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MATERIAL WITNESS PROVISIONS OF THE CRIMINAL CODE, AND THE IMPLEMENTATION OF THE USA PATRIOT ACT: SECTION 505 THAT ADDRESSES NATIONAL SECURITY LETTERS, AND SECTION 804 THAT ADDRESSES JURISDICTION OVER CRIMES COMMITTED AT U.S. FACILITIES ABROAD

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

MAY 26, 2005

Serial No. 109–19

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

21–396 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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MATERIAL WITNESS PROVISIONS OF THE CRIMINAL CODE, AND THE IMPLEMENTATION OF THE USA PATRIOT ACT: SECTION 505 THAT ADDRESSES NATIONAL SECURITY LETTERS, AND SECTION 804 THAT ADDRESSES JURISDICTION OVER CRIMES COMMITTED AT U.S. FACILITIES ABROAD

THURSDAY, MAY 26, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommitee met, pursuant to notice, at 9:34 p.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. Today the Subcommittee on Crime, Terrorism, and Homeland Security will conduct a hearing—in fact, at the request of our Democrat Members—to review two PATRIOT Act provisions concerning national security letters and extraterritorial jurisdiction, and one issue unrelated to the PATRIOT Act, which is the material witness law.

Section 505 of the PATRIOT Act amended the authority to use NSLs, or national security letters. A national security letter, as you all perhaps know, is an administrative subpoena that can be used in international counter-terrorism and foreign counter-intelligence investigations.

Prior to the PATRIOT Act, an FBI agent, who authorized an issuance of an NSL, had to certify that there were specific and articulable facts giving reason to believe that the information sought pertains to a foreign power or an agent of a foreign power.

The USA PATRIOT Act changed this to allow for certification that the NSL is sought for foreign counter intelligence purpose to protect against international terrorism and clandestine intelligence activities.

This is consistent with the Supreme Court's ruling on the issuance and purpose of administration subpoenas.

While this section does not sunset, a district court found that the underlying law that authorized NSLs violated the fourth and first amendments.

The court's decision found no fault with the amended language from the PATRIOT Act per se, but rather by pre-existing provisions of the statute.

First, the court found that the statute was unclear as to whether the recipient of an NSL could consult with an attorney without violating the prohibition on disclosure for such a request.

Second, the statute contained no explicit provision for the Government to seek judicial enforcement.

And third, there was no provision imposing penalties against a person who fails to comply with an NSL.

The court found that H.R. 3179, a bill you may recall that was introduced in the last session by Chairman Sensenbrenner, would have addressed two of the issues listed above by explicitly providing for judicial enforcement of NSLs and by imposing penalties of up to 5 years in imprisonment for persons who unlawfully disclose that they had received an NSL.

The second issue we're here to discuss today is section 804 of the PATRIOT Act, which extends extraterritorial jurisdiction beyond military personnel and military contractors to other Federal agency employees and contractors.

The third issue for today's hearing is not a PATRIOT Act provision. The longstanding material witness law was codified under title 18 of the U.S. Code, section 3144. The authority to detain and depose a material witness has existed for decades. Basically, the law provides that when a judge determines that an affidavit filed by a party proves that the testimony of a person is material in a criminal proceeding and the person's appearance cannot be secured, the judge then may authorize a warrant for detaining that person until testimony can be provided or that the person can be deposed.

Now, we all look forward to the testimony from the witnesses today, and now I am pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of this Subcommittee, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and I am pleased to join you in convening this hearing on sections 505, 804 of the PATRIOT Act, and the material witness provisions codified in sections 3144 and 3142 of title 18.

I'd also like to personally thank you and Chairman Sensenbrenner for acquiescing to the minority's request to hold a hearing on these three topics.

While none of the authorities included in the scope of today's hearing are scheduled to expire at the end of the year, like other parts of the PATRIOT Act, the Department's aggressive use and extraordinary power, particularly contained within section 505 of the PATRIOT Act, and the material witness statute, warrant today's additional hearing.

The material witness statute was originally enacted with the sole purpose of guaranteeing the testimony of a witness during a grand jury or other criminal proceeding. Yet, since September 11, this authority has been routinely used as a pretextual investigatory arrest and detention of dozens of terrorist suspects.

