my question is, is there any perception that comes out of the retaining of a thousand persons for these particular positions? Dr. al-Hibri?

Ms. AL-HIBRI. Thank you, Congresswoman Lee.

I share your feeling about the uncertainty of what would another thousand officers do. Coming from the antiwar movement in the 1960's, knowing of some of the abuses that took place then what I would like to see is increased communication in this country among the various points of views to make the frustration level lower and to make the possibility of such terrorist activities much lower because all people have a voice.

I think the solution should be outside of this. The solution should be that we, as citizens, ought to communicate more together, that there should be for a where everybody can speak.

You were right to say, where are the militias? Why don't we hear what they have to say? And I think it is through that and not through increasing our firepower that we are going to make the American citizens safe.

Ms. JACKSON LEE. Ms. Lansner, let me just go to you. Because you had mentioned, I know, the work of the Anti-Defamation League. And even though there may be some disagreement with members who are on the panel, you certainly have had a history, your organization, of standing for human rights. How does this smack with respect to your organization?

You also mentioned something about membership, which is part of the proposed legislation that may raise a concern on people's ability to associate.

Ms. LANSNER. Yes, well, I expressed that view before. I think if you are asking, though, about the issue of staffing, manpower under this legislation, that we really defer, I guess, as does the

chairman, to law enforcement. We don't have a particular basis for judging what is adequate, what is not adequate for purposes of carrying out the intent of the legislation.

I think, as you do know, as you are familiar with ADL, that we also would certainly support any hearings on militias. As you well know, the ADL, in fact, has a model paramilitary statute which has been adopted by a number of States. We have monitored the activities of the militias; and I think, as Congressman Barr may know, some of the information that we had collected was, in fact, useful and was used by the law enforcement agencies in connection with the Oklahoma City bombing.

Ms. JACKSON LEE. Let me conclude, unless there is someone else who wants to comment on that.

Mr. SHENEFIELD. Could I just add—it has not been so long since I was in budget hearings that I have forgotten how strapped law enforcement agencies and the Federal Government think they are and are, in fact. It is undoubtedly the case that there are real needs both in the Bureau and the Border Patrol and elsewhere that have gone unmet; and my sense of it is, though I am not privy to any inside information, that a thousand additional agents is by no means excessive in a country of this size and will have not the slightest effect on civil liberties.

And, indeed, if one were looking for places to put additional bodies, I would also suggest the U.S. attorneys' offices that are dreadfully undermanned, who can't even take depositions at the end of the fiscal year because they are running out of money.

The situation for Federal law enforcement is in very serious straits. It seems to me that it would be good to try to address that.

Ms. JACKSON LEE. Yes, sir?

Mr. JAHSHAN. Just a layman's perspective on the question that you raised. I am not a law enforcement specialist, but I see this problem more as a qualitative problem in handling terrorism rather than a quantitative one.

We face at least two deficiencies, technical and intelligence, and they both have a price in terms of financial support to be upgraded or updated. But, at the same time, we have a tendency in this country to throw money and seek quantitative solutions for problems in times of crisis that might not be the only answer.

So, the 1,000 additional agents and the $2 billion, that is fine. They might be needed. It might be justified. But I am not sure that is the only answer. It depends on what we do with the 1,000 agents and what we do with the $2 billion that are being proposed.

As for your earlier comment regarding the role of the military and your concern about that, from our perspective in terms of how it affected our community, there was one announcement made by the Pentagon after the Oklahoma bombing that they were sending 10 or 20 Arabic speaking specialists to Oklahoma.

First of all, I don't understand why they had to announce it publicly. Let's assume it was a necessary logistical step, but that ended up contributing to the stereotyping and the backlash that was directed at our community, implying that the perpetrators of the bombing in Oklahoma were Arabic speaking.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Certainly we have to strike a chord for safety and saving lives, and I hope out of the testimony that I have heard here today, very important testimony, that tomorrow and the next day we can strike a bipartisan chord that protects lives but as well protects constitutional rights.

Mr. HYDE. I thank the gentlelady.

And I want to thank this great panel. It has been an outstanding panel and gave us more food for thought than really any other panel.

I just want to express a certain sorrow that the assumption is, that additional FBI are going to be a threat to our civil liberties and not a buttress, not a support for our civil liberties. I think criminals, Federal criminals, are an abuse and are a curtailment of the right to enjoy your country freely and walk the streets without concern.

I don't assume that all policemen are corrupt or are oppressive or tyrannical. I rather like to think that, on the contrary, they are there to protect me and my rights. It always hasn't been thus, and perhaps I am excessively naive, but I look for the day when we can once more welcome law enforcement and not look at it with such cynical—skeptical—strike cynical—skeptical suspicion.

I thank this wonderful panel.

Thank you.

The committee is adjourned.

[Whereupon, at 4:30 p.m., the committee adjourned.]

APPENDIXES

APPENDIX 1.—DEPUTY ATTORNEY GENERAL GORELICK'S RESPONSES TO ADDITIONAL COMMITTEE QUESTIONS

Question No. 1: Is the definition of "terrorism" embodied in the proposed Administration bill adequate to deal with all important aspects of terrorism?

Response: The description/definition of "terrorism" occurs in two places in H.R. 896. They are in section 101, in proposed subsection 2332b(e), and section 202. (Section 301 also incorporates the definitions established under section 202.) In our judgment, they are sufficient for their respective purposes.

Section 101 relates to a certification concerning a "terrorism" motive in a criminal prosecution. Section 202 contains improvements in the definition(s) of "terrorism" under the INA, and section 301 incorporates by reference this definition for purposes of the fundraising statute. We are satisfied with these uses.

Question No. 2: The World Trade Center and the Oklahoma City bombing were investigated and will be prosecuted without the benefit of any of these provisions, obviously. Can you describe any particular areas or situations where the investigation or prosecution was or has been hampered or frustrated because of a lack of like statutes?

Response: Fortunately, prior to the bombing of the World Trade Center and the Murrah Federal Building in Oklahoma City, the United States had experienced a relatively small amount of terrorism activity within our borders. As a result, we do not have examples of prosecutions that have been hampered by the lack of statutes of the type proposed in H.R. 896. However, the potential for such an impact clearly exists.

In the bombings of both the World Trade Center and the Murrah Building, jurisdiction was quickly apparent under existing law based on the fact that federal government officers were located in these facilities. 18 U.S.C. § 844(f). Federal jurisdiction over major international terrorist acts, such as those covered by Section 102 of the Administration's proposal, should not depend on chance factors of this type.

Additionally, even if it were to be concluded that most international terrorism offenses occurring in the U.S. could be reached under some statute, the fact remains that the pertinent statute might not be appropriate to reach the true gravamen of the offense and might not carry a penalty commensurate with the nature of the offense. For example, until corrected by the pending legislation, most conspiracies to commit terrorism offenses are punishable by only five years' imprisonment, even where the perpetrators had formulated a plan to commit an act of catastrophic consequence which they would have carried out had they not been prevented from doing so by government action or some other intervening factor.

Where there is a constitutional basis for federal jurisdiction, there is no reason to deprive federal law enforcement of the best possible legal tools for preventing and prosecuting acts of terrorism.

Question No. 3: If terrorists are here legally, what steps need to be taken during the visa application process to better prevent these terrorists from gaining admission to the United States?

Is the visa application sufficiently detailed to elicit information about the applicant's possible terrorist activity?

Response: This question would be more appropriately addressed by the Department of State.

Should we incorporate a waiting period of some duration to allow for more extensive background checks of questionable immigrants?

Response: This question would be more appropriately addressed by the Department of State.

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What can we do to provide embassy personnel with better intelligence (i.e. more complete "lookout lists") on the identity of potential terrorists?

Response: Continued sharing of intelligence information and data on individual terrorists and terrorist groups will assist in preventing terrorists from gaining admission to the United States. Through the Department of State's (DOS) TIPOFF system, known and suspected terrorists are intercepted either as they apply for visas overseas or as they attempt to pass through border entry points. As part of the INS reinvention efforts, the INS Office of Inspections, in conjunction with the DOS, has developed a plan to expand use of telecommunication systems to improve the visa issuance and Port-of-Entry inspections processes. The INS/DOS Data Sharing Initiative, or DataShare, provides for the electronic transmission of visa information from stateside INS and DOS offices to the visa issuing posts and then back to the Port-of-Entry and Immigration Card Facility where an alien's "green card" is generated. The goal is to eliminate paper processes while improving customer service and national security.

Since 1994, the INS has been involved in reevaluating and improving its principal lookout system, the National Automated Immigration Lookout System (NAILS). We have improved the internal controls for the maintenance of the database, including required supervisory reviews of all lookout records before becoming permanent records in the database, timely deletion of expired lookout records, enhancement of automatic instructions within the database to facilitate the use of the system, and the facilitation of communications among different INS Ports-of-Entry and offices within the database to exchange information relating to specific lookout records.

The INS is continuing maintenance enhancements to the NAILS database and streamlining the lookout data transfer between the Consular Lookout And Support System (CLASS) and NAILS to reduce the data loading time from eight days to one hour. We also plan quarterly enhancements during fiscal year 1995 that will include more sophisticated features such as:

Message function to be used by officers to discuss specific lookout records within NAILS; and

Message function for administrative messages and dissemination of information concerning trends, intelligence exchange, migration patterns and other general purposes.

Since many terrorists use fraudulent travel documents, information from all members of the intelligence community relating to the production, manufacture, and use of fraudulent and counterfeit documentation needs to be widely disseminated in a timely manner.

Consular officers, as well as airline personnel and immigration and customs officers can benefit from continuous document and terrorist awareness training. The INS is attempting to increase the anti-fraud and anti-terrorist training offered to its own officers and to the carriers.

Question No. 4: Do you believe that terrorist activities in the United States could be reduced if the immigration laws were expanded to prohibit entry into the United States by persons who are simply known *members* of a terrorist organization, as opposed to present law which excludes only persons who have *engaged* in terrorist activity?

Response: A mere membership standard might well reduce terrorist activities in the United States, but given the broad sweep of such an approach, we would support its adoption only if the Attorney General were granted waiver authority with respect to this provision.

Question No. 5: What problems has the government had in deporting non-citizens whom the government has discovered to have engaged in terrorist activities while in the United States?

Response: The government has rarely brought deportation cases against terrorist aliens on terrorism charges, although numerous terrorist organizations have infrastructures in the United States. Three circumstances generally account for this situation: (1) we are generally unable to declassify sufficient investigative information to prove a deportation case without incurring unacceptable costs to standing investigations and the national security; (2) until 1990, the Immigration and Nationality Act contained no "terrorism-specific" deportation provisions; and (3) in a number of instances, the government has declined or delayed new prosecutions awaiting the successful conclusion of a long-pending "test-case."

INS cannot proceed in these cases unless the FBI can declassify a substantial part of its investigation for use in open court. The dispositive proof in many FBI investigations consists of FISA surveillance and confidential sources. Some enforcement subjects are minor players in continuing FBI investigations, and the FBI reveals the existence and scope of the investigation only at substantial and generally unacceptable risk to its continuation. Hence, the most dispositive proof will often remain un-

available for trial, and INS must decide whether to proceed with proof that is tenuous and agents who must refuse to testify with respect to a variety of questions at trial.

The foregoing notwithstanding, the government has succeeded in deporting terrorist aliens on routine immigration status violations.

Question No. 6: How often does it occur that the government cannot prove the grounds for deporting a non-citizen who has engaged in terrorist activities while in the United States without disclosing classified information?

Response: INS maintains no records of terrorism-related deportation cases which were never brought or where terrorism grounds were charged but found insupportable due to the inability to disclose classified information. It should suffice to observe that we are aware of a number of terrorist aliens who are in the United States in violation of the terrorism-related deportation provisions. These cases have not been brought due to the national security cost of the existing process and other reasons discussed above in response to the Committee's previous question.

Question No. 7: Are "roving" wiretaps currently available? Under what circumstances?

What are the necessary requirements the prosecutor needs to meet prior to getting "roving" wiretaps authorized?

Response: The provision of the federal electronic surveillance statutes ("Title III") that allows for roving wiretaps is contained at Title 18, United States Code, Section 2518(11)(b). This provision allows the use of roving wiretaps where the government is able to demonstrate that it cannot identify the specific facility or facilities to be tapped because the named subject changes facilities with a "purpose . . . to thwart interception [by law enforcement] by changing facilities."

The showing of a purpose to thwart interception has proven to be a fairly difficult standard to meet: if the subject has not specifically advised an undercover government agent or cooperating witness as to his motives for changing facilities, or if his conduct is not blatant in the use of multiple telephones within a brief period of time, it is difficult for the court to find probable cause for the requisite intent. While we might speculate that terrorists would not want their criminal communications to be intercepted, the statute presently requires that we demonstrate, and a court so find, a subject's specific intent to thwart interception, which might be very difficult where the subject is travelling from site to site and using motel phones, cellular phones, or pay phones in connection with his criminal activities, and whose use of changing facilities may relate to expedience rather than to any effort to thwart interception. A modified standard, identical to that contained in the roving *oral* interception provision at Section 2518(11)(a), which would allow use of roving wiretaps where the "specification [of the phone(s) over which the wire communications are to be intercepted] is not practical," would cover this type of situation.

By using the same "practical" standard for wiretaps in terrorism situations as presently exists to obtain a court order authorizing the roving interception of oral communications, we would be better able to address the terrorist who may travel from site to site to plan/execute their actions.

There are current, pending investigations that I am not at liberty to discuss in which the inability to demonstrate an intent to thwart interception limited our ability to seek a roving wiretap. Without going into specifics, I can note that we have been increasingly faced with situations where our targets have been using cellular phones—often cellular phones that have been "cloned" [with the cost of phone service being charged to an unwitting legitimate subscriber]—and in which the use of changing phones may relate more to these targets' intent to avoid having to pay for the thousands of calls they place than to any intent they may have to thwart government interception. Because the court is required to make a specific finding that the purpose of the subject in changing telephones is to thwart surveillance, the government must develop evidence sufficient to indicate the subject's state of mind. This can be a time-consuming process because a short period of changing telephones will not, by itself, be sufficient to establish an intention to thwart surveillance. During the time necessary to establish intention, valuable evidence, in the form of wiretapped conversations, is lost. The time necessary to establish intention could, quite literally, be the difference between life and death in a terrorist investigation.

Do you feel that an exception is necessary for terrorism investigations? Why?

Response: The roving tap should be available for terrorist investigations as well as for other types of investigations because terrorists are as apt to change phones to circumvent law enforcement as any other criminal offender.

In this regard, the proposed amendment to the roving tap statute in section 309 of H.R. 1710 would change the standard for the necessary judicial finding from a specific intent to thwart law enforcement to a finding by the judge that specifying

the individual phone to be tapped is not "practical." This amendment would make the roving tap readily available in terrorist investigations.

Question No. 8: How many requests for technical coverage or institution of full investigations of terrorist organizations—domestic or foreign—have been made since January 21, 1993?

How many of these requests have been disapproved since January 21, 1993?

How often are those case files reviewed?

Response: I have been advised that the FBI has provided you a response to this question that is classified in the interests of national security. We would be pleased to discuss that response with you, other Committee members and appropriately cleared staff at your convenience.

Question No. 9: Has there been a reluctance to date by the Office of Intelligence Policy and Review to grant such requests for investigations or technical coverage of terrorist groups?

Response: The Office of Intelligence Policy and Review (OIPR) does not reject FISA applications. OIPR attorneys are responsible for ensuring that FISA applications meet all statutory requirements and, in that regard, the FBI and other agencies are occasionally requested to provide additional information in support of an application.

Moreover, a recent streamlining of the FISA application process should result in a greatly decreased period of time from when a request for surveillance is received by OIPR from an FBI field office to the signing of an order by the Court.

Question No. 10: Has there been any difficulty in obtaining approval for such investigations or technical coverage?

Response: No.

Question No. 11: Is there any reluctance to approve such investigations and technical coverage due to litigation arising out of the CISPES case?

Response: No.

Question No. 12: Has the Department proposed or considered any legislative correction for the CISPES-type litigation that many Departmental personnel legitimately and individually fear, from these types of cases, based upon past history?

Response: In the late 1980's, because of general concerns regarding personal liability, the Department proposed that the United States be the exclusive defendant in cases alleging constitutional or common law torts by government employees. In 1988, Congress amended the Federal Tort Claims Act in this regard where the employee is acting within the scope of his or her employment but only for common law torts.

Within the next few weeks the Supreme Court is expected to issue decisions that will affect this area of the law. After analyzing those decisions, the Department will consider whether additional legislative proposals are warranted.

Question No. 13: What can Congress do to buttress better coordination of intelligence agencies in the U.S. government?

Response: Recognition should be given in legislation to the lead agency concept, whereby coordination in all domestic counterterrorism matters is done through the FBI. This arrangement allows for a controlled flow of intelligence so it may be used to prevent terrorism. It also allows for central decision-making in the event of a terrorist act.

Question No. 14: Can you describe an actual case where the government was unable to obtain an order of deportation against a non-citizen who committed terrorist activities while in the United States because the only way to have obtained the deportation order would have required the government to have disclosed classified information?

In that case, why was the government unable to obtain a criminal conviction against the non-citizen?

Response: The government's single attempt to deport aliens on terrorism-related charges under the 1990 Act is now in its fifth year in Los Angeles. *Matters of Hamide & Shehadeh*, A19 262 560 & A30 660 628 (EOIR Los Angeles). There, aliens charged with having provided material support to the Popular Front for the Liberation of Palestine (PFLP) responded with a variety of collateral attacks and claims both in immigration court and district court.

In district court, the aliens claimed violations of associational and due process rights including a claim that they were selectively prosecuted. In immigration court, they claimed discovery rights to: (1) the disclosure of electronic surveillance information under 18 U.S.C. §3504; (2) State Department, FBI, CIA, and DIA files which "might tend to contradict" the factual assertions of the government's academic expert witnesses concerning the PFLP's terrorist record; and (3) foreign government intelligence made available to one of our experts. The immigration judges in the case have taken an expansive view of aliens' discovery rights in the absence of clear

bars in the statute, with the result that considerable delays were incurred to enable the government to respond to unprecedented discovery orders.

Trial has also been considerably protracted due to imprecision in the language of the 1990 Act deportation provision regarding the government's obligation to prove that the PFLP is a "terrorist organization" within the meaning of the Act. The existing provisions require the INS to prove that the subject organization is a "terrorist organization" without defining either "terrorist organization" or "terrorism." 8 U.S.C. 1182(a)(3); § 1251(a)(4)(A) & (B) (1990 ed.). As a result, the government has found it necessary to submit extensive expert testimony concerning both the concept of terrorism and the PFLP's 28-year terrorist record. The aliens have essentially contended that: (1) the provisions are unconstitutionally vague, and (2) the immigration court is bound to take evidence concerning the PFLP's ostensibly legitimate activities.

The government has never sought to indict these aliens on terrorism-related charges. The existing material support provision in 18 U.S.C. § 2339A was not enacted until September 13, 1994.

Question No. 15: With respect to the designation of terrorist organizations, does the Administration have a set of standards it applies when designating?

Are they/can they be made public?

Are they activity based guidelines?

Response: The Administration applies the definitions contained in Title 22 of the U.S. Code. The term "terrorist group" as it is defined in Title 22 U.S.C., Section 2656f(d), is "any group practicing, or that has significant subgroups that practice, international terrorism." "International terrorism" is defined in that section to mean "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents involving citizens or the territory of more than one country."

Question No. 16: There is some thought to putting the visa granting function within the INS mission rather than leaving it at the State Department. What is the DOJ's view on that issue?

Response: There are two issues raised by this question: whether two government interviews before aliens enter the United States—one overseas and one domestic—are necessary, and if so, whether different agencies should conduct them. The Department of Justice believes that the current organizational arrangement where there are generally two interviews, one conducted by the Department of State for visa issuance and the other by INS at the time of entry, offers several advantages. We note, however, that this two interview process has been changed for certain temporary visitors from countries with very low volumes of immigration-related problems through the Visa Waiver program.

The current two-interview process provides a system of checks and balances where persons wanting to come to the United States are interviewed at different times and from different perspectives—one overseas before entry and one domestic at the time of entry. Overseas interviews for visas have the advantage of screening applicants before they arrive at U.S. ports where ineligible applicants can be efficiently turned down and where additional information in support of visa applications can be easily obtained. Under this arrangement, government officials can readily make inquiries locally to verify facts on visa applications and can be expert in local country conditions and fraud patterns to assist in evaluating visa applications. Although there is a large volume of visa work, there is generally more time overseas to interview visa applicants and review applications than is available at U.S. ports of entry.

Inspection at the time of arrival in the United States is critical because inspectors verify the identity of visa holders and pursue any changes in circumstances since the visas were issued which would affect eligibility to be admitted to the United States. This is especially important since many nonimmigrant visas are valid for multiple entries.

Federal government officials overseas are responsible to the U.S. Ambassador, and the State Department limits the number of non-State Department personnel overseas, which would dictate against having INS in a role where considerable personnel presence overseas was required. Since the State Department is the primary federal agency overseas and already has a mechanism in place to issue visas as part of the Consular Service program, we believe that the current system is workable and should be continued.

Question No. 17: Are there any public parking facilities adjacent to or underneath Department of Justice offices or buildings? If so, what is being done to address this obvious security vulnerability, especially in light of the Oklahoma City tragedy?

Response: The Department of Justice currently employs more than 98,000 individuals who are housed in approximately 2,100 buildings nationwide. Approximately

900 of these buildings are government-owned or maintained and the remaining 1,200 locations involve space that is commercially leased from the private sector. A majority of the commercially leased buildings have public parking facilities adjacent to or underneath them. In addition, a number of government-owned or maintained buildings, especially in urban areas, have nearby public parking facilities.

In almost all government-owned or maintained facilities that house Department of Justice employees, the government has direct control in restricting public access to parking areas within the facilities; however, there may be adjacent public parking facilities not under the government's control. In buildings where the Department occupies leased space, it is more difficult, if not impossible, to control access to public parking facilities. We can explore the possibility of leasing entire garages to restrict public access, but this is an extremely costly solution. For example, in the Washington metropolitan area, we estimate that it would cost as much as $6 million per year to consolidate, for the government's exclusive use, commercial parking at 15 locations where the Department occupies leased space. The conversion of parking at these locations could increase vulnerability at the numerous other buildings in the Washington metropolitan area where the Department occupies leased space because government employee parking would be reduced or eliminated at those locations.

As you know, the Attorney General is chairing a Cabinet committee that is reviewing security at federal facilities. The U.S. Marshals Service has the lead on this review effort which is scheduled to be completed by June 20, 1995, and is expected to result in new security standards for federal facilities as well as estimates of the costs that would be incurred to bring existing facilities in line with those standards. Once this review is completed, we will be able to better address security vulnerability including public parking facilities adjacent to or underneath space occupied by the Department of Justice.

APPENDIX 2.—STATEMENT OF HON. BOB BARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Terrorism didn't begin on April 19th with the tragic bombing of the Alfred P. Murrah federal building in Oklahoma City, and unfortunately, it won't end today as we begin this hearing on combatting domestic terrorism. We must put our work in the proper perspective. What we do in this committee with these hearings must be based not just on what happened on April 19th, but on the history and substance of our government's efforts to protect and defend our law-abiding citizens.

We must remember that what we do in this Congress, beginning today, will remain with the American people for not only months, but years to come. We need to proceed deliberately and carefully, and not with a knee jerk reaction. Instead of focusing on some tangential agenda or talk radio, we need to focus on individuals or groups that advocate violence and take steps (any steps) to carry out violent acts. We need to make sure our government has the capability to discover, apprehend, try, convict, and quickly sentence these people and groups. Of course this Committee, this House, had already begun that process with habeas corpus reform. Hopefully the Senate and the White House will now recognize what we already have, that the best deterrent to murder is swift justice and swift execution.

These panels today, Mr. Chairman, provide an outstanding opportunity to begin this urgent but deliberative process. I commend the Chairman for assembling such an outstanding panel of men and women. I look forward to hearing from them and examining their written testimony before we develop any new legislation to curb terrorism. As a former United States Attorney, I have come to believe that often we do not suffer from a lack of laws, but sometimes from stifling bureaucratic procedures. Thus, as our Subcommittee takes up the fight against domestic terrorism, I believe we have to be mindful that freedom from violent crime cannot be assured by passing new laws. I expect we will have accomplished a great deal if we can strike a solid balance between respect for constitutional rights and the imperative of a strong defense against terrorist violence.

APPENDIX 3.—STATEMENT OF HON. ELIOT L. ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, only four weeks ago, two American diplomats were brutally killed and a third seriously wounded by a terrorist attack in Karachi, Pakistan. Since that tragic day, information has filled the media of terrorist bases in Pakistan. In an article entitled "Pakistan Shelters Islamic Radicals," The Washington Post reported on March 8, 1995 that one extremist group known as Harkatul Ansar had already trained more than 4,000 militants in weapons use and bomb-making since 1987. And, only yesterday, *The New York Times* reported that

> Pakistani leaders have made no secret of their belief that drug money was in some way linked to the March 8 attack that killed two Americans working at the United States Consulate in Karachi, and to the terrorist underground that supported Ramzi Ahmed Yousef, a 27-year-old fugitive and suspected mastermind of the World Trade Center bombing in New York in 1993.

The Secretary of State included Pakistan on the 1993 list of countries which repeatedly provide support for acts of international terrorism. Additionally, although the State Department did not single out Pakistan last year, it did maintain that "there were credible reports . . . of official Pakistani support to Kashmiri militants."

As you may be aware, Pakistani Prime Minister Benazir Bhutto is now visiting the United States next month to "mend relations between our two nations" severely strained by recent terrorism against Americans. For such improvement to occur, the Pakistanis have a long way to go.

Earlier today, members of the House International Relations Committee met with Prime Minister Bhutto. Several Committee members expressed concern about her government's support for radical factions and urged increased efforts to crack down on terrorists. Members of Congress hope that U.S. relations with Pakistan improve, but many will not accept upgraded ties unless the Pakistani government stops allowing militants and radicals to use Pakistan as their base of operations.

To underscore my concern, last month, I introduced a resolution, H. Con. Res. 35, along with Rep. Bill McCollum, a member of this Committee, which calls upon the Secretary of State to designate Pakistan as a state sponsor of terrorism. The resolution stresses Pakistan's inadequate response to terrorists operating both within and outside of its borders and calls attention to support by elements of the Pakistani government for militant activities. Rep. McCollum and I have been joined by a bipartisan group of five other members in introducing this bill.

Mr. Chairman, I commend the Judiciary Committee for holding this important hearing and urge you to give a high degree of scrutiny to the increasing number of reports about Pakistan's support for international terrorism.

APPENDIX 4.—STATEMENT OF TOMMY P. BAER, INTERNATIONAL PRESIDENT, B'NAI B'RITH

I am writing today in hopes that my comments on behalf of B'nai B'rith be shared with the entire Judiciary Committee and entered into the official record of the Judiciary Committee's hearing on Terrorism.

On March 9, 1977, seven Hanafi Muslim terrorists stormed B'nai B'rith International headquarters in Washington, D.C., the Islamic Center, and the District Building where one reporter was killed. The armed intruders held 123 people hostage in the B'nai B'rith building for 39 hours. Staff members were beaten; the building was ransacked; its museum stripped. Of all the Jewish organizations located in the nation's capital the terrorists had selected B'nai B'rith as the target because they saw it as the pre-eminent symbol of Jewish presence and power in America.

Eighteen years later our organization is still here, the oldest and largest Jewish organization in the world with members throughout the United States and in more than 54 countries. And eighteen years later terrorism is still very much an issue for our organization. During the past months we have witnessed the terrorist bombing of the AMIA building in Buenos Aires which was the home of the Jewish Social Service Agency as well as the political umbrella group for the Jewish Community of Argentina. We lost B'nai B'rith members as a terrorist blew a Panamanian airliner out of the sky and watched in horror as terrorist activities continued in Israel and against Israeli and Jewish community installations in London.

And now as we watch the trials of those who tried to wreak havoc in this country, it is clear that the efforts of terrorists are not just aimed at the Jewish people or Israel, but against democracy and our way of life.

B'nai B'rith has mobilized its membership around the world to work with the proper authorities to make sure that all that is possible is done to bring about an end to terrorism. The AMIA building was an easy target for terrorists who realized that the investigation of the Israeli Embassy bombing eighteen months before was never brought to closure. If they see that the perpetrators are not brought to justice, there will be no deterrence to prevent them from striking again.

I have just returned from Latin America, where I had high-level discussions on this issue in Chile, Uruguay and Argentina. I brought home to the officials with whom I met the importance of the Administration's counter-terrorism initiative and urged those officials to enact similar legislation in their own countries. I have also discussed the Iran Sanctions Act with diplomats from around the world and have urged countries to enact similar legislation against Iran, the source of much of the funding and other support for worldwide terrorism. However, if the United States Congress does not enact legislation on these important issues we can rest assured that terrorism will not cease.

The Omnibus Counter-Terrorism Act of 1995 is what we need to protect citizens from the kind of terror the perpetrators of the World Trade Center bombing and the Pan Am flight over Lockerbie inflicted. By correcting deficiencies and gaps in current law, most notably the lack of any specific anti-terrorism laws on the books, the bill will strengthen the ability of the United States to deter terrorist acts and punish those who engage in terrorism. In addition, the bill will serve to ensure that the United States is not used as a support base for acts of terrorism carried out in other countries and provides a workable mechanism to expeditiously deport alien terrorists without risking the disclosure of national security information or techniques.

The Iran Sanctions Act must be enacted to ensure U.S. credibility against those who support terrorism worldwide. The Iranians—the primary exporters of terrorism worldwide—still benefit from U.S. oil companies who are the single largest purchasers of Iranian oil. Some estimates say time nearly $4 billion is spent by these companies in Iran.

Lastly, efforts to guarantee that the State Department's commitment to an office on counter-terrorism stays intact is critical: Only through coordination of all law enforcement agencies within the United States and communications with similar agencies of our allies around the world will we be able to effectively fight against those who wish to perpetrate terror.

Unless the United States leads the way, the war against terrorism will not be won. With that conviction, B'nai B'rith has called for an international coalition, with the United States as the leader, to organize against terrorism. Only when we enlist the commitment of our friends, and work together, can we bring this scourge to an end.

Thank you for the opportunity to address this very critical issue.

APPENDIX 5.—STATEMENT OF JAMES PHILLIPS, SENIOR POLICY ANALYST, THE HERITAGE FOUNDATION

RECENT TRENDS IN INTERNATIONAL TERRORISM

International terrorism, a cancer that has plagued the United States in recent years, is metastasizing into new and more deadly forms that will pose grave new challenges to U.S. security in the years to come. Although the collapse of the Soviet bloc has removed an extensive terrorist support infrastructure, the rise of Islamic radicalism has created a new terrorist infrastructure and a powerful ideological motivation for launching terrorist attacks against Americans.

Since the 1979 Iranian revolution, a wide variety of Islamic militants, inspired but not necessarily controlled by Iran, have launched a series of attacks against Americans. Iranian extremists stormed the U. S. Embassy in Tehran in November 1979 and held American diplomats as hostages for 444 days. Pro–Iranian Lebanese militants bombed the U.S. Embassy and the U.S. Marine barracks in Beirut in 1983 and took fifteen Americans as hostages (killing three) between 1984 and 1991. Islamic extremists also hijacked several airliners in the 1980s and singled out Americans for especially harsh treatment, including murder.

In addition to Iran, Sudan has trained and supported Muslim militants since radical Islamic forces seized power in Khartoum in a 1989 coup. Radical Islamic terrorists also operate from bases located in anarchic regions beyond the power of weak central governments in war-torn Afghanistan, Lebanon, and in the autonomous tribal areas of Pakistan. And Algeria soon could become a base for international terrorism, if Islamic extremists win the bloody civil war that has engulfed that country.

The new breed of radical Islamic terrorist is more intractable, more unpredictable and more dangerous than most of the secular nationalist terrorist organizations that flourished in the Middle East since the late 1960s. Unlike most Palestinian terrorist groups, who observed self-imposed restraints against targeting Americans or launching attacks on American soil because they sought to influence U.S. foreign policy, many radical Islamic terrorist groups operate under no such restrictions In part, this is because they are bitterly opposed not just to American policies but to American values, which they perceive to be a corrupting secular threat to their own vision of Islamic purity. Their choice of possible targets is wider and more indiscriminate because they often are motivated by apocalyptic zeal rather than sober political calculations.

This ideological fanaticism apparently inspired the bombers of the World Trade Center in February 1993 to kill six Americans and injure over 1,000—the worst single act of terrorism on American soil in history. It also inspired Algerian terrorists to attempt to crash a hijacked Air France passenger plane onto the streets of Paris in December 1994, an attack that would have dwarfed the World Trade Center carnage, if it had been successful. Terrorism in the 1990s is likely to be more indiscriminate and lethal, if not more frequent, than terrorism in previous decades.

In addition to a greater willingness to commit mass murder, terrorists in the future also are likely to have greater access to chemical, biological and nuclear weapons of mass destruction. The proliferation of such weapons, particularly among the states that support terrorism, is an ominous trend. Moreover, the relaxation of controls over Soviet military technologies, combined with the mushrooming growth of the Russian mafia and other criminal organizations inside the old Soviet bloc, have greatly raised the risks that future terrorists will be able to purchase on the black market deadly terror weapons capable of inflicting unprecedented numbers of casualties. The March 20, 1995 terrorist nerve gas attack in Tokyo that killed 10 people and injured more than 4,000 is likely to be the harbinger of things to come. Now that the chemical weapons threshold has been crossed by a terrorist group (terrorist states such as Iraq and Iran previously had used such weapons), other terrorist attacks involving weapons of mass destruction are likely, because terrorists are notorious copycats.

U.S. COUNTERTERRORISM POLICY

The Clinton Administration introduced legislation on February 10 to bolster U.S. deterrence of terrorism and punish those who aid and abet terrorist activity. This bill, the Omnibus Counterterrorism Act of 1995, will outlaw fundraising in the United States in support of terrorist activities overseas, expedite the deportation of alien terrorists, and make international terrorism committed in the U.S. a federal crime. This legislation is a long overdue step in the right direction But it focuses primarily on domestic and legal aspects of the war against terrorism. The February 7, 1995 arrest of Ramzi Yousef, the suspected mastermind of the World Trade Center bomb-

ing, is an important reminder that international efforts are a key ingredient of fighting terrorism.

Yousef's terrorist activities underscored the global reach of terrorist networks and the need for stepped-up international cooperation in combatting terrorism. The mysterious 27 year old, who fled the United States only hours after the 1993 bombing, has been extremely active in recent months. Yousef was implicated in a terrorist bombing of an airliner in the Philippines in December, a plot to assassinate Pope John Paul II in January, and an aborted attempt to bomb an American airliner in Thailand in early February.

Yousef's ability to repeatedly cross international borders undetected for two years despite being the subject of an intensive international manhunt indicates that he had extensive help from co-conspirators operating in diverse countries. His considerable financial resources, large supply of false documents, and access to safe houses, explosives, local assistance and information about his planned targets in far-flung regions of the world suggest that he enjoyed the backing of a well-organized network, and possibly a state sponsor.

The Clinton Administration has hailed Yousef's arrest as an important victory in the war against terrorism. But in at least one respect this victory came despite the administration, rather than because of it. Yousef's apprehension and his rapid extradition from Pakistan can be attributed to close coordination between the State Department, Justice Department, Federal Bureau of Investigation and intelligence agencies. This coordination and the close cooperation between the U.S. and Pakistan was in large part a function of the State Department's Office of Counterterrorism. The Clinton Administration had planned to fold this office into a new Bureau for Narcotics, Terrorism and Crime and demote the Coordinator for Counterterrorism from the current equivalent of an Assistant Secretary of State to the level of a Deputy Assistant Secretary. Congress temporarily blocked this reorganization scheme in April 1994 by passing an amendment to the State Department authorization bill sponsored by Representative Benjamin Gilman.

Congress and the Fight Against Terrorism

The critical challenge facing U.S. counterterrorism policy is putting relentless pressure on the states that sponsor terrorism—Cuba, Iraq, Libya, North Korea, Syria, Sudan, and particularly Iran, the chief supporter of international terrorism in the world today. This is an opportune time to ratchet up the pressure because Iran and other state sponsors of terrorism are economically weak and diplomatically isolated. But the administration has not followed through on its tough rhetoric on terrorism It has not given up on plans to downgrade the State Department's Office of Counterterrorism, for example, and it continues to woo Syria despite Syria's continued support of more than a dozen terrorist groups.

Congress has an opportunity to strengthen U.S. counterterrorism policy above and beyond the legislative proposals the administration is pushing. To do so, Congress should:

Press the administration to make counterterrorism a top priority in American foreign policy. Congress should force the administration to drop its short-sighted plan to downgrade the State Department's Office of Counterterrorism, which spearheads international efforts in combatting terrorism. The Gilman amendment, which bars the administration from downgrading the office, expires on April 30, 1995. Representative Gilman has introduced H.R. 22, a bill to preserve the office on a permanent basis and elevate the Coordinator of Counterterrorism to the status of an Ambassador at Large, as was the case in the Reagan Administration. Senator Al D'Amato introduced a similar bill in the Senate. Congress also should press the administration to raise the issue of terrorism in every appropriate bilateral and multilateral diplomatic contact, including the annual G–7 summits. A series of congressional hearings on new trends in international terrorism and the involvement of various groups and states, would help to highlight the threat of terrorism and raise the priority of fighting it. Another vital topic for congressional hearings is investigating strategies for blocking the efforts of terrorist states such as Iran, Iraq and Libya to obtain weapons of mass destruction. A nuclear-armed Iraq or Iran could pose the ultimate terrorist threat.

Reform immigration laws to improve internal security. Congress should pass legislation that enables the U.S. government to deny visas to foreigners because of membership in terrorist groups. Right now, would-be terrorists are denied entry only if the government can prove that they already have committed terrorist acts or that they intend to commit such acts. These rules are too lax and should be strengthened. Moreover, tougher penalties should be imposed on the production or use of fraudulent passports and visas, including giving the government the power to seize

the assets of criminals convicted of creating or using false documents for terrorism or drug smuggling. Nine of the original 35 indictable counts in the 1993 New York bombing plots involved visa or passport offenses.

Punish states that support terrorism on as many fronts as possible. The U.S. must work with its allies to raise the diplomatic, economic, political and military costs of supporting terrorism so high that it outweighs the strategic benefits. Although the administration has singled out Iran as the world's most dangerous state sponsor of terrorism, it has not succeeded in persuading its allies, particularly Japan and Germany, to levy economic sanctions against Tehran. In part, this is because American oil companies have become Iran's biggest customers, buying about $4.2 billion dollars of Iranian oil annually to supply their overseas markets.

Although imports of Iranian oil into the U.S. are prohibited, the Clinton Administration has declined to ban U.S. companies from purchasing Iranian oil for their overseas markets. This business-as-usual approach undermines American diplomatic efforts to isolate Iran and raise the cost of its continued support of terrorism. Moreover, this limp approach to sanctions has encouraged U. S. oil companies to cooperate with Iran in developing its oil export potential. Growing public outrage forced the Administration on March 14 to nullify a deal that Conoco Inc. had signed with Iran to develop two Persian Gulf oil fields. Yet the Administration still balks at strengthening sanctions against Iran.

Congress should step into this leadership vacuum and pass legislation banning American oil companies from purchasing Iranian oil and should call upon U.S. allies to do the same as long as Iran supports Hezbollah, Hamas and other terrorist organizations. Senator D'Amato has introduced legislation that would ban all U.S. trade with Iran until the President has determined that Iran has ceased its support for terrorism, terminated its nuclear weapons program, and improved its human rights policies. This bill, the Comprehensive Iran Sanctions Act of 1995, would be a major step in the right direction.

Improve the gathering and sharing of intelligence on terrorist groups. The Attorney General's guidelines on domestic intelligence-gathering need to be revised to permit federal law enforcement agencies to monitor the open activities of, and public information about, organizations that clearly indicate their support of terrorism. A central information repository needs to be created within the federal government to collect and analyze information concerning the activities and immigration status of foreigners who have engaged in or supported terrorism. This would help improve coordination between intelligence agencies and immigration officials that could prevent errors, such as those that led to the granting of a visa to Sheik Omar Abdul Rahman, the so-called "spiritual leader" of the World Trade Center bombers. U.S. law enforcement and intelligence agencies also should step up their cooperation and information exchanges with their counterpart agencies in moderate Muslim states.

Make sure that impending budget cuts do not undermine the war against terrorism. Congressional appropriations committees must take care to avoid weakening the organizations crucial to America's defenses against terrorism—particularly counterterrorism efforts of the intelligence community, the Federal Bureau of Investigation, the State Department's Office of Counterterrorism, and the Defense Department's Special Operations Command. Budget policymakers should also accord a high priority to the Treasury Department's Office of Foreign Asset Control, which is responsible for implementing the U.S. government's freeze on the financial assets of terrorist groups, and the State Department's Counterterrorism Research and Development program, which helps develop new means of detecting explosives, among other things. Cutting such programs not only would jeopardize the nation's security, but would be penny-wise and pound-foolish. The World Trade Center bombing, which resulted in 6 deaths and over 1,000 casualties, also triggered more than $600 million in economic losses.

Assist the governments of Lebanon and Afghanistan to restore order and expel international terrorists. Civil wars exacerbated by foreign interventions have enabled terrorist groups to operate with impunity from bases in both of these countries Ramzi Yousef and several other terrorists involved in the World Trade Center bombing had extensive contacts with radical Afghan Islamic groups. Congress should hold hearings to determine ways in which the U.S. can assist the weak central governments in both countries to dismantle and expel terrorist groups.