And the arrest of Brandon Mayfield serves as a classic example.

As you recall, he was wrongly arrested and detained for over 2 weeks last year while the Government investigated his suspected involvement in the 2004 train bombing in Spain.

Now, we know that Mr. Mayfield's arrest and 2-week detention as a material witness was pretextual because not long afterwards, Federal agents candidly told reporters that he was arrested simply to prevent him from fleeing while authorities built a case against him. In other words, the Federal agents freely admitted using the material witness statute to make an end run around the fourth amendment barring the arrest or detention of an individual without probable cause of criminal activity.

Hopefully, we can all agree that something must be done to end this unconstitutional and abusive practice.

Now, in section 505, the Department's increasing use of national security letters raises different, but equally important, concerns.

Under section 505, the Federal Government can secretly obtain certain confidential communication and financial records provided the Government maintains that the need of such records is relevant to an ongoing intelligence or international terrorism investigation.

The inherent problems associated with this new authority are numerous.

First, records sought under this provision don't have to pertain to a foreign power or an agent of a foreign power, thus, the confidentiality of records of countless innocent Americans can routinely get caught up in such requests.

Second, instead of requiring the approval of a senior official at FBI headquarters, section 505 authorizes the release of such letters at the whim of a special agent in charge who is located somewhere in a local FBI office.

Third, national security letters are subject to the gag rule, which prevents the recipient from disclosing its receipt, and, therefore, questioning whether it's appropriate.

Finally, the issuance of such letters is accomplished without any judicial supervision or checks and balances whatsoever. Admittedly, with regard to these latter two points, a recent decision by a Federal court in *Doe v. Ashcroft* may have adequately addressed these concerns, but as I understand it, the case is currently on appeal, and, therefore, additional legislation may still be warranted.

So, Mr. Chairman, I look forward to the testimony of our witnesses on how these extraordinary powers are being used and how we can best provide the necessary checks and balances our system calls for and working with you to implement those changes. Thank you.

Mr. COBLE. I thank you, Mr. Scott.

Gentlemen, it's the practice of the Subcommittee to swear all witnesses appearing before us, so if each of you would please rise and raise your right hand.

[Witnesses sworn.]

Mr. COBLE. You may be seated. Let the record show that each of the witnesses answered in the affirmative.

We have a very distinguished panel today, ladies and gentlemen. Our first witness is Mr. Chuck Rosenberg, Chief of Staff to Deputy Attorney General James B. Comey. Prior to introducing Mr. Rosen-

berg, I'd like to thank him for appearing before us for I believe a second time—Mr. Rosenberg—in this series of hearings on the USA PATRIOT Act.

Mr. Rosenberg previously served as counselor to Attorney General, John Ashcroft, and before that was counsel to FBI Director Mueller.

Prior to joining the FBI, Mr. Rosenberg was an Assistant U.S. Attorney, and he is an alumnus of Tufts University, Harvard University, and the University of Virginia School of Law.

Our second witness is Mr. Matthew Berry, Counselor to the Assistant Attorney General for the Office of Legal Policy at the Department of Justice.

Prior to serving in his current capacity, Mr. Berry served as an attorney advisor in the Office of Legal Counsel. Additionally, Mr. Berry worked as a visiting assistant professor at William and Mary School of Law, and clerked for U.S. Supreme Court Justice Clarence Thomas and the Honorable Lawrence Silberman of the U.S. Court of Appeals for the District of Columbia Circuit.

Mr. Berry is a graduate of the Dartmouth College and the Yale School of Law.

Our third witness today is Mr. Gregory Nojeim, Acting Director of the Washington Legislative Office of the American Civil Liberties Union. I also want to thank Mr. Nojeim for joining us I believe as well for a second time, Mr. Nojeim, in this series of hearings on the USA PATRIOT Act.

Prior to joining the ACLU, Mr. Nojeim served as Director of Legal Services of the American Arab Anti-Discrimination Committee. Previously, he worked as an attorney with the Washington D.C. law firm Kirkpatrick and Lockhart, where he specialized in mergers and acquisitions, securities law, and international trade.