The war against terrorism requires concerted international efforts which only the U.S. can lead. But the Clinton Administration does not appear willing or able to exercise the leadership necessary to decisively mobilize the international community against terrorism. This makes it all the more important that Congress take proactive steps to vigorously combat international terrorism, which looms as one of the greatest challenges to U.S. security in the 1990s.

APPENDIX 6.—STATEMENT OF GERALD H. GOLDSTEIN, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. Chairman and Members of the Committee:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Committee for this opportunity to offer the following brief written statement for the official record -- regarding the Committee's April 6, 1995 hearing on international terrorism. NACDL commends the Committee for promptly convening such a hearing. However, NACDL also respectfully urges the Committee to hold additional, necessary hearings as soon as possible *concerned with H.R. 896 in particular*.

Further, NACDL respectfully requests permission to offer both oral and written testimony at such an additional, necessary hearing on H.R. 896. NACDL submits that the views of its members, who have devoted their lives to representing the persons in this country who are accused of committing a crime (that is, the type persons who will stand accused in a Star Chamber, McCarthyistic, and *Korematsu*[1] manner, should this bill pass into law), are imperative to gaining a true understanding of the dangers to the Republic inhering in this proposed legislation.

The members of NACDL are front-line defenders of the People's rights and liberties. NACDL represents the Nation's criminal defense lawyers, and in turn: People accused of having committed a crime; and our constitutional democracy itself. NACDL's 8,700 direct members and over 20,000 affiliated members of 70 State and local affiliates include private criminal defense lawyers, public defenders, and law professors who have devoted their lives to ensuring that others do not wrongfully lose theirs. NACDL members are the legal advisors and advocates who represent the people whose rights and liberties will be trampled by enactment of H.R. 896 or any similar terrorism bill. NACDL respectfully submits that its members' experienced insights are critically important to full understanding of H.R. 896 or similar proposals -- and that these insights cannot be gleaned from full-time academics, agency representatives, or others who might also testify about such proposals.

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[1] Korematsu v. United States, 323 U.S. 214 (1944).

I.

"Tough on Terrorism"

> Being tough on terrorism is not exactly a difficult stance for a politician. * * * But precisely because the label [of "terrorist"] is so powerful, it invites overreaction: Just as the Communist threat led to the blacklisting, imprisonment, and deportation of countless innocent persons for their lawful political activities during the Cold War, so [the Clinton administration's] recent measures against terrorism threaten to throw innocent citizens in jail and innocent immigrants out of the country simply for their political associations.[2]

NACDL would also remind the Committee of the similarities between this bill and the infamous Japanese-American internment horror of *Korematsu* (which most Americans recall now with shame, but at least a rather satisfying assumption that we have learned our lesson -- that such a lapse in our Nation's constitutional character could not happen again);[3] and the Star Chamber so anathema to our

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[2] Professor (and Chair, NACDL Supreme Court Argument Preparation Committee) David Cole, "The Omnibus Counter-Civil Liberties Act," Legal Times, March 13, 1995, at 31. NACDL commends Professor Cole's entire article to this Committee's attention.

[3] Korematsu v. United States, 323 U.S. 214 (1944). But note, even in the now-infamous *Korematsu* set of cases, the government's placement of Japanese-Americans in concentration camps, based on their ancestry, and solely because of their ancestry, without evidence or inquiry concerning the individuals' loyalty and good disposition towards the United States, was even then upheld by the Court only *because* of wartime, "military necessity" (notwithstanding the actual lack of a martial law declaration). No such wartime, "military necessity" even arguably exists relative to H.R. 896. Certainly any such "analogous" claim must be deemed to be as dubious as the government's claims in *Korematsu* were later revealed to have been. *See e.g.*, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (federal district court grant of writ of *coram nobis*, based on findings that the government deliberately omitted relevant information and provided misleading information in papers submitted to the Supreme Court of the United States concerning whether military orders at issue were reasonably related to the security and defense of the nation and to the prosecution of the war); Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986) (federal appeals court holding that the government's fraudulent concealment of facts undermining its claims of military necessity tolled the applicable statute of limitations on at least certain claims by a group of Japanese-American victims of the evacuation in their suit to recover damages for injuries arising out of their wartime internment), *vacated on other (Federal Circuit appellate jurisdiction) grounds*, 482 U.S. 64 (1987). *See*

Founders.[4]

Moreover, NACDL fully agrees with the oral and written testimony before the Committee of Gregory T. Nojeim, on behalf of the American Civil Liberties Union (ACLU). Both H.R. 896 and S.390 represent massive assaults on our Bill of Rights, and indeed, would inflict more damage on constitutionally protected rights and liberties than any legislation in recent memory. These bills trash such cherished individual rights and liberties as the presumption of innocence, freedom of lawful speech and association, equal protection of the laws, the right to reasonable bail, the right to confront the "evidence" against you, and the right to be free from unreasonable searches and seizures.

For example, these bills propose that mere suspicion of involvement with even the lawful activities of an organization that has members who resort to terrorism (e.g., South Africa's African National Congress of just a few years ago; or Ireland's Sinn Fein) would be sufficient to allow the executive branch of government to jail an alien with no right to bail. (Permanent resident aliens would get the chance to get out of jail on bail, but they would have to contend with the burden of proof being shifted to their shoulders -- they would have to prove their innocence, rather than have the government prove their guilt or even probable guilt).

Too, these bills would go well beyond even H.R. 666 (a bill *opposed* by H.R. 896's chief sponsor, Mr. Schumer, for example) -- permitting the FBI to conduct criminal investigations into "material support" to alleged terrorists with no requirement for

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generally Professors Peter M. Shane & Harold H. Bruff, The Law of Presidential Power 694-697 (1988).

[4] The Star Chamber:

> [t]hat curious institution, which flourished in the late 16th and 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" defenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.

Faretta v. California, 422 U.S. 806, 821 (1975) (Stewart, J.). *See also* Professor Lawrence Friedman, A History of American Law 23 (1973):

> The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it -- a reminder that high state policy could not safely be entrusted to a system so chancy as English law. . . .

See generally 5 W. Holdsworth, A History of English Law 155-214 (1927).

even reasonable suspicion that the target of such an investigation knowingly had or would violate any federal criminal law. Anyone who reads books should be familiar with the history of FBI practices of the past, for example and at least, and should certainly know better.[5]

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[5] *See e.g.*, Anthony Summers, Official and Confidential: The Secret Life of J. Edgar Hoover 112-116 (1993):

> In May 1940, [President Franklin D.] Roosevelt gave the go-ahead for use of that vital tool of any secret police, the telephone tap. On its face, Edgar's track record on wiretapping was entirely respectable. The Bureau's first manual, issued in 1928, said flatly that tapping was "improper, illegal . . . unethical" and would not be tolerated. Edgar had assured Congress that any agent caught wiretapping would be fired.
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> Though some sought to find loopholes in it, the Federal Communications Act of 1934 had seemed to outlaw wiretapping altogether. And, in spite of an Attorney General's ruling that allowed some tapping with prior approval, Edgar continued to say that he was against it except in life-or-death circumstances, such as kidnappings. The testimony of his own men, however, makes it clear that was not true.
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> According to . . . agents, Edgar had on occasion used bugging to further his own private interests. There had been the time, years earlier, when he ordered taps on the telephones of Roosevelt's Postmaster General James Farley, who wanted him replaced as FBI Director. * * *
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> "Perhaps only Mr. Hoover himself," Federal Communications Chairman James Fly was to write, "can tell exactly how many times he has instructed his men to break the law that his Bureau was supposed to enforce; but he has chosen not to discuss such details." In 1940, when Edgar was quietly lobbying for looser wiretapping laws, it was Fly's congressional testimony that ensured the legislation was rejected. Edgar detested the FCC Chairman from then on, so much so that -- even two decades later in retirement -- Fly insisted on meeting a reporter out of doors, for fear his home was bugged by the FBI.
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> In spring of 1940, convinced that wiretapping was vital to national security, President Roosevelt overrode the law. He authorized the Attorney General to permit eavesdropping on "persons suspected of subversive activities against the United States, including suspected spies. . . . ". This order, [Roosevelt Attorney General] Francis Biddle pointed out long afterward, "opened the door pretty wide to wiretapping of anyone *suspected of subversive activities* [Biddle's emphasis]." It was to remain Edgar's basic authority for telephone tapping for a quarter of a century.

The bills also seek to do away with confidentiality protections certain special agricultural workers and amnestied illegal aliens were assured under previously-enacted law -- with respect to personal information they gave the government in seeking lawful immigration status.

Finally, the "fig leaf" of the Act's envisioned Chief Justice appointment mechanism notwithstanding, the Nation's courts are effectively taken out of the picture by these bills. The bills propose to create in the stead of the presumably chancy, pesky and unwieldy third branch of government, a "special" five-judge secret court -- with the "power" to deport immigrants for "supporting" "terrorist organizations" without the government ever having to actually reveal its "evidence" against the accused individual. This is nothing less than the Star Chamber revived.[6]

Of course, as the ACLU has well noted, a great, overarching danger inhering in these anti-constitutional, bill characteristics is that the vague and sweeping powers ushered in by such legislation would be wielded only "selectively," which is to say,

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* * * During the run-up to the 1944 election, [Edgar] would reportedly supply the White House with the results of wiretaps on Republican politicians -- an alleged Watergate three decades before the scandal that would topple Richard Nixon.

According to Nixon, Edgar told him "every president since Roosevelt" had given him bugging assignments. As the Senate Intelligence Committee would discover in 1975, Presidents Truman, Eisenhower, Kennedy, Johnson -- and Nixon -- all used the Bureau to conduct wiretaps and surveillance for purposes that had nothing to do with national security or crime, and which can only be described as political. By ignoring ethics, and on occasion the law, and by using the FBI to do it, they all made themselves beholden to Edgar.

Against that background, it is hardly surprising that Edgar would feel free to deceive Congress on the subject. * * *

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[In addition,] [w]e shall probably never know how much wiretapping was done solely on the authority of senior FBI officials, without the approval of attorneys general. * * *

The FBI's surveillance index, started in 1941, contains 13,500 entries. While the identity of the individuals tapped is withheld on privacy grounds, the index establishes that Edgar's FBI tapped or bugged thirteen labor unions, eighty-five radical political groups and twenty-two civil rights organizations.

[6] *See supra* note 4.

at the disproportionate or exclusive expense of the "politically unpopular" groups and individuals among us. Indeed, H.R. 896 represents a bald attempt at the "legalization of racism."[7]

While NACDL is very concerned about the above-referenced, individual rights and liberties-crippling aspects of H.R. 896 and its ilk, NACDL thinks it also especially important to focus on the systemic and institutional chaos, or crisis, that would be unleashed upon the Republic by enactment of such legislation. In addition to the concerns addressed in the ACLU's testimony before this Committee and referenced above, NACDL would like to emphasize the following, additional points.

II.

The Unchecked, Unsafe, Would-Be "New" Weaponry Sought by H.R. 896 and its Kin is an Unnecessary "Red Herring"

First, it must be understood that the United States government already has the power (and the budget) under current law to attack the problems of terrorism purportedly driving H.R. 896 and similar proposals (e.g., S. 390). The only "inadequacy" that could possibly be seen to exist regarding these current terrorism-fighting powers is that they must take place within the bounds of the constitutionally-mandated Rule of Law, within our system of separation of powers and checks and balances and respect for fundamental individual rights and liberties.

Existing law is up to the challenge of the government's legitimate terrorism-fighting responsibilities. NACDL submits that if the government agencies charged with fighting terrorism would simply concentrate on using the weapons they now have, which exist within the bounds of the law, instead of trying to shift attention to the red herring of their professed need for more powerful statutory weaponry, we would all be better served and our tax dollars better spent.

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[7] Korematsu v. United States, 323 U.S. 214 (1944), dissent of Justice Murphy; *see also id.* at n.1 ("That this forced exclusion was the result in good measure of th[e] erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area."); *id.* at n. 15 ("The Final Report, p.34, makes the amazing statement that as of February 14, 1942, 'The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.' Apparently, in the minds of the military leaders, there was no way that the Japanese American could escape the suspicion of sabotage."). *See also generally supra* note 5 (regarding example entities on the FBI's surveillance index).

III.

This Unchecked, Unsafe, Would-Be "New" Weaponry Would Violate Our Governmental System of Check and Balances and Separation of Powers, at the Expense of the Nation's Independent Judicial Branch as Well as Individual Rights and Liberties

NACDL thinks it imperative to recognize the mockery H.R. 896 would make of the third, Judicial branch of our government -- the ultimate guarantor of the Constitution.[8] The "fig leaf" of Chief Justice appointment "power" notwithstanding: the bill would do away with our constitutional system of checks and balances and separation of powers, replacing our venerable court system with a Star Chamber system, as described above. NACDL respectfully submits this Committee should heed the warning of Justice Jackson, the Nuremburg War Trials' prosecutor -- *especially* in the obviously non-wartime, non-"military necessity" application context contemplated by H.R. 896:

> I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations *even if* it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.
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> Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to be wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. * * *
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> * * * I do not think [the courts] may be asked to execute a military expedient that has no place in law

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[8] *See e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See also* The Federalist No. 78 (Hamilton) ("No legislative act . . . contrary to the constitution can be valid. To deny this, would be to affirm . . . that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what powers do not authorize, but what they forbid."); *id.* ("If it be said that the legislative body are themselves the constitutional judges of their own powers . . . . It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to its authority").

under the Constitution.[9]

It is especially important to recognize as well, or in particular, that: United States courts have consistently held that lawful activities are constitutionally protected. But "terrorist support" is so broadly defined in H.R 896 and its fellow proposals that the term specifically covers lawful activities. Courts have also rejected, on due process grounds, the "secret evidence" procedures championed by H.R. 896.[10] Then again, under H.R. 896, the role of the court system is effectively thwarted. As one recent common-sensical, outside the beltway editorial (from Oregon) put it: "The president alone would decide which groups are terrorists threatening the national interests, foreign policy or economy of the United States. No court could second-guess him; no checks, no balances."[11]

IV.

Conclusion: The Committee Should Reject This Legal Pretender Now, or at Least, Convene Additional Hearings, Concentrating on H.R. 896 and its Bill of Rights and System-Wrecking Qualities, in Particular

Passage of H.R. 896 would represent an abdication of congressmembers' constitutional responsibility and would create a constitutional crisis -- and this in a day of macroeconomic budgetary and federal court caseload concerns. As the independent Judiciary has consistently held: the due process clause "is a restraint on the legislative as well as the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."[12]

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[9] Korematsu v. United States, 323 U.S. 214 (1944), dissent of Justice Jackson (emphasis added).

[10] *See, e.g.*, Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) (D.H. Ginsburg, J.). *Id.* at 516:

> Rafeedie -- like Joseph K. in *The Trial* -- can prevail before the [INS] Regional Commissioner only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.

[11] Editorial, "Mugging the Bill of Rights," The Oregonian, April 1, 1995.

[12] Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 276, 15 L.Ed. 372 (1855).

Substituting a Star Chamber "court system" for the independent Judiciary envisioned by the Founders, by which our great Nation has proudly prevailed for more than 200 years, will not turn H.R. 896's lack of due process into due process. Nor will it turn H.R. 896's other constitutional infirmities into provisions passing constitutional muster.

NACDL urges the Committee to unabashedly heed history and the Constitution, and to accordingly quickly reject the Orwellian and Kafkaesque H.R. 896 -- putting this legal pretender out of its misery and the People out from under the risks posed by H.R. 896. In the alternative, at minimum, NACDL submits that the Committee needs to convene hearings devoted exclusively to consideration of H.R. 896. The matters at stake are too important to not receive careful, full consideration by Congress. NACDL respectfully submits as well that it should be afforded the opportunity to offer oral and written testimony -- as the organization whose members have devoted their lives to representing persons wrongfully targeted, accused and prosecuted by government, and those additional persons who will be so officially victimized should the government be given this "new," high-powered, Constitution-crippling weapon it so covets.

APPENDIX 7.—MARY MOURRA RAMADAN, DIRECTOR OF LEGAL SERVICES, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE

The American Arab Anti-Discrimination Committee ("ADC") would like to thank the Committee for affording it the opportunity to submit testimony in this very critical matter before the Committee.

ADC's apprehension with respect to the proposed legislation is that it is designed to target the Arab American community. For the past twenty years, the Arab American community has suffered a vicious and sustained propaganda assault through the media, which has recklessly and irresponsibly fostered and promoted the most grotesque stereotypes in the public imagination. The devastating effects of such disinformation is exacerbated because Arab culture is profoundly misunderstood in the United States. Arab culture is diverse and based on sound moral principles. Nonetheless, a good majority of Americans believe that the word Arab is synonymous with Muslim and that Muslim is synonymous with terrorist. Both assertions are incorrect. The word Arab encompasses Christians, Moslems and Jews. Islam does not advocate or condone terrorism in any respect. Additionally, the Arab community has not attained the level of political organization and influence of other groups and thus it continues to struggle today to rise above and combat the stereotypes with which it has been burdened.

In section after section of the proposed legislation, we hear echoes from dark moments in this nation's struggle for national civil and political rights. Those grievous periods are remembered most painfully by members of many once-persecuted groups or ethnic minorities, including Chinese-Americans in the late 1800s, Japanese-Americans interned during the Second World War, and victims of McCarthyism in the 1950's. Mercifully, these dark moments were transcended and now represent milestones of our progress in securing and safeguarding the constitutional rights of all Americans. These achievements demonstrate unequivocally that as a nation, the United States has risen to a level of political consciousness and maturity in which it is understood that legislation based on visceral reactions—which in effect legalize discrimination on the basis of alienage or other basis—not only fails to remedy the problems against which it is directed, but also erodes the civil protections of all citizens.

As the committee considers the proposal presented to it, we urge each member to reflect upon the lessons of the past and whether these proposals truly advance the principles America has struggled at enormous price to embody.

Our objections can be reduced to two main themes. First, the scope of the applicability of the provisions is so broad that it invites abuse and selective enforcement which we feel will be directed at the Arab American community, silencing protected speech and punishing lawful political activities. Second, the exceedingly tenuous nature of the contacts with "designated organizations" sufficient to trigger the act allows for unprecedented expansion of governmental authority which could result in egregious violations of the constitutional rights of individuals singled out on the basis of speculation and inference.

Arab-Americans, like all Americans, are deeply concerned about terrorism and would support wholeheartedly the passage of laws that would enhance the government's ability to apprehend and convict terrorists. You may recall that our community has suffered numerous terrorist attacks and threats of terrorism over the years right here in the United States. Indeed, on October 11, 1985, a bomb blast demolished ADC's Southern California office, killing United States citizen Alex Odeh, ADC's West Coast Regional Director and injuring seven other United States citizens.[1] There have been many other incidents of terrorism directed against our community over the years. We want strong laws but we want fair laws. We want laws that will be applied across the board irrespective of the nationality of the offender. We want an objective definition of terrorism and objective criteria to guide the government and law enforcement agencies in the application of the laws. In brief, although politics is inherent in the definition of terrorism, we want the politics taken out of the application of the laws.

What follows is an overview of several of the provisions of the proposed legislation which are of particular concern to Arab-Americans.

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[1] Although, the Jewish Defense League praised the attack and FBI terrorist experts announced a line between the JDL and the bomb blast, no one was ever arrested or convicted for this crime.

I. Presidential Designations of Terrorist Organizations

Under the proposed bill, the President is granted unreviewable power to designate organizations as "terrorist." Any foreign organization may be so designated upon a unilateral determination that the organization engages in "terrorism activities" and such activities threaten the "national security of the United States."

As more fully described below, the ADC has significant concerns relating to the provisions in their present form:

A. THE DELEGATION OF POWER TO THE PRESIDENT IS OVERBROAD AND PROVIDES NO GENUINE GUIDANCE FOR ITS APPLICATION

Given the breadth and scope of the definition of terrorism, conceivably, almost any political organization or person that has engaged in some form of political struggle falls within the definition. What is objectionable here is that the President is given unreviewable power to pick and choose from among the entities falling under the definition. There is no predictability in the application of the proposed law. Since the President is not *compelled* to designate every entity meeting the definition, he necessarily must be applying some other unstated criteria to do so. If the bill was genuinely aimed at combating terrorism, it should it seems, seek to punish *all* those who by definition are terrorists. As it stands, this bill will apply to some but not all terrorists. We are entitled to ask what the bill is truly aimed at. Indeed, what will single out one terrorist but not another? Will the basis be ethnicity, religion, political belief or ideology depending on its unpopularity at a certain time? Thus, although the bill *seemingly* gives the president guidance in the execution of delegated legislative power, it actually provides no guidance at all. This type of delegation is clearly overbroad, and the type which has consistently been recognized to be most injurious to our liberties and the Rule of Law. Arguably, these bills are not a genuine effort to combat terrorism generally, but, in fact, seek to selectively reach far beyond terrorism and punish legitimate political activity and speech.

The ADC's fear is that since the application is selective and at the sole and unreviewable discretion of the President, the bill would, on the basis of political expedient and bias, be turned against the American Arab community.

B. THE PRESIDENT'S DESIGNATIONS WOULD BE UNREVIEWABLE

ADC does not object to granting power to the President to designate organizations and individuals as terrorist. ADC wants effective legislation to be passed that would protect all Americans from terrorism. ADC objects to the fact that these determinations as proposed, would be *unreviewable.*

The fact that the President's power, under H.R. 1710, has no provision for judicial review invites abuse. Specifically, the bill contains nothing to prevent the President from using his power to designate persons and organizations in an arbitrary or capricious manner, and to criminalize legitimate and legal political activities and associations. This would amount to punishing protected First Amendment activities. The dangers of the lack of review are particularly serious in a content such as this, which involves political speech and activity because the competition of political interests creates incentive for abuse.

Moreover, the proposed legislation does not set forth objective criteria on the basis of which such a determination *must* be made. Could one act by a lone member of an organization claiming to act on behalf of the organization, suffice to affirm the designation of the organization, or would a more substantial finding be required? For instance, that the organization engages in a pattern and practice of such activities. Or would the same intermediate standard apply? Further, what standard would apply to an organization that, at one time, may have fallen under the definition of "engaging in terrorism activities" but which now functions as a legitimate political organization, and engages in the political process and debate. In any event, the bill does not address these issues and no standards are established. The unreviewability and the lack of objective criteria invests the President with immeasurable authority to use this power selectively and arbitrarily, which the Arab American community feels will be used to target them and stifle the legitimate expression of their political beliefs.

Since both the criminality of many activities enumerated in the bill, and the triggering of provisions authorizing expanded governmental powers effectively removing the rights of accused individuals, flow from the initial determination by the President that an organization or individual is "terrorist," it is all the more critical that the process by which these determinations are made be scrutinized.

II. The Criminalization of Fundraising

The bills criminalize financial transactions with or fundraising on behalf of foreign organizations designated as terrorist by the President. Although ADC firmly supports laws criminalizing any fundraising for terrorist activities, ADC is concerned because these laws reach far beyond that goal and punish individuals *not* because they are engaged in or funding any criminal activity but rather, on the basis of very tenuous connections to designated organizations.

Unlike present laws that punish individuals or organizations that have been found to have *engaged* in "terrorism activities," the bill under consideration would base punishment on mere association. It would not be necessary for a particular individual to have actually conspired, committed or participated in the commission of any unlawful act. Casual association with the organization would also be punishable. For instance, contributions for humanitarian or charitable purposes would be sufficient for punishment if some connection could be drawn between the recipient of the donation and a designated organization.

In order to impute criminality to a person making such a donation, many inferences have to be drawn. Drawing inferences based on tenuous connections is exactly what the Supreme Court condemned in *Bridges* v. *Wixon*, 326 U.S. 135 (1945). That case involved a trade unionist against whom deportation proceedings were initiated on the basis of an affiliation with the Communist Party. The Court held:

> Inference must be piled on inference to impute belief in Harry Bridges of the revolutionary aims of the groups [involved in the labor movement]. . . . But where the fate of a human being is at stake the presence of the evil purpose may not be left to conjecture.

These provisions are a revival of old laws, specifically, the McCarran Walter Act—that established "guilt by association" and for which we subsequently apologized—that marked the era of McCarthyism.

Freedom of association, the right to raise and collect funds and the right to recruit members for an organization have long been held to fall under the constitutional protections of the First Amendment. *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295–296 (1981); *Village of Schaumburo* v. *Citizens for a Better Environment*, 444 U.S. 620, 623–33 (1980).

Under current law, it is illegal to raise funds for an organization's terrorist activities. Fundraising is not prohibited for an organization's lawful and legitimate political activities. This is true for even the most politically unpopular organizations. 18 U.S.C. section 2339A. For instance, as offensive as the Ku Klux Klan is, our laws will not punish its fundraising if it is in support of lawful activities—e.g., a KKK picnic. Furthermore, aliens cannot be punished absent a connection between the alien and the terrorist activity, i.e., providing material support to a terrorist activity.[2] In contrast, under the proposed legislation, even a purely charitable donation to an entity—e.g., an orphanage, a hospital, a school—that is found to have received some funds from a designated organization is enough of a connection to warrant punishing the individual. This is true even where the evidence that the accused has only made a charitable donation is uncontested. Thus. these provisions reach far beyond the stated goal of punishing terrorists, and arguably, would allow the government to exercise unlimited authority and discretion to silence protected speech and quash legitimate political activity.

A. PUNISHMENT

Finally, the punishment under the fundraising provisions is not inconsequential. The bill proposes a penalty of up to 10 years in prison and 50,000 dollars in fines for American citizens. With respect to aliens, the penalty is deportation. The "removal procedures for alien terrorists" as discussed below, involve numerous flagrant violations of the due process procedural rights of aliens to effect their deportation. That a charitable donation by an American citizen would be punishable at all seems inconceivable. Undoubtedly, if this bill passes these laws will be tested in the courts on the basis of unconstitutionality.

As previously stated, ADC's concern is that these provisions, which violate even the most basic notions of fairness, will effectively create a convenient legal mechanism which will facilitate the immediate removal from the United States of vulnerable individuals conceivably on any basis, including religion. nationality, ethnicity or political opinion. Furthermore, these provisions would have the effect of institu-

[2] Immigration and Nationality Act ("INA") section 212(a)(3(B)B)(iii).

tionalizing intolerance of legitimate political speech by means of immediate removal of any perceived "political undesirable."

That such bias is prevalent in our society is illustrated by the public response of hatred and anger directed at Arab and Muslim communities after the bombing of the federal building in Oklahoma on Wednesday April 19, 1995. Within hours of the bombing, the media began attributing the act to "Middle Eastern terrorists." ADC learned that one Senator went so far as to urge the government to seal the borders so that "muslim fundamentalists" would not be allowed to invade our nation. Within three hours of the bombing, an innocent Palestinian American, Ibrahim Abdallah Ahmed, became the nation's "suspect" and the only basis for this presumption was his Arab ethnicity and Muslim faith.

B. AGAINST WHOM WILL THESE LAWS BE ENFORCED?

Executive Order 12947, issued on January 25, 1995, entitled "Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Peace Process" makes clear the administration's intent to criminalize any transaction with many Middle Eastern organizations that have been engaged in armed struggle over the years. Hamas is among those organizations. Therefore, we can reasonably infer that the administration's position will be to enforce those provisions with criminal sanctions even with respect to purely humanitarian assistance to any institution however remotely related to Hamas, despite the fact that Congress is well aware of the substantial social welfare programs that Hamas supports.[3]

Would an Irish American be imprisoned for donating money to an orphanage supported by the Irish Republican Army under these laws? Would Americans tolerate such an exercise of governmental authority? Or would these provisions only be applied against groups that are politically unpopular at a given time? Until the politics is taken out of the applicability of these laws, the Arab-American community cannot be convinced that they are a genuine attempt to combat terrorism. All acts of terrorism should be condemned. All individuals who commit or finance terrorist activities should be punished regardless of the ethnicity, religion or political beliefs of the offender.

III. Removal Procedures for Alien Terrorists

A. THE USE OF SECRET EVIDENCE AND DENIAL OF WRITS OF HABEAS CORPUS

Under the provisions, a special immigration court would be created to prosecute both permanent residents and non-immigrant aliens. Jurisdiction of the special court would be triggered if the government establishes, by means of an application submitted to the special removal court in camera and ex parte, that the alien is in deportation proceedings under the "terrorism provisions" and that trying the matter in the ordinary immigration courts would "pose a risk to national security." Hence, virtually anytime the government invokes national security, an alien can be whisked away without the normal protections of the American judicial process.

In determining the merits of the charges, such as fundraising violations, the bills allow the government to use secret evidence in ex parte and in camera proceedings. Under the bill, the government *may* provide the alien with a summary of the evidence as a substitute for the actual evidence which it alleges is classified. Unlike the Senate version of the bill, H.R. 1710 would not even require that the summary "provide the alien with substantially the same ability to defend himself" as access to the evidence itself would provide. Rather, it appears that even a summary that is actually insufficient to allow the defendant to prepare a defense would be acceptable under this provision so long as the summary states the "general nature" of the evidence. Additionally, the government can invoke the use of secret evidence *without* even providing the defendant with a summary, if the court finds "(a) the continued presence of the alien or, (b) the provision of the required summary would likely cause serious harm to national security . . . or death or serious bodily harm or injury to a person." Conveniently, anytime the government uses an informant, these provisions could be triggered. Such proceedings would have the effect of trying an alien in his absence. These proposals offend even the most basic notions of justice and violate the most basic of rights, including the right to a fair hearing, the right

[3] Last year, when a bill was presented to Congress that sought to make "membership in Hamas" a category for exclusion under INA, Mary A. Ryan, Assistant Secretary for Consular Affairs, argued against the bill on the basis that Hamas also engages in "widespread social welfare reforms" and that, therefore, any presumption that any member of Hamas is a terrorist would amount to "guilt by association."

to the presumption of innocence, the right to confront your accusers and the right to confront the evidence used against you.

With regard to permanent residents charged under the provisions, the bill proposes a new but problematic provision involving the establishment by the special removal court of a panel of attorneys with security clearances to represent the defendant in the in camera and ex parte proceedings. However, such an attorney would be chosen by the court. not the respondent defending the charges and, the attorney would not be allowed to discuss the secret evidence with his client. Hence, the defendant, who is best able to challenge the evidence and the truth of the allegations against him, is excluded from most, if not all, of the review of the evidence and the merits hearings. Consequently, the respondent is unable to participate and assist in the preparation of his own defense. Finally, these provisions raise serious ethical concerns regarding the attorney-client relationship which, if passed, will have to be tested in the courts.

In a noted exclusion case, *United States ex rel. Knauff* v. *Shaughnessy,* 388 U.S. 537 (1950), the source of the government's "secret evidence" which was used to exclude and detain the alien for two and a half years, was eventually revealed to be the alien's jilted lover.

Arab-Americans fear that, similarly. "informants" with their own self-serving political agenda will rush at the opportunity to play a role in ex parte proceedings where they cannot be not challenged with regard to the truth of their testimony.

It is critical to note that the Immigration and Naturalization Service ("INS") has *never* been allowed to deport an alien on the basis of secret evidence. Indeed, the Supreme Court held that INS could not subject aliens to "summary deportations" on the basis of secret evidence because it violates the due process rights of aliens. In *Kwong Hai Chew* v. *Colding,* 344 U.S. 590 (1953), the Supreme Court held that withholding the nature of the charges from a respondent in summary deportation proceedings violates due process. In *Wing Wong* v. *United States,* 163 U.S. 228, 237 (1986), overturning a statute that provided for the imprisonment at hard labor of any Chinese nationals illegally in the United States, the Supreme Court held that where the nature of the charges against an alien are withheld in a deportation proceedings, due process is violated. Indeed, even illegal aliens are entitled to constitutional protection. *Mathews* v. *Diaz,* 426 U.S. 67, 77 (1976).

Moreover, these provisions would operate without regard to well established distinctions as to the status of different types of aliens—i.e., a deportable alien as opposed to an excludable alien, a permanent resident as opposed to a non-immigrant alien.

These distinctions have important legal consequences with respect to the constitutional protections to which aliens are entitled. In this connection, courts have distinguished between aliens who have made an "entry" into the United States, whether legally or illegally, and aliens who have not made an "entry." An alien who is said not to have made an "entry"—i.e., one who was caught trying to cross the border—is called an "excludable" alien, and although he may be brought into custody and detained in United States, he is considered not to have made an "entry" and is thus, technically, "not present." Hence, to the excludable alien, the protections of the constitution as we know and understand them do not attach. With respect to any alien who has successfully made an entry—even the alien who has crossed illegally and is thus "deportable—the constitution attaches. In *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, (1953) the Court held:

> Courts have long recognized the entitlement of aliens who have reached our shores to procedural due process rights and they may only be expelled after proceedings that meet the traditional standards of fairness.

Even when the Supreme Court upheld statutes which have since been stricken because today they offend our notion of fairness, it only upheld them on the basis of a finding that they met certain procedural due process safeguards. For instance, in 1952, when the Supreme Court upheld a statute granting the Attorney General the discretion to detain without bail any alien charged with being a member of the Communist party, it upheld the statute on the basis that the Attorney General's exercise of discretion was *reviewable* and, therefore it provided a procedural due process safeguard to prevent arbitrary and capricious denials of bail. *Carlson* v. *Landon,* 342 U.S. 524 (1952). Another such example is *United States* v. *Salerno,* 481 U.S. 739 (1987), in which the Court upheld the Bail Reform Act again articulating the importance of procedural due process safeguards in our laws:

> The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of re-

lease can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing.

Courts have long recognized that deportation is a form of punishment. In *Bridges* v. *Wixon,* 326 U.S. 135 (1945), the Supreme Court held that deportation was a "penalty" and that an alien has a "liberty interest" in remaining in the United States that is protected by the Due Process Clause of the constitution.

In any judicial context where punishment is a potential outcome of the disposition of a proceeding, the government has the burden of proving that which it is charging. The government must prove its case by "clear, unequivocal, and convincing evidence." *Woodby* v. *INS,* 385 U.S. 276 (1966).

B. THE USE OF ILLEGALLY OBTAINED EVIDENCE

ADC is concerned by the fact that H.R. 1710 would authorize the use of *illegally obtained evidence* in violation of the Fourth Amendment. Specifically, the bill would allow the use of "the fruit of electronic surveillance and unconsented physical searches." Furthermore, the alien would have no right of discovery and no right to seek suppression of such evidence. The Fourth Amendment protects all persons from unreasonable searches and seizures. With respect to the rights of aliens, courts have consistently held that the government may not use evidence that is obtained by means of unreasonable searches and seizures.

Although the Supreme Court has been reserved with respect to recognizing the rights of aliens to suppress illegally obtained evidence in a deportation hearing, in *INS* v. *Lopez Mendoza,* 468 U.S. 1032 (1984), the Court ruled that the exclusionary rule may apply to cases involving widespread abuse or egregious violations which transgress notions of fundamental fairness. Three years later the Supreme Court found an "egregious violation" where the only evidence used as the basis of stopping alien's was his Hispanic appearance. *Arguelles-Vasquez* v. *INS,* 820 F. 2d 1112 (9th Cir. 1987).

As mentioned earlier, the entire nation bore witness to exactly this type of "egregious violation" regarding the detention and interrogation of Ibrahim Abdallah Ahmed after the Oklahoma bombing. Incidents such as this are the substance of the fears that Arab-Americans have about the proposed legislation because it would create the institutional mechanism to facilitate these violations.

Under present laws, aliens have certain Fourth Amendment rights that are undisputed. For example, the INS cannot enter the dwelling of an alien without a warrant. *La Duke* v. *Nelson,* 762 F.2d 1318 (9th Cir. 1985). Warrantless searches are presumptively unreasonable and, absent consent or probable cause and exigent circumstances, the INS cannot enter a home and search or make an arrest. *Gallegos* v. *Haggerty,* 689 F. Supp. 93 (N.D. N.Y. 1988).

By merely invoking these provisions, the INS could strip an alien of these basic protections by stating that they are charging an alien under the "terrorism provisions."

IV. EXPANSION OF FBI INVESTIGATIVE POWERS

The authorization of widespread FBI surveillance and infiltration of political, religious and charitable groups under H.R. 1710, flagrantly violates the Fourth Amendment because it does away with the "probable cause" standard set by the Supreme Court. If "probable cause" is no longer the standard, what standard are we left with? The Supreme Court has consistently held that anything less than probable cause is unconstitutional. Yet, eliminating the probable cause standard is precisely what the bill does. Without probable cause the standard necessarily becomes suspicion. Suspicion on what basis? Can the articulation of an unpopular political opinion warrant the instigation of an investigation of an individual? In this regard, section 103 of the bill specifically *removes* a provision in our present laws that prohibits the government from initiating investigations merely on the basis of lawful political activity or speech. Hence, under these provisions, the government will no longer need to establish that it has probable cause that an individual has engaged in or is about to engage in an unlawful activity. It *will,* arguably, be able to investigate merely on the basis of lawful and protected First Amendment political activity or speech that may be unpopular with the government at a particular moment.

V. EXCLUSION OF ALIENS ON THE BASIS OF MEMBERSHIP AND ADVOCACY

H.R. 1710 would expand exclusion laws to bar the entry of aliens on the basis of political ideology. This provision would effectively amount to a re-enactment of the McCarran-Walter Act, overturned in 1990, with the exception that "terrorists" would replace "communists."

The Immigration Act of 1990 revised this area of the law, marking an end to McCarthyism, by limiting the ability of the government to exclude individuals on the basis of ideology or membership in a particular organization. Under INA section 241(a)(4), as amended by the Immigration Act of 1990, which consists of the security and related grounds for exclusion of an alien, there must be a connection to unlawful activity—i.e., criminal conduct[4] espionage,[5] criminal activity endangering public safety,[6] terrorist activity[7]—as opposed to an ideological or associational basis, for an exclusion.

The First Amendment includes the right to hear the ideas of others, to exchange ideas, and engage in political debate. This right is illusory unless everyone is free to speak. The exclusion of individuals, on mere ideological or associational grounds, violates everyone's right under the First Amendment because it permits the government to conduct a content based control over the "debate" and exchange of ideas by means of controlling the borders. Nothing would preclude the government from going one step further and excluding aliens on the basis of religion or ethnicity, under the guise of ideology. Under these provisions, could anything prevent the development of a pattern and practice by the government of denying entry to Muslims under the guise of "advocacy of terrorism?"

Such bias in our society was felt ever so poignantly by Arab-Americans after the Oklahoma bombing. Many Arab-Americans and Muslims were threatened and assaulted simply because of their ethnicity or religion. One woman even miscarried as the result of such an assault. An Oklahoma politician repeatedly expressed his disappointment when it was revealed that the culprits were not Middle Eastern but rather Mid-Western. How are we to understand such reactions? Such biases, as unfortunate as they are, exist. Good laws are our only safeguards against the abuses to which such attitudes can lead. Not only does the proposed legislation provide no safeguard but in fact, would give a powerful tool to those who are inclined to abridge the rights of others.

VI. Conclusion

ADC supports the passage of strong laws that would effectively deal with terrorism. However, for all the reasons stated above, ADC believes that the proposed legislation would reach far beyond that goal and punish individuals on the basis of ethnicity, religion and political opinion, thus eroding the civil protections of all citizens.

[4] A section 241(a)(2).
[5] INA section 241(a)(4)(A)(I).
[6] INA section 241(a)(4)(A)(ii).
[7] INA section 241((a)(4)(A)(iii).

APPENDIX 8.—STATEMENT OF THE NATIONAL JEWISH COMMUNITY RELATIONS COUNCIL AND THE NATIONAL ASSOCIATION OF ARAB AMERICANS

NJCRAC
National Jewish Community
Relations Advisory Council

NAAA
National Association of Arab Americans

STATEMENT OF PRINCIPLES ON JEWISH-ARAB RELATIONS

May 4, 1995

The National Jewish Community Relations Advisory Council and the National Association of Arab Americans jointly

-- condemn unequivocally all terrorist acts, defined as politically motivated acts of violence against civilians, whatever their origin, and urge even more vigorous U.S. government efforts to combat the scourge of international and domestic terrorism;

-- reject all forms of stereotyping and discrimination based on the actions of individual members of religious or ethnic groups;

-- recognize the need for enhanced U.S. governmental capabilities to conduct the battle against terrorism;

-- believe that U.S. constitutional safeguards for civil rights and liberties must be respected and maintained in the development of anti-terrorism initiatives;

-- support the peace process and active U.S. involvement in the pursuit of comprehensive Arab-Israeli peace based on justice and security for all parties;

-- value the relationship between the Jewish and Arab American communities and seek practical ways to broaden and deepen that relationship through dialogue and joint projects; and

-- while acknowledging disagreement over the Omnibus Counterterrorism Act of 1995 -- the NJCRAC supports it with certain modifications, the NAAA opposes it as currently drafted -- pledge not to permit different perspectives on this or other initiatives to damage our relationship, or to deter our two communities from continued cooperation on behalf of shared goals and interests.

The National Jewish Community Relations Advisory Council is the national coordinating and planning body for the 13 national and 117 local agencies comprising the field of Jewish community relations.

The National Association of Arab Americans is the premier political and lobbying organization for the Arab American community.

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APPENDIX 9.—PAPER ENTITLED, "INTERESTING TIMES," BY RUSSELL SEITZ,* ASSOCIATE, JOHN M. OLIN INSTITUTE FOR STRATEGIC STUDIES, HARVARD UNIVERSITY

Generations have passed since the instauration of the Manhattan Project—generations not just of people but technologies. It's just not the same world in which the study of disarmament and proliferation began. For all that has happened in the Soviet Union over the course of the last year, Lenin has been proved right in one observation: When it comes to technology, high or low, quantity is quality. And the quantity of former secrets that have sprung up as technology grows in extent may afflict our future. For the compartmental barriers to protect those secrets have been severely eroded by the passage of time.

There is a biological metaphor for compartmentalization: treating scientific subdisciplines as one-celled organisms that can be cultured in sterile isolation, with all transfer of genetic information under the control of an executive authority. This was perhaps how General Groves originally endeavored to assure the total secrecy of the Manhattan Project. [Fig. 1: 1945—The Thick Black Box.] But it was soon evident that perfect secrecy was incompatible with scientific success.

It is equally obvious in retrospect that a whole generation of world-class scientists, with only a handful of exceptions, both kept their oaths as to the technical details of the first generations of nuclear and thermonuclear weapons, and raised up a new generation of graduate students and post-doctoral fellows who, by the time they matured, collectively knew more than their masters did.

A generation later still, much that is unspeakably classified in the context of the culture of weapons design and fabrication, is merely the common wisdom of other disciplines that have undergone a separate evolution in the unclassified world of international scientific endeavor. Circulating within that community is a wealth of expertise that dwarfs the amount of intellectual currency that existed in the forties and fifties. The inflation of the numbers of newly-coined Ph.D.'s and Sc.D.'s entering the marketplace each year is transforming the global R&D scene as profoundly as the flood of specie (and new agricultural plants) from the New World transformed the economy of Europe in the centuries after Columbus.[1]

THE DIFFUSION OF PEOPLE

For four decades, the United States and Europe have been engaged in exporting into the developing nations the most sensitive of nuclear materials. This uncontrolled trade has grown exponentially, increasing ninefold in the last ten years. The matter in question is warm, wet, and gray—a small tonnage of human brains freshly armed with Ph.D.'s in nuclear physics and all its supporting disciplines. Most of them go home.

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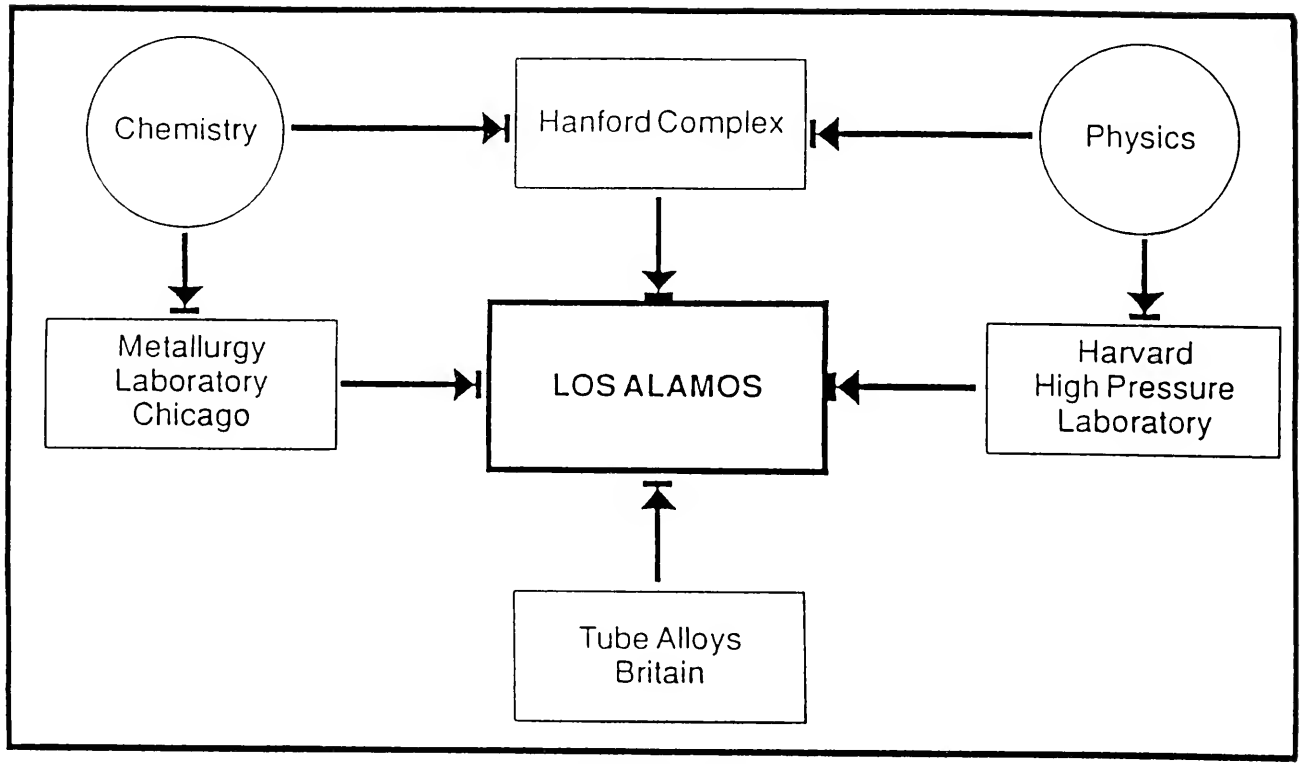
[1] Graphs derived from *Issues in Science and Technology,* National Academy of Science, 1990. Article gives breakdown on Ph.D.'s in the sciences issued by U.S. universities to foreign nationals on a nation-by-nation basis. Total issued in applied sciences to Islamic country nationals from 1960–90 is thousands. For data base, see appendix.


Chemistry
Hanford Complex
Physics
Metallurgy
Laboratory
Chicago
LOS ALAMOS
Harvard
High Pressure
Laboratory
Tube Alloys
Britain

1945

Ph.D. proliferation, at a rate of 5,000 foreign nationals a year, is a driving force in the present and future expansion of the Nuclear Weapons Club. It acts also to reduce the military gap between nations that have always participated in state-of-the-art hardware development and the have-nots that traditionally have lacked the intellectual depth and critical mass of people that are a precondition of supporting the technical research that underlies the development of advanced weapons systems.

At the top of the list of nations whose Ph.D.'s are American stand Taiwan and India, each with more than 2,500 physical science degrees since 1970 and 1960 respectively, and still greater numbers of engineering doctorates. Owing perhaps to proximity and educational traditions that favor Europe, Iran, Iraq, Egypt, Pakistan, and Lebanon have less conspicuous numbers of such degrees.[2] The statistics, which are voluntarily reported (Iraq seems to have discouraged such reporting from 1970 onwards) record 1,049 doctorates in the physical sciences from 1960 to 1989 and roughly twice that number of engineering Ph.D.'s.

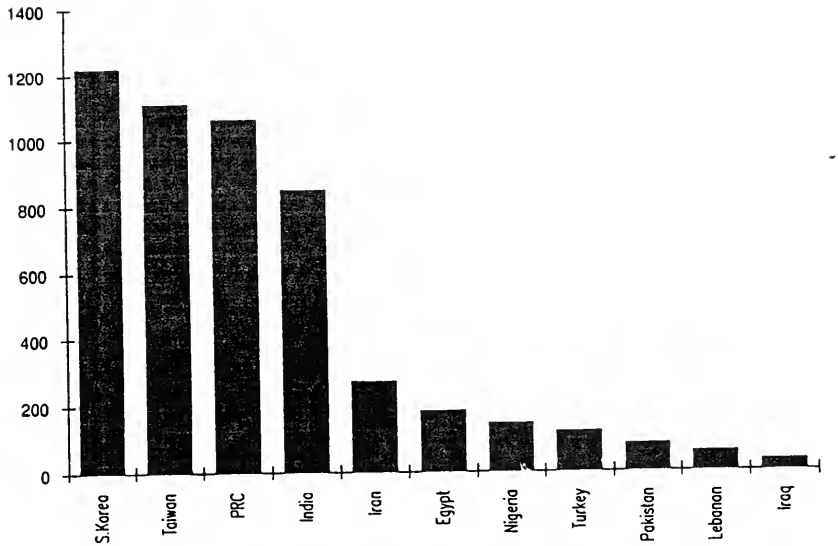
In 1990, Korea took the overall lead in doctorates in all disciplines, just ahead of Taiwan and the PRC—each with more than 1,000 Ph.D.'s. It is hard to quantify the impact on domestic science and engineering education of the return of large numbers of graduates of foreign universities and institutes of technology. But this phenomenon is of clear qualitative importance to the context of proliferation.

Just over 1,000 U.S.-trained post-1960 physical science Ph.D.'s existed in India when that nation demonstrated its nuclear device capability 17 years ago, together with 2,700 engineers of the same educational background. Today they are respectively 2,600 and 5,500 strong. Perhaps 400 to 600 Ph.D.'s of all ages and backgrounds participated in developing India's atomic explosive.

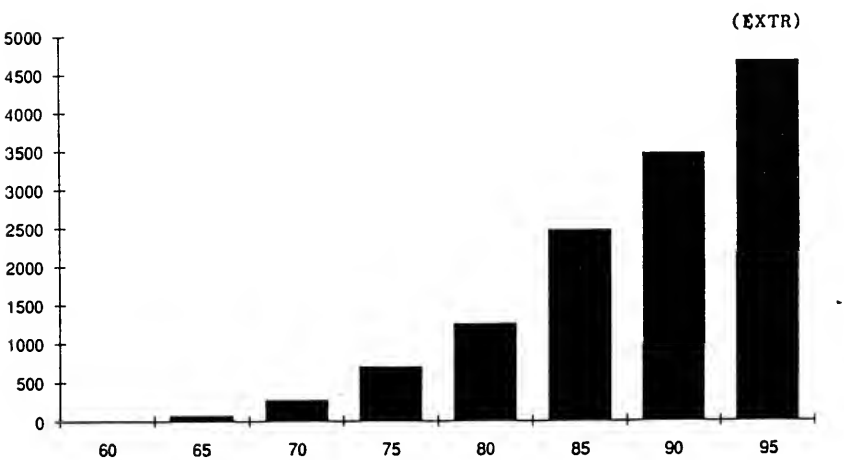
In contrast, only 75 Iraqi physical science doctorates and 173 in engineering are reported to have been gained from American universities in the period from 1960 to 1989. This figure is not in reasonable demographic proportion to the number of Iranians—487 scientists and 1,645 engineers who obtained similar degrees in the same interval. Clearly more research is needed to clarify both this disparity and the question of where intellectual resources behind the Iraqi nuclear science program came from, in the universities of both the NATO and former Warsaw Pact nations, as well as from those of the Middle East.

[2]The scientific productivity of the Islamic or substantially Muslim nations has been ranked by the number of scientific articles published: 1. Egypt, 2. Iran, 3. Pakistan, 4. Nigeria, 5. Turkey, 6. Malaysia, 7. Lebanon. *Cf.* Abdus Salam, in the preface to *Islam and Science* by Pervez Hoodbhoy (London: Zed Press, 1991).

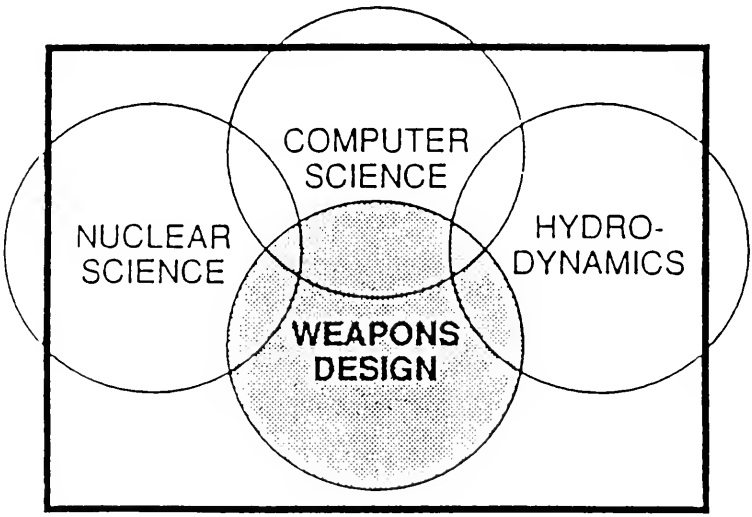
U.S. SCIENCE AND ENGINEERING Ph.D'S TO FOREIGN NATIONALS: 1990



U.S. SCIENCE AND ENGINEERING Ph.D'S TO
IRANIAN NATIONALS SINCE 1960



The percentage of the world's scientists and engineers resident in developing countries rose from 7.6% to 10.2% between 1970 and 1980. Today it exceeds 13%.[3] But a disturbing idea raises itself: do the numbers matter? Has the strength of science itself, relative to solving anew the problems faced by the scientists of the Manhattan Project, grown to a point where a comparative handful of scientists and engineers can successfully pursue tasks that once required the concerted effort of hordes of the best and brightest? The answer is yes. [Fig. 2: The Emergence from the Box, 1955.]



1955

Many, perhaps most, of the concepts, techniques, materials, and machines that were developed *de novo* to enable the production of the first generation of thermonuclear devices have been reinvented, rediscovered or spontaneously spun off from and within the global plenum of civilian R&D and purely scientific endeavor. This is particularly true with regard to the impact of interdisciplinary research programs, such as astrophysics and geophysics.

Let us examine some of the things that are hidden in plain sight—weaponizable information that is not labeled as such within innocent-sounding sub-disciplines that are totally unclassified and so hybridized internally as to defy any attempt to return their sensitive content to effective regimes of security and compartmentalization.

A good place to start is with people who study the universe. The realm of astrophysics subsumes the whole of the intellectual underpinnings of nuclear weapons development and indeed antedates it. The basic principles of how the sun works, set forth by Bethe and von Weiszacker in the thirties, gave rise not just to the hydrogen bomb but to the epic task of harvesting fusion as a peaceable source of power.[4] And on the more modest scale of planets, the extreme pressures common to their cores and the ignition of fusion bombs are described by one and the same

[3] *C.f. Scientists in the Third World* by Jacques Gail lard (Lexington: University Press of Kentucky, 1991).

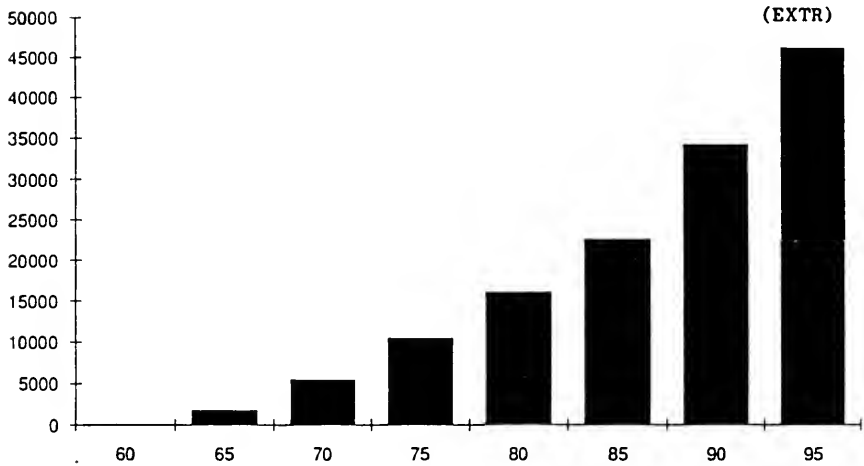
[4] I number among my acquaintances at M.I.T.'s fusion research facilities both Syrian and Iraqi physicists—each with an extended family left at home in those nations.

set of equations of state—the work of Fermi and Taylor.[5] Static pressures in excess of 3 million atmospheres, which were experimentally unthinkable in 1945, are now achieved using diamond anvil cells that fit in the palm of your hand.

So today we have a robust sub-discipline of geophysics—the study of comet and asteroid impacts that utilize the liberated (or re-invented) expertise of the weapons laboratories on a daily basis. The major difference being that those who utilize such weapons-derived hydrodynamic finite-element computer codes have at their disposal vastly more computational power than Fermi or Bethe ever dreamed of.

U.S. SCIENCE AND ENGINEERING Ph.D'S TO WEST ASIANS

SINCE 1960



The progress made by the global scientific community not only recreates in the unclassified world knowledge that was at one time restricted to the world of nuclear weapons designers. Progress can also make viable pathways to nuclear weapons that were initially rejected by the U.S. and released into the realm of unclassified data. It is important to remember that the initial selection of the winning concepts in the inception of the first generation of fission bombs or ICBM's (or whatever) is *not a process that denies the validity of the concepts that are initially declined.* It is rather a reflection of the perceived state-of-the-art at a very early time in the evolution of a particular technology. The fittest idea for such a time and place gets selected on the spot on the basis of saving as much time as money can afford, but the other proffered concepts may prove fit or fitter in other times and other places. Thus, while uranium isotope separation via gaseous diffusion was the mainstay of

[5] Veiled references to phenomena relevant to thermonuclear weapons design outcrop frequently in contemporary Russians works on nuclear physics and astrophysics. Two interesting examples are to be found in the recent English translation of V. K. Ignatovitch, *Physics of Ultra-Cold Neutrons* (Oxford: Clarendon Press, 1990). On pp. 14–15, a discussion of non-linear optical effects in a dense cloud arising from a compact explosion ends (and with it the chapter): "The Rest Is Silence," on p. 371, in a two-page bibliography of Ignatovitch's reports of the Joint Institute for Nuclear Research, Dubna, several of the reports' titles have been deleted and replaced by parenthetic descriptions of their contents in whole or in part, e.g., "(The Hypothesis of Secret Neutron States Is Advanced."). In the astrophysical realm, theoretical accounts of radiation pressure and electron ponderomotive forces in stars can be interspersed with discussions of such effects in channels and converging surfaces—such physical structures are artifacts—alien to stellar physics.

the Manhattan Project, the then impractical technique of gas centrifuge separation went on to become practical (and perhaps principal) source of weapons-grade fissionable materials in the Soviet Union in the 1950s.[6]

There is historically evident in the history of proliferation, a strong tendency to succumb to the temptation to believe that the central problem is to prevent the history of technology repeating itself. But very often such initially dismissed branches of technology as the calutron can take root and flourish in the shadow of their "mature" competitors. Having abandoned as hopeless the materials problems posed by both the high beam current source and product collection (target) end of the early calutrons and the strength of materials limits that rendered gas centrifuges impractical in the 1940s, the A.E.C. and its successors blithely funded a plenum of materials research for another half-century.

And somehow, lacking collective memory or interdisciplinary oversight, the materials science community naively solved those problems and irremediably changed the context of separation technology. Nothing, more or less, than progress is at fault. For, in global perspective, the past of technology was a world in which none of the lesser nations existed in the same time as the technologists of the First World. In 1939, the state-of-the-art in south Asia was filing a working replica of a Lee-Enfield rifle out of bar stock. Building a Norden Bomb sight from scratch in Baghdad was as out of the question.

But the near future is a time where increasingly, almost all of the history of technology past can be recapitulated in all but the most forlorn of Third World backwaters, and much of the present state-of-the-art is both intellectually and practically accessible. Teach a man to make microwave ovens and you've opened the door to radar and calutrons alike, for while COCOM can list and monitor trade in "critical" components, tools, and materials, the ubiquity of iron, copper, sand and vacuum dooms the exercise to inanity in the long run.

The Diffusion of Data

This applies equally to information of military value[7] as well as weapons of mass destruction. Witness the publication in an Indian scientific journal[8] of satellite images of both low- and high-resolution of the gulf war despite their being withheld by the U.S. for security reasons. Those responsible for withholding them evidently overlooked India's possession of a NOAA–11 downlink, a moderate-resolution reconnaissance platform—the Indian Research Satellite, and a geosynchronous satellite to boot.

This is not to suggest that the best efforts of the U.S. or NATO aerospace industries are at risk of obsolescence. India would be hard pressed to deliver a successor to the KH–11 or Pyramider reconnaissance systems. But it illustrates the already fragile nature of the assumptions that lead to the attempt to deny information to Iraq by internal control of information when that data flows unencrypted from orbit 24 hours a day. It could have been had for the asking by anyone on a computer net that has (courtesy of DARPA and a host of other federal agencies) come to span the globe in the last decade.

So the new paradigm of qualifying for the orbital reconnaissance club is not the capacity to design, build, and launch a large-aperture precision-pointed satellite, but knowing someone, anywhere, in the world in possession of an *Ethernet* directory, a PC with a color display, a Polaroid camera and a stamp.

The consequences of privatizing the component entities of the Soviet military-industrial complex, from basic metallurgical facilities to aerospace centers and nuclear R&D laboratories, may include the proliferation of ideas as well as artifacts and technologies. At one level of the game it's an intelligence windfall, but beyond the opportunities for reverse engineering comes a windfall of missing links in the web of Western military technology—the de facto declassification of Soviet military high

[6] The Soviet Union's seizure of German technical personnel after the collapse of the Third Reich led to major improvements in their nuclear program, just as the Manhattan Project benefitted from the efflux of refugees from Germany in the thirties. The Nobel laureate Gustav Hertz, who developed the gaseous diffusion progress in the 1950s, was taken into custody by Soviet forces in 1945. *Cf.* David Cassidy, "Gustav Herz, Hans Geiger und das Physikalische Institut der Technischen Hochschule Berlin in den Jahren 1933 bis 1945," in R. Ru"rup, ed., *Wissenschaft und Gesellschaft*, vol. 1, pp. 373–387 (Berlin: Springer, 1979).

[7] India is an illustrative case of a nation whose high-technology sector is sufficiently sophisticated to host an indigenous upgrading of a demonstrated nuclear capability to a thermonuclear one. Its technologists clearly have advanced beyond dependence on foreign sources of such "traditional" fission bomb components as high-speed electronic switching tubes (krytrons). They prefer a combination of fiber optics and pulsed laser diodes.

[8] *Current Science*, April 25, 1991, Indian Academy of Sciences, Bangalore.

technology puts many Western systems in jeopardy of being comprehensible to analysts denied access to their classified sub-systems.[9] Their high technology cannot be compromised without ours falling victim, too. If living with a sick bear was a trying experience, consider that of surviving in the presence of the carcass of a flea-infested one that has died of the Plague.

More than this amplifies the proliferation risks inherent in our emphasis on the classification of data rather than the protection of technology from exposure. It is edifying to attend the manufactures' displays that accompany many large technical meetings sponsored by engineering associations or the DOD. There one sees proudly displayed the first fruits of R&D—components whose exotic materials and advanced electronic, thermal, and optical performance have no parallel in the civilian sector. Very often they are put on offer before their end-use systems—the B–2 and SDI, for instance, have even been tested or publicly displayed. Be it silicon carbide laser mirrors or stealth carbon foam, it's all on offer in the West—albeit without reference to what it has been developed for.

The failure of World War III to materialize has not reduced the stockpiles of materiel or the mountains of information and high technology that the superpowers accrued by decades of heavy investment. And with the devolution of the USSR, a question accordingly arises: What are the possible consequences of the uncontrolled dissemination of its high technology and technologists into a multipolar world? For as the Soviet military-industrial complex faces literal bankruptcy, we are being confronted with an enthusiastic sell-off of its assets both human and material. It is something as unanticipated as the outburst of democracy there. Throughout the former Warsaw Pact's territory we are witnessing the Yard Sale at the End of History.

Its basic format seems the same from St. Petersburg to Semipalatinsk—be it naval shipyards on the Baltic or the nuclear laboratories of the Ministry of Medium Machines. Hardware, software, expertise and equipment, everything in sight, or out of it, is for sale cheap. The party is over, and as winter approaches, the rhetoric of conversion to the production of civilian goods is yielding to the reality of short-term survival—generating a cash flow, in rubles or *valuta,* to keep up with the payrolls and provide the fringe benefits that Moscow no longer guarantees.

The iron curtain did more than serving to isolate the citizens of the Warsaw Pact nations from the free world. It also functioned as an impermeable barrier, a containment that kept in a plenum of militarily important high technology that often rivaled the best in the West. Now that that containment has been breached, the most secretive of military powers is spilling that technology into a new and multipolar world. One where many nations with nuclear ambitions have been striving to achieve the sort of weapons capability that both the U.S. and USSR attained in the 1940s.

As *glasnost* mutates into an unbridled high tech sell-off, with expertise (and artifacts) for sale to almost any bidder, high or low, we must affect the restructuring of our perception of the context of the control of the proliferation of the technologies of mass destruction. Only this much is certain: we are in for some interesting times—for what is on offer is not Manhattan Project surplus, but the right stuff for fighting the World War III that never was.

The flow of people and data from the former Soviet Union will be rivalled by that from the former Warsaw Pact, Cuba, and North Korea. Given the aversion to nuclear weapons development intrinsic to the German constitution and the sophisticated maturity of NATO's weapons laboratories and arsenals, few nuclear scientists or engineers from the East are likely to find their customary employment close to home. How will their redundancy in Europe affect the nuclear ambitions of nations elsewhere in the world?

Entities as diverse as national laboratories, military aerospace development centers, organs of the Soviet Academy, biomedical research facilities, and the City Council of St. Petersburg suddenly dispatched reams of abstracts of technical proposals by a variety of charmels,[10] ranging from individual scientists turned entrepreneurs to the Minister of Military Conversion. The fruits of literally millions of man-years of research suddenly became perceived as somewhat fungible into hard

[9] One Soviet physicist/entrepreneur visiting an investment firm in the U.S. responded to expressions of concern about the potentially destabilizing effects of the transfer of military technologies to Middle Eastern states with the following Russian proverb: "If a man wants to keep his wife from getting drunk, he must drink her wine before she does." If we don't want it sold elsewhere, we should buy it ourselves.

[10] Despite their diversity of affiliation, the individuals who have described the deterioration of financial support for their institutions and its negative effects on the quality of their colleagues' lives have spoken in a remarkably similar way, with occasional instances of verbatim phraseology, despite differences in the quality of their English.

currency at a time of rising ruble inflation and increasingly poor supply of everything from consumer goods to research supplies.

The systems and services on offer include much that is too purely military in origin to be readily vendible into the Western civilian economy, although its ramifications for proliferation, arcane and conventional, are obvious. But amongst this outpouring of technology high and low, there are a significant number with commercial promise, and a variety of dual-use services and information charmels such as image enhancement and high-resolution satellite optical and radar imaging that could seriously effect the outcome of conflicts between states otherwise without access to orbital recormaissance.

While there is some evidence of restraint concerning state-of-the-art technologies or C31, some few of the systems offered are of a sophistication that would change the correlation of forces between nations used to depending on the generations of technology available on fringes of the global arms bazaar. It would therefore seem prudent for analysts of low-intensity conflict to keep track of more than weapons systems per se as the nineties evolve.

The liberalization of travel and emigration from Russia also poses the problem of weapons scientists, once denied any prospect of leaving, becoming free agents, able to sell their expertise to the highest bidder (or bidders) abroad. A regime like Pakistan's, having succeeded in purchasing a (presumably) valid weapon's design from the P.R.C., would clearly benefit from the services of those familiar with the materials and techniques of its manufacture.

In the aftermath of Chernobyl, the Soviet nuclear power (and plutonium) industry found itself burdened with a generation of reactors that no one wanted to operate and a corps of nuclear engineers and designers whose careers were suddenly jeopardized. Yet they retained their skills and expertise, and today as emigration and foreign travel regulation are liberalized, those skills may become available in the international marketplace. Likewise, their counterparts in Eastern Europe and the other states in which Soviet reactors were installed are no longer subject to the regime of security that prevailed in the heyday of the Warsaw Pact.

While a former employee of the now mothballed East German reactors should face a reasonable prospect of gainful employment in re-united Germany that staunchly supports the IAEA's anti-proliferation regime, he remains the lawful prey of headhunters in the employ of states that seek to circumvent it—as do his opposite numbers in Eastern Europe, and, more marginally (and perhaps ominously), in such refractory bastions of *stalinismus* as Cuba and North Korea. The harder the idols of Marxism-Leninism fall, the farther fly the shattered pieces.

The reactor complex approaching completion in Cifuentes, on Cuba's southern shore, shares with most Soviet-designed plants a copious plutonium production capacity and a corollary ability to breed tritium from lithium as well.[11] The prospect of its completion—an economic necessity given Cuba's dearth of fossil fuels, must accordingly be viewed with as much concern as the evolution of nuclear power technology in nations with less colorful histories of military adventure abroad. North Korea's interest in this matter must be considerable.

The Implications for Controls

The net effect of progress, quite simply, is to greatly expand the universe of people, data, and hardware that must be controlled in order to retard the development of nuclear weapons.The "proliferation control regime" for calutron-produced U–235 must encompass in an ever-vigilant search-and-destroy operation. One that must encompass everything from transformers and vacuum pumps to the interdiction of hydrofluoric acid moonshiners and artesanal miners of pitchblende.[12]

The centrifuge enrichment technology is likewise as difficult to inhibit by denying critical materials exports as it is impossible to control. Steel is steel, and any nation

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[11] Volume 3 of *The Nuclear Weapons Databook: U.S. Nuclear Warhead Facility Profiles* by T. B. Cochrane et al. (Cambridge, Mass.: Ballinger Publishing, 1987) affords a wealth of information on the military reactor transuranic reprocessing cycle and 6-lithium and tritium production. It is also a disturbing example of how the literature of disarmament can contribute to the acceleration of the history of proliferation.

[12] Any nation that possesses a petroleum refining and petrochemical capacity operated by its own citizens should be credited with a mastery of chemical engineering adequate for the indigenous production of basic inorganic chemicals as well. Given an unremarkable degree of geological diversity (i.e., that of Iraq, as opposed to the homogeneous sedimentary geology of Kuwait or Bahrain), such nations can often find within their borders modest deposits of such common minerals as fluorite or phosphate rock. International controls on trade in the chemical precursors of volatile uranium compounds for isotopic enrichment, or on the phosphorous compounds vital for nerve gas production are proportionately marginalized as impediments to the production of weapons of mass destruction.

that has emerged from the Bronze Age and possesses an iron foundry or steel minimill is quite capable of producing high-strength metal as good as that embargoed. If high-strength composites—carbon fiber or kevlar—for centrifuge construction should be preferred to steel, the raw material can be obtained by the ton from the stocks kept by any boatyard that builds competitive ocean racing sail craft.

As for the more sophisticated magnetic materials needed for the gas centrifuges levitated bearings, the embargo can only succeed if accompanied by a product recall encompassing all of the better sort of automotive starter motors and hi-fi loudspeakers shipped in the past and present decade, for very often materials developed for esoteric military applications spin off into civilian markets that dwarf their military ones. And given their astronomical initial cost in small-scale production, "exotic" new materials, whose research is militarily subsidized, very often make their debut not as production-line aerospace components, but as limited-edition up-scale sporting goods: boron fiber fly rods and titanium/beryllium 12-meter yacht masts are two ancient (ca. 1960) exemplars.

The architects of the present regime of proliferation controls will protest that such speculations are moot—that, given iron-clad sanctions against trade in enriched uranium and plutonium and vigilant monitoring of the technological basis for their enrichment and separation, traffic in weapons-building expertise is unlikely to result in anything being built for a sheer lack of the critical materials of construction. But is this necessarily the case?

The common wisdom is that the high-level radwaste from spent nuclear reactor fuel assemblies poses only the problem of finding a safe means of long-term storage while its radioactivity slowly decays. But some of this spent fuel residue is already four decades old and has decayed to a point where its once ferocious radioactivity has fallen by nearly three orders of magnitude. Yet it is still pregnant with elements that, despite their never having been used[13] in deployed nuclear weapons, are every bit as fissionable as their better known elemental cousins.

By defining the problem exclusively in terms of uranium and plutonium—the historical basis of all past bombs—the I.A.E.A. has opened the door to a very curious future—one predicated on repositories intended to keep humans safe from radiation, rather than radwaste safe from persons bent on radioactive blackmail or mining it for fissionable elements that were rejected for weapons use not on the absolute basis of physics but simply because they were uncompetitive on a bang-per-buck basis, or required more demanding regimes of implosion, critical mass, or size than superior fissionables.[14]

But given Iraq's enterprising revival of the un-economic, but viable, calutron, perhaps it is time to forswear marginal cost-effectiveness and contemplate *de novo* the Rich Man's Atom Bomb. For while no First World defense procurement bureaucracy would ever contemplate securing explosive ordnance predicated on so unstable and expensive a substance as silver fulminate, any terrorist denied access to TNT, but left free to purchase common chemicals and silver coin might know his duty clearly.

And given the proliferation of technologies as diverse as robotics and ion exchange separation, a group bent on quarrying radwaste for Neptunium—a patently suicidal notion three decades ago—might live to tell the tale.

Who's Next?

How do the nuclear ambitions of the nations in question compare? North Korea is at once the most ambitious and opaque—a 30- to 40-megawatt plutonium production reactor is suspected, but undetected.

Algeria, with its francophone connections to European technocracy, is a far cry from Libya as a site for nuclear proliferation. Until the 1960s it was part of metropolitan France and thus integrated into the technical economy of what has become the pre-eminent producer of nuclear power. Over 70% of French electricity is pro-

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[13] The neptunium bomb was first theorized by current German President von Weiszacker's younger brother, Carl-Friedrich, in a secret report dated July 17, 1940. It refers to the element by its pre-discovery name, "eka-rhenium." *Cf.* "Eine Mo glichkeit der Energiegewinnung aus U–238," in David Irving, comp., *Third Reich Documents:* Group 11, *German Atomic Research*, microfilm no. 29, frames 451–455 (Wakefield, England: Microform Academic Publishers, 1966).

[14] Apart from not being, in Oppenheimer's phrase, "technically sweet" in their design philosophy, radwaste bombs repel the mind in terms of their potential fallout. unfortunately, this may make them all the more attractive to the enthusiastic terrorist. Trans-uranic elements with high ratios of Z^2/A share the problem posed by the plutonium–240 content of the metal as used in bombs, but engineering solutions to the problems of spontaneous fission and predetonation have been elaborated over a period of 40 years. From the view point of an analyst dealing only in unclassified information, the author cannot fathom the extent of the weapons' designers success.

duced by reactors. these, like the *force de frappe* are predicated on uranium mined both in trance and her former colonies, especially Gab on and Niger.

This vertical integration, from mine-head to breeder reactor, entails a complete range of technical competency *and* a full suit of technical facilities for isotope separation, nuclear metallurgy, reactor and weapons design modeling and nuclear chemistry. So France is a place where much exists to be learned, and everything is documented in French.

Libya, in contrast, more resembles Portuguese Africa, Italian occupation established little physical or educational infrastructure to support indigenous technical activity, and the discovery of oil created wealth that rendered development unnecessary. Only today are the first generation of Libyan nuclear physics learning the ropes at Canadian and (one assumes and will further investigate) other universities.

Quadafi's nuclear ambition has been obvious for decades, but it long manifested itself as attempts to buy a bomb outright from whatever NATO or French installation would accept a seven-figure bribe. There were no takers, and Libya thus appears to figure in the equation of the Islamic bomb primarily as a source of finance and a cut-out for technology transfer. The question of whether other Islamic nations provided chemical engineering expertise for Libya's CBW program in exchange for the subsidy of their nuclear programs is an open one.

Pakistan, like India, does not lack for scientists and technologists trained in the British tradition, and has produced a first-rate Nobel Laureate in physics. It is well represented in the international scientific community and has been instrumental in establishing the Trieste Institute—a European outpost of the Third World Academy of Sciences. While not endowed with the petrodollars of Iran or Iraq, it has received considerable subsidies for its nuclear program from the Arabian states, which depend on Pakistan for not just casual guest-workers, but Baluchi troops who serve as military auxiliaries.

It has been among the most aggressive states in its efforts to acquire dual-use technologies in America and Europe. Well-publicized failures—the krytron switching tube seizure, for example—have raised its programs' profile. But these are unlikely to have impeded its progress. As with the international drug problem, the interdiction of a small portion of the flow of contraband does little to stem consumption.

Pakistan's industrial base, and the sophistication of the weapons systems and platforms that it domestically maintains and services, afford ample cover for dual-use imports. The present status of its program, as described in the January and March 1992 testimony of C.I.A. Director Robert Gates and National Intelligence Officer Gordon Oehler, resembles India's posture immediately before it detonated its fission device in 1974. The question of its ability to produce a bomb is fast decaying into "what will the yield be?"

Elsewhere in the Middle East, real-time revelations about the Chinese connection to Pakistan and Iran are occurring at a rate that makes it quite futile at the time of this writing to sketch a picture that is still very much in motion. But one diagnostic flashback to the events of 1990 is in order.

In the spring of that year, the export control end-use certificate for an ultra-high-precision universal machine tool manufactured by Cincinnati-Milicron (the firm that sells the machine in question to D.O.E. nuclear weapons manufacturing facilities) was forwarded to the attention of Ambassador Glaspie in Baghdad. Two embassy officials duly visited the Iraqi defense research establishment that had ordered the unit, and having satisfied themselves as to the *bona fides* of the Iraqi scientists there, prevailed upon the ambassador to strongly endorse the unit's export. It was in good working order when discovered by the U.N. inspection team, led by Dr. Kay of the Uranium Institute, in July 1992.

When nuclear ambition is coupled with not just an ample cadre of well-educated scientists and technologists, but also a managerial revolution, we'd better look out. It takes a high level of managerial astuteness to get a petrochemical complex on a steel mill up and running and even more to keep it competitive in a cutthroat commodities market. Such a level of management is now more the norm than the exception.[15]

The Old Order Changeth

In the two generations that have grown to adulthood since World War II, the global sociology of science and technology has been transformed from an Eurocentric enterprise to a multinational one. In 1939, German was the *lingua franca* of science in general and physics in particular. The number of scientists was vastly smaller

[15] Dr. David Kay made this point at a Harvard seminar on March 16 1992, and I am indebted to him for subsequent discussions of the Iraqi (and other) weapons programs.

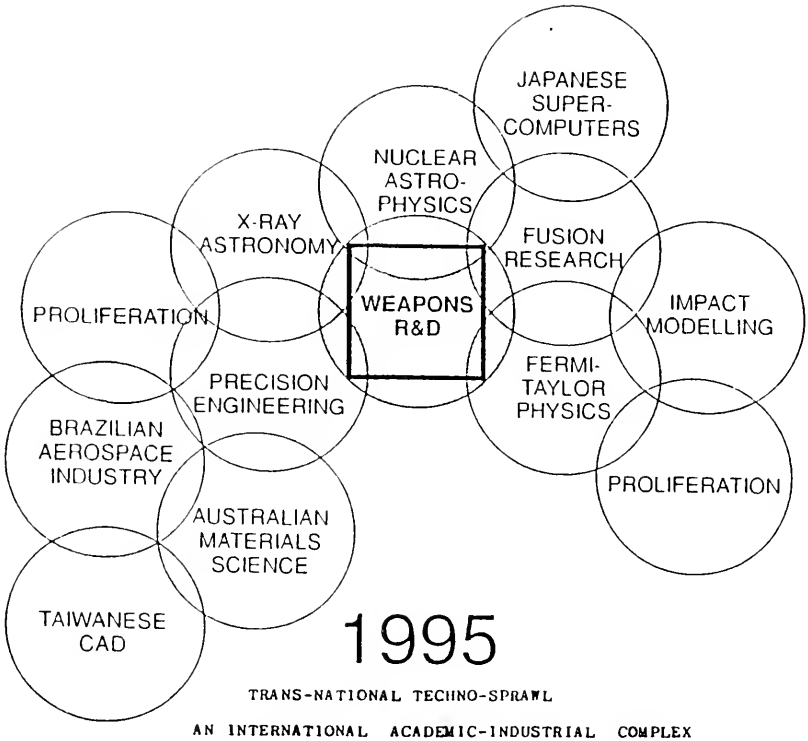
than is the case today, and, apart from America, Europe, Japan, and the USSR, few nations could boast of dozens, let alone hundreds, of citizens with a doctorate in the pure or applied sciences. Wherever individuals of scientific promise arose in the British or French colonies, they tended to be sent to the centers of education at those empires' heart, there to remain for the duration of their productive lives, rather than to return to the relatively impoverished technical cultures of the Third World. But today we live in a world transformed—a technical culture with a material endowment far more sophisticated—and with a range of computational techniques undreamed of 40 years ago. High technology has become a global enterprise and the scientific data base that underlies it has become almost universally accessible. With the advent of this burgeoning free trade in technical ideas and people who think about them, we have entered a new era in the history of arms control. It is no longer safe to assume that looking for the paper trail of a nation attempting to emulate the work of the Manhattan Project will lead us to the laboratories of those with nuclear ambitions. There is simply too much technical enterprise in today's world to allow of a rigid definition of what to look for—the new *obiter dictum* of today's ambitious bomb-smiths might be, "These are our weapons technologies—if you don't like them, we have others."

The intervening years have witnessed a transformation of the world of technology. What was extremely demanding then—building a few bombs stretched the "high technology" of World War II to its limits, and beyond—has ceased to be state-of-the-art—or even demanding. Note that at a time when German was still the *lingua franca* of physics, the Third Reich's atomic weapons program barely got off the drawing board. Its experimental program ended before a chain reaction was achieved. Yet today, two decades after India proved equal to the task of building a nuclear device using its own technical resources, none of equipment or materials innovated in the course of developing the first generation of atomic weapons is alien to the research establishments of a large university or the international equivalent of a Fortune 500 company. [Fig. 3: 1995, Technological Sprawl.]

It is cautionary to note that what the Germans could and did accomplish at the limits of their wartime high technology binge—the V–2—has been successfully emulated by Iraq and North Korea.

So perhaps the most fitting adjective to apply to the scientific and technical resources of most nations, with or without nuclear ambitions today, is "overqualified." The concept of the Third World accordingly needs redefinition regarding weapons of mass destruction.

To be safely ignored in the establishment of an anti proliferation regime, a nation needs to have rather fewer Ph.D.'s and Dipl.Ing's than Venezuela or Bangladesh, and a technical economy incapable of building a diesel engine from scratch. The requisite level of technical incompetence, once to be found in all but a handful of nations, must now be sought out, and by the end of the century may resemble the tropical rain forest—still thriving in Vanuatu and Burundi, but bound for extinction in Indonesia and Brazil.



For so excellent an education is being afforded to so many from so far afield in the technical universities of the First World that the entrepreneurial growth of technical sophistication has become an increasingly global phenomenon. There is little consolation in demography, for while a scant majority of foreign graduate students stay on to seek their careers in the nations that educate them, thousands return annually to the nations whence they came.[16]

At the other end of the spectrum of risk is the qualitative escalation of proliferation. Of nations proceeding directly to the development of simple thermonuclear devices instead of settling for a few kilotons of pure fission yield. The assumption that "tactical" yield devices are vastly less demanding technically has been altered by two factors—numerically controlled machine tools of optical levels of precision and almost unlimited versatility, and computers and optical and hydrodynamic software that bridge the gap between the level of sheer genius needed to innovate thermonuclear devices and the less demanding task of getting them built once their operation is understood from first principles. This hypothesis, first voiced as the principal technical "MacGuffin" in Tom Clancy's techno-thriller *The Sum of All Fears* has been chillingly corroborated by the U.N.'s recent discovery of Iraq's possession of multi axis precision machine tools as well as isotopic ally purified lithium–6, with

[16] Diagram of interlinked contemporary pure research disciplines arising from early scientific work that gave rise to the atomic bomb and the first thermonuclear weapons.

evident intent eventually to develop a hydrogen bomb.[17] To compound matters, by buying into the company that manufactured these machine tools, Iraq obtained the CAD/CAM software whereby to clone them at will.

Common Knowledge, Uncommon Skills

The end of the NATO-Warsaw Pact confrontation has been attended by an outburst of thermonuclear *glasnost* by the former inmates of the late nuclear gulag. In the course of celebrating the memory of the late Andre I Sakharov, his physicist-colleagues have explicitly revealed some of the fundamental tricks of the weapons trade. In *Sakharov Remembered,* V. I. Ritus of the Lebedev Physical Institute [Fizika Institut Akademiya Nauki] outlines the foremost of the early breakthroughs on two-stage fission-fusion bombs: the method of increasing the fusion reaction rate by incorporation of depleted uranium into a layered structure containing deuterium and a tritium precursor so that, when it becomes fully ionized by resonant absorption of the x-ray flux of a fast first-stage fission primary (contained in an holraum of appropriate geometry made of the right stuff) the radiation pressure is locally amplified by the abundant electrons liberated from the U^{-238}. This increases the concentration of the deuterium nuclei: which increases the fusion reaction rate by an order of magnitude. "Such a method of reaction increase was called 'Sakharization' by our colleagues."[18]

$$N_d = \frac{Zu + 1}{Zd + 1} \cdot nU = \frac{Zu + 1}{2A_uM} \cdot \frac{\rho u}{4M} \cdot du$$

18

Welcome to the future. This is not the sort of hoary schematic speculation typical of Howard Morland's decade-old "The H-Bomb Secret," but straightforward (albeit antique) thermonuclear bomb design information of a quality transcending the fission bomb intelligence that sent the Rosenbergs to the electric chair! It has been on the library shelves for three years,and is about to be joined by the wealth of empirical knowledge contained in Richard Rhodes' "Dark Sun: The making of the Hydrogen Bomb."

In another paper, A. I. Pavlovski displays some x-ray flash photographs of how to overcome Rayleigh-Taylor instability by an iteration of implosion components.[19] A third, by Yu. A. Romanov, further outlines the similarities and differences of early U.S. and USSR thermonuclear devices and bombs. This is in turn augmented by the deploably complete quantitative tutorial on radiation pressure scaling afforded to readers of the 1994 nuclear astrophysics text "Stellar Interiors," which features a computer diskette loaded with Thermonuclear regime hydrodynamics codes based on those developed at Los Alamos!

This level of candor may be a source of satisfaction to the curious, but while Drell, Teller and Bethe remain close-lipped and their proteges safely within the confines of Los Alamos and Livermore, one wonders what's going to become of those of Sakharov and his contemporaries? Especially those who hail from the former "Independent Khanates of Turkistan." One hopes that the next mayor of Dushanbe will be a man devoid of thermonuclear ambition that will deal out transit visas to Pakistan only sparingly.

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[17] The author freely confesses to being among Clancy's technical advisors, but although he attempted to persuade General Electric to make carbon-12 diamonds long before Clancy's 1988 novel *Cardinal of the Kremlin* was written, Saddam Hussein's people deserve sole credit for figuring out lithium-6 *a priori*. *The Sum of All Fears,* completed in April 1991, assumed a fictitious East German nuclear scientist to have signed on with an Iran-financed Lebanon-based weapons fabrication group. As of November 26, 1991, a *Soviet* bomb designer is reported missing from his lab, together with a substantial amount of documentation, and presumed turned mercenary.

[18] Z=atomic number. A=mass number of nucleus. M=1 atomic unit (Dalton). u=uranium. d=deuterium. p=density.

[19] This subject is pursued in depth in several papers in *Proceedings of the Madrid Conference on Hypervelocity Impacts* (Amsterdam, Elsevier, 1986).

When the Einstein-Szilard letter brought the possibility of the A-bomb to President Roosevelt's attention, the American Physical Society had just 4,000 members. About half of this cadre of (mostly) Ph.D.'s joined the Manhattan Project, which at its height employed roughly 10,000 scientists with advanced degrees, principally in chemistry and chemical engineering. Industry contributed a larger share of such skilled personnel than academia.

Some few of the Manhattan Project scientists of the author's acquaintances have reflected on the acceleration of their research efforts relative to the pace of the academic or industrial endeavors they pursued before World War II. They all concur that the relatively unlimited budget of the program contributed mightily to its rapid progress. It took a great deal of money, some two billion dollars in an era when the largest of industrial research establishments—G.E.'s or DuPont's, for example, had annual budgets on the order of ten million dollars.

That acceleration, based on all but bottomless coffers (when copper shortages due to military demand got in the way of Oak Ridge's requirements for calutron power transformers, the U.S. Treasury was tapped for hundreds of tons of silver) has more modern exemplars: the Apollo program in the sixties and the Iraqi nuclear program of the eighties being but two. It is a tacit principle of research management that money buys time, and having spent a billion dollars a year for a decade, Iraq's progress, like Iran's and North Korea's, should surprise no one.

As we enter the nineties, it costs roughly $100,000 per research man-year, inclusive of support personnel and overheads, to productively employ an American or Japanese scientist. But owing to their abrupt unemployment due to the retrenching of the Soviet military-industrial complex, the institutions employing tens of thousands of displaced Soviet researchers are frantically trying to find Western support. The asking price for their services ranges from $500 a month for a group leader with a Ph.D. to $100 for a skilled technician. The ramifications of this level of leverage, combined with the apparent obliviousness of Soviet R&D managers to the very existence of proliferation issues, let alone their complexity, are obvious.

Technicians are as important as the problem of proliferation as scientists. The actual construction of devices entails very high standards of mechanical precision and electronic performance, often reckoned in millionths of an inch and billionths of a second. In the mechanical domain, the advent of digitally controlled machine tools with optical sensors and air bearings has effected a revolution in the quality of precision machining.[20] Surfaces of large size can now be finished to optical quality over arbitrary curvatures. This has to a large degree trivialized the task of machining components for spherical symmetrical first-generation nuclear device components, metallic and otherwise. That this is the case is evidenced by the commercial production in many nations of artifacts as materially diverse as contact lenses and CD discs, all of which may well rival the level of precision of the first generation of thermonuclear devices.

The compatibility of these precision tools with computer-aided design (CAD) and computer-aided manufacture (CAM) software, as well as precision robotic manipulators, substantially lowers the demands on the proficiency and skill of their operators.

It also reduces the need for prolonged proximity to potentially dangerous transuranic elements and materials like plutonium turnings. It can also facilitate the design of atmospherically isolated work cells that, being fully automated, could permit the fabrication of components that are far more radioactive than the materials normally employed in fission devices. The built-in deterrent to radwaste bombs—the presumption that the starting material is lethal to handle must be re-examined in the light of machines that produce precision components untouched by human hands.

Issues of automation also involve informational components. Linking the output of a hydrodynamical model with the refinement of a mechanical design is a demanding computer programming task. It has lately been simplified by the advent of sophisticated computer languages that are both mathematically explicit and object-based (*Mathematica,* developed by Dr. Stephen Wolfram is one example). Designs in turn must be interfaced with CAM software, but expertise in that area is becoming as endemic as robotics in the Pacific Rim.

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[20] The air-bearing lathe and related precision machine tools arose from a desire to mass produce complex optical components for high-power lasers. A technology developed from the Strategic Defense Initiative by Oak Ridge has proved eminently serviceable to the business of building warheads instead. *Cf. Intercavity Optics, Proc. S.P.I.E.,* vol. 961, 1988.

Trans-National Technology

While the role of computer science in weapons design has led to the installation of the most formidable of cryptographic safeguards to isolate the weapons' labs powerful computers from the outside world, the advent of highly secure public-key safeguards in unclassified civilian computer nets has a serious downside. Provided with almost unbreakable computer security, the international dispersion of the people and hardware necessary to conduct the conceptual design, modeling and CAD/CAM cycle becomes a possibility. For while vigilance might detect the accrual of expertise necessary to nuclear ambition in a single place, the same human assets working at home in a half dozen countries might go undetected.

The culture of technology in France has contributed a new and curiously ramified dimension to the problem of global proliferation. The legal fiction that declares some of its former colonies to be metropolitan departments of a European nation-state translates into a dispersion of channels connecting the E.E.C. with the Third World. From its equatorial spaceport in French Guinea, to the nickel smelters of New Caledonia and its nuclear test site in the mid-Pacific, the French presence creates interfaces for technology transfer, licit and illicit—a francophone phenomenon best studied by the French themselves. No one foresaw in 1945 that the Brazilian aerospace industry would share a common northeastern border with (come 1992) the European equivalent of NASA.

Nor was it realized that, quite apart from France's nuclear autarky, its considerable share of the Centre Europe Anne du Recherche Nucleare (CERN) would place it at the interface of supercomputer-integrated circuit development: x-ray optics for synchotron photo lithography and observational astrophysics—x-ray astronomy. So fungible is truly high technology as to generate a wealth of interconnections. A topology of progress that verges on fractal complexity can emerge and grow like so much kudzu from the rootstuck of thermonuclear ambition. But in the shade of that deciduous growth, shady characters can be found: illicit channels, of whatever sort, can add a new and truly fractal dimension to the calculus of proliferation.

The portrait of a neatly compartmentalized Manhattan District drawn by its founders was drawn, it seems, within a small rectangle on the surface of what has proved to be a very large and highly elastic balloon. After a half century of continuous inflation, its expansion has yielded not only a vast increase in the amount of weapons technology still within the perimeter of secrecy, but an all but infinite canvas, upon which a generation of artists has been independently working.

From their relativistic perspective, the thick black box has been shrinking, not growing, as its walls are eroded. By the flow of new knowledge into the unclassified data bases of an ever growing scientific world. With the exponential growth of information comes the realization that information is the universal solvent of secrecy itself.

And secrecy itself is not accordingly to be regarded as a permanent thing. The more that is known, the less remains that can be kept unknown. This is an empirical, not a metaphysical, observation, for given the exponential growth of the technologies of information, the pressure of the known can exceed the strength of a secret technology's containment, and secrets can implode into irrelevance. What sort of phase charges can proliferation undergo in the midst of an information explosion? With the burgeoning of technology and the prospect of the growth of what intelligence, human and artificial, can accomplish in the century to come, comes the realization that the present regime of proliferation control may be among that rare set of entities—a fit object for catastrophe theory.

Now for the Bad News

To compound the problem, some few of those Ph.D.'s are in a discipline that didn't even exist in 1945: molecular biology. With its advent, chemical and biological warfare have become less than Poor Man's Atom Bomb, than the lazy one's. The political and military factors that spared the world a failure of CBW deterrence in the Gulf War and the (relative) success in interdicting trade in nerve gas precursors are of but little relevance. Too numerous and ubiquitous are plants and organisms containing molecules of intimidating virulence and toxicity. We have no need of high-biotech nightmares involving genetically engineered microorganisms when an acre of one of several tropical legumes, processed in a jungle laboratory no more sophisticated than those used to process cocaine, can yield a scudload of a plant toxin of a toxicity that rivals anything in the arsenals of the First World. The prospects for the interdiction of trade in such substance are as dismal as those found in the drug war.

And while the notion that the easiest way to smuggled an atomic bomb into this country is to put it into a drumful of cocaine and leave it on a dock in Cartagena

suffers from the failure of bombs to grow on trees, the beans the yield some of the biotoxins of truly genocidal strength flourish untended throughout the world. Ricin, the lectin made infamous by an umbrella-gun wielding Bulgarian assassin in London, is a potentially abundant by-product of the production of castor oil. There are still more toxins. So even in Burundi *or* Vanuatu,[21] appropriate technologies of mass destruction are to be found at hand in the state of nature. It is a mere fact of evolution. In order not to be eaten, plants have come to produce chemicals that fulfill a criterion of toxicity—one molecule can kill an animal cell—that cannot be exceeded by artifice. In the aftermath of the Oklahoma City bombing, the FBI announced the confiscation from individuals of not just substantial quantities (roughly a million lethal doses worth) of Ricin, but also a freezer full of viable cultures of the Yersinia pest is bacillus—the pathogen responsible for the Black Death.

These substances have legitimate (albeit exotic) uses in biomedical research, and what is important is not the knowledge of their existence, but that the essential research skill taught to those who manipulate them in the laboratory is how to use them—and stay alive in the process. It has never been customary in the culture of science to inquire into the state of ethnic tension in a graduate student's homeland before enrolling him or her into a biohazards safety course, nor to reflect on whether the security forces there contain a service resembling the KGB's (hopefully late) technical enterprises.

In the light of the triviality of plant toxins as potential weapons of mass destruction or terror an obvious question arises: in a multipolar world, is nuclear proliferation cost-effective? Delivery systems being equal, why should the still considerable costs and risks of discovery that emulating the Manhattan Project entails be preferred to means that are far cheaper, technically less demanding, and nearly undetectable before the fact of deployment?

The only substantive advantages nuclear weapons possess as instruments of terror or defense arise from the universal realization of just how terrible their effects are. Hiroshima was, among other things, the high-water mark in the history of advertising, having endowed nuclear weapons with a status that remains unshakable to this day as emblems of national power and the ultimate talisman of warlike ambition. Yet the residue of repugnance that led even Adolph Hitler to refrain from risking a failure of deterrence with nerve gas, and a return to the chemical warfare of World War I, has decayed to a point where Iraq has already ventured into the suburbs of the unthinkable.

An episode of Hiroshima's magnitude might be required to refresh the world's faded collective memory of the horrors of CBW, and, unfortunately, only the continuity of rational action stands between the relatively benign present and that historical contingency. For so low is the threshold of technical difficulty and the critical mass of men and material within the orbit of whatever fanaticism should find such a deed compelling, that it is hard to imagine a world not at risk of it.

For while we can endeavor to better understand how the interaction of participants in the applied sciences can signal the emergence of a latent capacity to practice the art of nuclear weapons development, and take action when that capacity emerges in a state, we are faced with an alarming discovery when it comes to CBW. For the former art entails a cadre of at least a hundred and a budget of many millions spent in ways that are at least locally exotic. But the latter can be done by a few directing the labors of unskilled dozens at a task that might cost less than a pound of gold. Even the assumption that a Scud is a *de minimis* delivery system may constitute overkill—think what Mathias Rust *could* have accomplished with a crop-duster.

It takes but a visit to Sydney or Johannesburg to remind one that not all of our contemporaries are living in the same time. Some nations are farther into the future, and others still are lingering in the recent past. But as time's arrow advances, the nuclear age will eventually encompass most of the industrialized world, and so too must progress the ubiquity of the basic technologies of weapons of mass destruction.

As high technology ramifies, appropriate technologies multiply. The universal desire for material progress that has led to the influx of scholars into the technical universities of the First World is a force for change that will not be denied. But we can be vigilant of what is taught and to whom, and endeavor to see that all who

[21] While the plant and animal toxins of the New World, curare and the arrow poisons derived from frogs of the genus *Dendrobates*, are deservedly famous, the ubiquity of biotoxins was brought to the author's attention upon arriving at Rannon anchorage on the island of Ambrym in Vanuatu. Upon being informed of our arrival from the adjacent island of Epi, an Ambrym resident said, "Epi man he putt em one fella leaf on path, you steppem leaf, you die finis."

come to study the applied sciences learn at least something of the historical consequences of their atrocious misuse in the service of aggression

For the sciences should be the foremost of the arts of peace—as the lever of riches, technology can and does provide the deliverance from want that can be the salvation of democratic polity in the developing world. It is to be hoped that those we train in contemporary technologies will devote their skills to effecting change for the better today more radical even than that effected millennia ago by the advent of agriculture and the invention of the plow. And that most will strive to reap for their nations the benefits of what they learn here. But any man with the mettle to forge a plowshare can readily reforge it into a sword.

Perhaps students of proliferation control should look over the shoulders of those who study immunology, and oncology. They too are addressing problems of mutation and of metastasis; of constantly changing threats and challenges, and of how to aid the human immune system in rising to meet them. For the growth of technology can be as benign as that of any living tissue, or as malignant as the worst of cancers.

Only a diagnostic vigilance that affords the earliest of warnings and the timeliest intervention can forestall that malignant contingency. Our survival requires, as technology grows, the development of new modalities of vigilance, and the informational tools to support them. For the substantive urgency of that vigilance will increase as the boundaries of the post-industrial world expand to encompass the whole of it. Long before the majority of the world's practitioners, of high technology and science fall within the orbit of being capable of fulfilling nuclear ambitions, they must be taught their active responsibility for forestalling them.

Their constant vigilance, being our best defense, needs to be aroused to face a danger that is both clear and close. For though the future, as always, is a dangerous place, we are fated forever to live there. As Heraclitus knew too well,

> He who lacks vigilance will not detect the unexpected, for it is a wilderness and unexplored.[22]

[22] Heraclitus, frag. 7, as found in Clement, *Stromateis* II.17.4.

APPENDIX 10.—STATEMENT OF HON. WILLIAM P. LUTHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. CHAIRMAN, I wish to speak on an issue that, due to the recent tragedy in Oklahoma City, demands increasing attention and congressional action: the use of tracing elements called "taggants" in explosives.

Taggants are small particles added to explosives at the time of manufacture. These particles survive the detonation of an explosive and can be found by investigators, who can then identify the batch of explosives and trace the last legal purchaser of that explosive. Requiring the use of taggants can help federal law enforcement to quickly and accurately identify the culprit of a bombing attack.

The capability of taggants to help our law enforcement agencies to bring terrorist bombers to swift and severe justice is very promising. Switzerland has solved crimes involving illegally used explosives by requiring, since 1980, the use of taggants, which are produced by a Blaine, Minnesota company called Microtrace, Incorporated.

The recently-passed anti-terrorism bill in the Senate included an amendment by Senator Feinstein, which was supported by a 90–0 margin, requiring the Department of Treasury to conduct a study on taggants and, if appropriate, to make recommendations for legislation concerning the use of taggants in explosives.

The anti-terrorism bill before us in this committee does require a study of taggants, and I believe that is a good first step. But, Mr. Chairman, I believe we must give direction and purpose to that study. To merely require a study of taggants without establishing guidelines by which to consider requiring their use is to confront the issue of terrorism half way. The administration favors the use of taggants in explosives because it believes we must act to identify and bring to justice criminal bombers with the use of existing technology.

The promising and compelling data on the effectiveness of taggants suggests that we should at least begin consideration of legislation to implement taggants in explosives. With all that we know about taggants so far, and because Oklahoma City showed us that tragedy can strike anytime and anyplace, we owe it to the safety of American citizens to require the use of taggants.

Thank you.

APPENDIX 11.—LETTER DATED JUNE 13, 1995, TO CHAIRMAN HYDE, FROM GREGORY T. NOJEIM, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

WASHINGTON NATIONAL OFFICE
Laura Murphy Lee
Director

122 Maryland Avenue NE Washington, D.C. 20002

(202) 544-1681 Fax (202) 546-0738

RECEIVED
JUN 15 1995

June 13, 1995

Hon. Henry J. Hyde
2110 Rayburn House Office Building
Washington D.C. 20515-1306

Dear Mr. Hyde:

Thank you for inviting the ACLU to testify at the hearings conducted yesterday, June 12 on H.R. 1710, the "Comprehensive Antiterrorism Act of 1995." I write to correct an inaccuracy on page 2 of the ACLU testimony. It is accurate to say, as we did, that under the definition of "terrorism" appearing in Section 315 of H.R. 1710 (which would amend 18 U.S.C. Section 2331) that the forcible blocking of an abortion clinic in violation of the FACE law would be an act of terrorism. However, the testimony was inaccurate in suggesting that providing a bus or a meeting place for the anti-abortion protest would be proscribed under 18 U.S.C. 2339A, as it would be amended by Section 103 of H.R. 1710. Section 103 lists particular federal law crimes the provision of material support for which would be a criminal act. Because 18 U.S.C. Section 2331 is absent from that list of crimes, the criminal sanctions for violating 18 U.S.C. Section 2339A would not apply. The testimony was accurate in pointing out that under Section 308 of H.R. 1710, the FBI would be empowered to obtain, without a court order in advance, an "emergency wiretap" of the meeting in the church basement at which the anti-abortion protest involving the forcible blocking of an abortion clinic in violation of the FACE law was planned.

Please feel free to include this letter in the record of the proceedings.

Sincerely,

Gregory T. Nojeim
Legislative Counsel

APPENDIX 12.—MEMORANDUM DATED MAY 22, 1995, TO CONGRESSMAN ZACH WAMP, FROM J. WAYNE CROPP

To: Congressman Zach Wamp

From: J. Wayne Cropp

Date: May 22, 1995

Re: Ammonium Nitrate -- Oklahoma City Bombing

Recently, Dr. Marion Barnes asked that I contact you regarding certain scientific/political issues associated with the production of ammonium nitrate. You may remember that ammonium nitrate fertilizer was converted to an explosive, which was the destructive force used in the Oklahoma City bombing.

Dr. Barnes holds, I believe, a Ph.D. in Chemistry. If you do not know Dr. Barnes, you probably know some of his children, including John Barnes, previously of Provident Life Insurance Company, and David Barnes, M.D.

Dr. Marion Barnes was formerly a chemist with Monsanto Corporation and did some of the early experimental work on ammonium nitrate. He indicates that Monsanto understood the destructive capability of mixing ammonium nitrate with diesel fuel and, therefore, he had been assigned to work on a methodology for preventing its misuse. He indicates that this methodology is known to the industry, but not used across the board. Dr. Barnes advised that he believes Monsanto had sold its financial interest in ammonium nitrate to industry competitors so he did not believe Monsanto would be in a position to pursue the issue. Dr. Barnes states that he is willing to talk to appropriate officials regarding the methodology for preventing common fertilizer from being converted to an explosive.

The methodology that Dr. Barnes proposes entails an additional processing step in the chemical reaction of the production of fertilizer grade ammonium nitrate.

It would seem to me that the proper course of action for your office would be to contact the appropriate executive branch agency with regulatory authority, to have them follow up on this issue.

If you have any questions, please let me know.

JWC:pjm

cc: Helen Hardin

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APPENDIX 13.—STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I anticipate that the testimony of the witnesses today will aid this committee in its deliberations regarding the legislation now before us. I regret having not been here yesterday, but I was attending a field hearing regarding immigration.

Terrorism has become a core instrument for those of this world who have little regard for the loss of innocent life in attempting to achieve the ends to their social and/or political means. We have an obligation to enact legislation that protects potential American victims from such heinous acts of violence.

However, we must be cautious as we act to exercise laws regarding terrorist activity. It is our goal to protect our citizens and not to threaten their civil liberties so as to develop in them the same fear of American government as they already have of terrorists.

Thank you again, Mr. Chairman, for having these hearings.

APPENDIX 14.—LETTER TO CHAIRMAN HYDE, FROM EDWARD J. WALLACE, NATIONAL PRESIDENT, ANCIENT ORDER OF HIBERNIANS IN AMERICA

NATIONAL BOARD

OFFICE OF THE
NATIONAL PRESIDENT

EDWARD J. WALLACE
536 Theresa Street
Clayton, New York 13624-1212
(315) 686-3917

ANCIENT ORDER OF HIBERNIANS IN AMERICA
INCORPORATED
Organized in New York City, May 4, 1836

May 9, 1995

The Honorable Henry J. Hyde
United States House of Representatives
2110 Rayburn House Office Building

Dear Mr. Chairman: RE: HR 1710

The Ancient Order of Hibernians is opposed to terrorism and violence in any form at any time and supports any reasonable legislative effort to improve the security of the American people. The Ancient Order of Hibernians and Irish-American community as a whole does not support or condone acts of terrorism anywhere under any circumstances.

We note with approval your efforts to produce a balanced and just reform of American law to give American law enforcement officials the tools to protect American citizens from foreign-based terrorism without infringement of our cherished civil rights.

It is our understanding that at least one Irish-American organization has expressed concern that this legislation could be used to punish Americans who provide material support for charitable relief in the North of Ireland or for legitimate Nationalist political efforts. Having read the legislation, we find these concerns to be without foundation.

We do, however, note one some concern about subsection 611(2) which grants the Secretary of State and the Attorner General an unreviewable right to identify foreign nationals as 'representatives' of a terrorist organization. You must understand that Irish-Americans with strong ties to Ireland and long-standing concern about the problems of injustice in the North of Ireland tend to harbor historically well-founded suspicions concerning this provision. The fear is that a combination of (a) the lack of rights of due process under Britain's Prevention of Terrorism Act and the (b) traditional "special relationship" between British and American diplomats may lead to abuse. Specifically, the concern is that an American Secretary of State

may, as a favor to his British counterpart, improperly designate spokesmen of lawful Irish Nationalist organizations as terrorist "representatives." We ask, therefore, that at a minimum, this provision be amended to require the Attorney General or the Secretary of State to either make public the findings that ground the decision or to report such findings to the appropriate Committees of the Congress.

In the present and foreseeable political climate this kind of abuse of power is unlikely. However, prudence suggests that the legislation include some checks on possible future abuse.

Mr. Chairman, The Ancient Order also thanks you for your invaluable leadership in advancing the MacBride Principles now incorporated in H.R. 1561 and, we hope, soon to be passed by the full Congress. The House of Representatives in the 104th Congress has shown more courage and leadership in support of peace and justice in Ireland than has been shown in any Congress in living memory. We are aware that your initiative in preparing a bipartisan Dear Colleague letter in support of the MacBride Principles was the key to assembling a clear majority in support of the provision.

Precisely because of the climate of peaceful progress you have personally helped to foster, the era of violence in the North of Ireland appears to be coming to a close. The Ancient Order of of Hibernians is working towards establishing a strong American role in support of a permanent just peace. There isnothing in H.R. 1710 which conflicts with that mission. On the contrary, the bill makes a constructive stride toward ending international terrorism.

Sincerely yours,

Edward J. Wallace

Edward J. Wallace
National President

APPENDIX 15.—STATEMENT OF RALPH C. OSTROWSKI, CHIEF, ARSON AND EXPLOSIVES DIVISION, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEPARTMENT OF THE TREASURY

Mr. Chairman, members of the committee. I am here today representing the Bureau of Alcohol, Tobacco and Firearms (ATF) and the Department of the Treasury. I appreciate this opportunity to participate in this discussion on law enforcement's anti-terrorism efforts and describe to you the capabilities ATF has in addressing the issue.

ATF has statutory jurisdiction over the provisions of title XI of the Organized Crime Control Act of 1970, as codified in Public Law 91–452. The law assigned the authority for administering this law to the Secretary of the Treasury. ATF strives to bring the full force of this enforcement authority to bear against those responsible for violence involving explosives. This is being accomplished through investigations of criminal bombings and explosives thefts; investigative assistance and training to Federal, State, and local agencies; and protection of the public from potential injury, death, or property damage resulting from the improper storage or illicit use of explosives.

In addition to its criminal enforcement responsibilities, ATF has regulatory jurisdiction over the explosives industry. This industry is closely regulated at both the State and Federal level. ATF works closely with the industry to ensure that their products are sold to authorized individuals and stored in safe and secure facilities.

In its regulatory capacity, ATF administers the licensing of explosives manufacturers, dealers, users, and importers, and issues permits allowing the acquisition of explosives in interstate and foreign commerce. Currently, ATF has oversight of approximately 10,000 licensees and permittees in the United States.

ATF also enforces the regulations governing the storage of explosives, and maintains a compliance inspection program. This program involves the inspection of explosives storage facilities, known as magazines, in relation to their proximity to other inhabited buildings, construction material, and security, as well as the examination of the records to document explosives transactions.

In its nearly 25 years of existence, ATF has made considerable strides in explosives crime scene investigation. ATF's greatest asset in this regard is its special agents, who through years of experience and advanced training, have developed an unmatched expertise in postblast analysis. This expertise has, in turn, been shared with ATF's law enforcement counterparts at the Federal, State, and international levels through support initiatives developed to assist them in their efforts to investigate explosives crime scenes and reduce the incidence of this violence in society.

One such initiative is ATF's National Response Team (NRT). The NRT consists of four teams organized geographically to cover the United States. Each team, comprised of 20–25 experts including postblast and fire reconstruction investigators, chemists, and bomb technicians, can respond within 24 hours to assist in onsite postblast investigations when requested by State or local officials. This specialized response capability is the only one of its kind offered by a Federal law enforcement agency. The effectiveness of this response capability and the team members was most evident in ATF's response to the World Trade Center bombing. It was ATF's recovery of the partial vehicle identification number of the van in which the bomb was carried that ultimately led to the persecution of the perpetrators. In Oklahoma City, 200 ATF agents, bomb technicians, and chemists, as part of two NRT's working side by side with FBI investigators, quickly reconstructed the devastating bomb and the events surrounding this horrific crime.

An offshoot of the NRT is the International Response Team. Through the IRT, ATF provides investigative assistance at select fire and postblast scenes on U.S. property where the Diplomatic Security Service, U.S. Department of State, has investigative responsibility. ATF also provides technical/forensic assistance and oversight to foreign governments on foreign territory. To date, there have been nine international responses, five of which were explosives-related. Two were to Peru, and involved large vehicle bombings and improvised explosive devices never before seen. Two were to Argentina, and involved a bombing attack in 1992 that destroyed an Argentine/Jewish organization. One was to El Salvador, and involved technical support in the disassembly of an improvised explosive device.

Supporting ATF's explosives enforcement efforts are its laboratories in Maryland, Georgia, and California. Besides providing the full range of traditional forensic analysis, these laboratories routinely examine the components of both intact and detonated explosive devices and explosives debris in order to identify device components and the explosives used. The laboratories also provide trace evidence comparisons.

Moreover, the laboratories maintain liaison with explosives manufacturers who provide them with exemplars of new explosives products on the market.

Criminal investigative analysis is another tool used by ATF to support its explosives investigative efforts. ATF agents assigned to the FBI's Arson and Bombing Investigative Services Subunit (ABIS) of the National Center for the Analysis of Violent Crime are trained in the techniques of preparing analyses on serial bombers to assist law enforcement in identifying possible suspects based on characteristics particular to incidents. Related concepts of these analyses can also be applied to other areas such as onsite crime scene assessments, suspect interviewing techniques, and investigative strategies.

Also within ATF is a cadre of personnel who have unequaled technical expertise in the explosives and bomb disposal fields. They construct facsimiles of explosive and incendiary devices, render destructive device determinations, provide expert analyses of intact and functioned explosive/incendiary devices, and provide onsite investigative assistance at bombing. They keep ATF abreast of the latest technology related to explosives and issue classifications for new explosives and incendiary devices and materials. In addition, they provide technical advice on Federal explosives storage regulations, and provide training in all aspects of explosives handling, destruction, and instruction for Federal, State, local, and foreign law enforcement officers.

An added dimension to ATF's explosives enforcement efforts is its canine explosives detection program. This program was implemented in 1992 at the request of the U.S. Department of State, who knew of ATF's success in training accelerant-detecting canines for Sate and local law enforcement agencies and needed canines to deploy to foreign governments. Using the proven training methods and protocols for the accelerant-detecting canines, ATF, in conjunction with its laboratory, developed the explosives-detecting canine methodology and protocols.

This unique methodology hones the explosives identification/discrimination capabilities of the canines. This training exposes them to the five basic explosives groups, which include chemical compounds that are incorporated in over 19,000 explosives formulas. These canines can detect minute quantifies and a greater variety of explosives that canines trained in any other program available. Because of their conditioning, the explosives canines have been able to detect firearms and ammunition hidden in luggage and buried underground. Since 1992, 63 canines have been trained for use by governments in the countries of Chile, Greece, Cyprus, and Egypt.

As a means to combat the problem of explosives thefts and losses, ATF instituted the Stolen Explosives and Recoveries (SEAR) Initiative. SEAR was established to aid in the recovery of such materials, to determine trends and establish patterns of thefts, to assist in the investigative process of criminal bombings or accidental explosions, and to assist state, local, foreign, or other Federal agencies in their investigation of such matters.

A licensee, permittee, carrier, or any person who has knowledge of a loss or theft of explosives is required to notify ATF within 24 hours of discovery, and the failure to do so is in violation of the law. Reporting an explosives theft, loss or recovery can be accomplished by contacting ATF through a toll-free telephone number, which is 1–800–800–3855.

ATF's efforts in this regard is facilitated by its explosives tracing capability. This capability enables other Federal, State, and local law enforcement agencies to initiate traces of recovered, stolen, or abandoned explosives, explosive materials, and criminally or illegally used explosives. This capability is also applicable to foreign commercial and military explosives, ordnance, and munitions.

The tracing of explosives is made possible by the statutory requirement that all manufacturers of explosives that sell or distribute explosives shall legibly identify them with a location, date, and shift of manufacture. This marking is known as the date shift code. It is this code that provides the essential link between the manufacturers and the chain of distribution. Given the proper identifying data, ATF can trace an explosive from the manufacturer to the last retail sale by a licensed dealer. The explosives manufacturers, distributors, and users are required to maintain records of these explosives by amount, type, and date shift code.

ATF's repository for information regarding thefts, losses, recoveries, and seizures of explosive materials nationwide is the Explosives Incidents System (EXIS). Incidents captured in this data base are divided into specific categories such as date shift code, manufacturer, and quantity. EXIS can also be used to match targets and motives of bombings as well as similar explosive devices, and can show trends or patters in a given area, State, or throughout the Nation. Information this detailed is unavailable elsewhere in the Federal sector. ATF is in the process of formulating a similar data base on international explosives incidents.

These resources are highlighted to show what Treasury has in place to prevent and respond to criminal and terrorist bombings, and to underscore the potential that exists in enhancing these already highly successful programs through comprehensive antiterrorism legislation.

ATF would call upon our existing infrastructure to conduct an exhaustive study on the tagging of explosives materials for purposes of detection and identification. Our explosives incidents data base as well as our 25 years of explosives experience teaches us that such a study must be appropriately balanced. It must include a study as to whether common chemicals used to manufacture explosive materials can be rendered inert, and whether it is feasible to require it. Finally, it must examine whether controls can be imposed on certain precursor chemicals used to manufacture explosive materials, and whether it is feasible to require them. This balance is so critical to ensure that the would-be bomb maker does not simply move on to another less regulated or untagged product such as the 60 chemical oxidizers in the commercial marketplace that can be used to create improvised explosive devices. This is also true with regard to any study on rendering fertilizer grade ammonium nitrate ineffective for making large scale vehicle bombs.

There have been a number of products suggested as the ultimate solution: Calcium carbonate, which was tried in England to stop the IRA bombings; diammonium phosphate, the subject of another subcommittee hearing; and now urea nitrate. Some of these products are known to be unacceptable. The others must be tested to determine how knowledgeable, well-equipped and patient a criminal bomber must be to reverse the effect of the product, either through separation or resensitization. The study must explore all alternatives, and how they compare with respect to cost, practicality, and tamper-proofing.

In the last eight weeks, ATF has received a myriad of unsolicited ideas in all of those areas that would be the subject of a study as part of the comprehensive antiterrorism legislation. In anticipation of this legislation, ATF is now organizing a conference, bringing together from throughout the world scientists and subject matter experts from government research facilities, agencies such as the Bureau of Mines, FAA, and the Department of Defense, as well as private corporations and interest groups. These experts will provide the most current information as to each of the three areas to be studied under the antiterrorism proposals. ATF will provide this comprehensive overview to Treasury as well as this committee so that in a matter of weeks, informed speculation on this issue that is so vital to the safety and security of this Nation will give way to sound solutions that will form the basis for the comprehensive 1-year study proposed in the legislation.

Individual acts of violence or attempted violence involving explosives and improvised explosive materials continue to occur every day in this country. But this committee can rest assured that ATF will use all available resources to prevent such acts from occurring and arrest and prosecute to the fullest extent of the law any individuals found responsible.

I appreciate the opportunity to appear before the committee today, and will be happy to answer any questions you may have.

APPENDIX 16.—STATEMENT OF KEVIN F. CRAWFORD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNIMIN CORP.

Unimin Corporation wishes to thank the Judiciary Committee for the opportunity to submit written testimony today to express it's opposition to Section 305 of the proposed anti-terrorist bill (H.R. 1710). Section 305 authorizes the Treasury Department (BATF) to promulgate regulations requiring the use of identification "taggants" in explosives manufactured in or imported into the United States. This legislation could devastate our business by ruining our product.

HIGH PURITY QUARTZ

Unimin is the world leader in the mining, production and sale of high purity silica powders used both domestically and abroad in the production of semi-conductors. In the initial stage of Unimin's silica purification process, explosives are used to extract the silica-containing ore from the earth.

In order to meet the stringent purity requirements of our semi-conductor industry customers, Unimin has gone to great expense using the most advanced technology in the industry to remove nearly all forms of contaminants from our high purity quartz products. Unimin has reduced the metal contaminants to levels below 1 part per million. The slightest impurity in our materials can result in costly losses to our customers because they result in defective silicon chips. High purity silica is the hallmark of our international business success and leadership. We produce the world's purest natural silica powder. As a result, we are the

leading supplier of this essential semi-conductor product to producers in each of the U.S., Europe and Japan.

The proposed anti-terrorist legislation, in pertinent part, calls for the use of taggants in explosives. Taggants are little microscopic (metal, ceramic and/or plastic) tags which are said to help trace the source of explosives in the event of terrorist bombings.

This proposed legislation would force Unimin to introduce contaminants (the taggants to be included in the explosives we use) into our product, and could make our product unsuitable for their intended use - the production of semi-conductors. This legislation would give our foreign competitors (who will not have their products contaminated by taggants from explosives used in silica mines abroad) an enormous opportunity to get our customers in the U.S. and overseas to drop their U.S. supplier, Unimin.

GLASS SAND AND GLASS PRODUCTION INDUSTRIES

Unimin Corporation is also a national producer of silica sand, the main ingredient in the manufacture of glass for use in both the U.S. glass container and flat glass industries. Like most U.S. glass sand producers, our business uses explosives in the initial extraction of silica sand from the earth. In order to meet the demanding requirements of our glass manufacturing customers, our materials must meet stringent chemical specifications, particularly for certain impurities. Thus, our company has again incurred great expense in using the most advanced technology in the industry to remove nearly all forms of contaminants from our silica products. Impurity in our materials can result in costly losses to our glass

customers in the form of off-spec and defective products.

The introduction of taggant contaminants into nearly all U.S. produced glass sand products could make our product unsuitable for its intended use -- the production of glass. This legislation would give Canadian and Mexican producers who will not have their products contaminated by taggants an enormous opportunity to get our customers in the U.S. and overseas to drop their U.S. silica sand suppliers. Further, even if Unimin and other domestic glass sand producers were able to successfully remove the taggant contaminants, this would result in increased purification cost to our glass container and flat glass customers. Such increased costs would place these U.S. glass producers at a great competitive disadvantage with Canadian and Mexican glass producers in domestic and foreign markets.

CONCLUSION

Unimin Corporation urges that you oppose any legislation calling for the unqualified use of identification taggants in explosives. While everyone seeks to deter terrorism, further study and thorough consideration should be given to this important issue before any action is taken which will have unintended, far-reaching and commercially injurious consequences to both Unimin's world leadership in the high purity silica market, as well as to the U.S. glass sand and glass production industries as a whole. There must be some way to meet the objectives of this legislation without requiring a company which depends entirely on the purity of its product to introduce contaminant taggants into our production stream.

Unimin urges you to support legislation calling for a fair and objective study of detection and identification taggants for non-plastic explosives. The focus of the taggant study should include not only consideration of costs, safety and environmental impact, but also assurance that the purity of the minerals extracted by use of taggant laden explosives will not be compromised to the detriment of both the quartz/silica producers and consumers in both the domestic and international economic arenas. Legislation should require the use of taggants only in those situations in which all of the above criteria have been satisfied.

Once again, Unimin thanks this Committee for being given the opportunity to provide this written testimony and we look forward to your support relative to this important issue to our industry.

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