He is a graduate of the University of Rochester and the University of Virginia School of Law.

Our final witness today is Mr. Shayana Kadidal. Am I close, Mr. Kadidado? Pardon. Kadidal—who is Staff Attorney at the Center for Constitutional Rights.

As Staff Attorney, Mr. Kadidal works on a wide variety of issues, including military jurisdiction, post-9/11 immigration litigation, racial discrimination in employment and the first amendment.

Previously, he worked as counsel to a variety of high tech start-up and hedge fund clients. Mr. Kadidal clerked for the Honorable Kermit Lipez of the U.S. Court of Appeals for the First Circuit. He is a graduate of Duke University and the Yale Law School.

Gentleman, as you all have been previously advised, we operate under the 5-minute rule here. We impose that rule to you all, but we impose it to ourselves as well. So when you see the red light appear on that panel, that is your warning, your not so subtle warning, that your 5 minutes have elapsed. You'll have an amber light that will tell you that you have a minute remaining. Mr. Rosenberg, if you will start us off.

TESTIMONY OF CHUCK ROSENBERG, CHIEF OF STAFF, OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. ROSENBERG. Chairman Coble and Ranking Member Scott, thank you very much for holding these hearings and for giving me the opportunity to testify today. I will be brief.

Material witness warrant authority, Mr. Chairman, as you noted, is longstanding. It was codified many years ago. The recent incarnation of the statute, 18 U.S.C. 3144, was enacted in 1984. The predecessor statute, almost identical, enacted in 1966.

The material warrant is an ordinary tool, as a Federal prosecutor one that I used myself and one that Federal prosecutors and agents use all the time throughout the country in good faith, scrupulously, and closely adhering to the Constitution.

A warrant would be issued upon application to a Federal judge and not on the sole authority of a prosecutor or an agent. And that application would have to establish probable cause to believe that the testimony of a witness is material and that it would be impracticable to secure that witness's testimony by subpoena, in other words that you need to have this witness. You really need this witness. The testimony is material and the Federal judge so finds.

Now, if detained or if arrested as a material witness, Mr. Chairman, that witness, nevertheless, still has certain and numerous important rights: for instance, to be represented by an attorney. And, if the witness cannot afford an attorney, under 18 U.S.C. 3006(a), a witness is appointed—excuse me an attorney is appointed for the witness.

As well, that witness would have the right, through his or her attorney, to challenge that detention under the authority of the Bail Reform Act, 18 U.S.C. 3142.

A hearing pursuant to that Bail Reform Act, Mr. Chairman, would demonstrate that there are either conditions upon which that witness can be released pending a grand jury appearance or that that witness would need to be detained because there is no condition or a combination of conditions which would assure his or her appearance.

But, in short, this is an ordinary tool that's used throughout the country, but always in adherence to the Constitution and always—and this is so important—always with the oversight of a Federal judge who has to determine that that probable cause exists in the first place.

And so, while it's not a PATRIOT Act provision, and you're quite right to note that, I do want to tell you in my opening statement and later in response to questions how we use it, why we use it, and why we need it. I thank you for the opportunity to testify.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF CHUCK ROSENBERG

Testimony of Chuck Rosenberg
Chief of Staff
Office of the Deputy Attorney General
United States Department of Justice

Concerning
The Use of Material Witness Warrants

before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

May 26, 2005

Chairman Coble, Ranking Member Scott, and Members of the Subcommittee,

Thank you for the opportunity to testify at this important hearing regarding the use of material witness warrants in criminal investigations. I appreciate the opportunity to testify today and will begin by addressing four prime misconceptions surrounding material witness warrants.

First, material witness warrants are not a creation of the USA PATRIOT Act. To the contrary, the use of material witness warrants to secure the testimony of witnesses, before a grand or petit jury, is a long-standing practice that is authorized by statute and that predates the USA PATRIOT Act by many years. Nor have material witness warrants been issued solely in terrorism investigations; for years courts have issued such warrants in matters ranging from alien-smuggling to organized crime investigations.

Second, the Department of Justice cannot unilaterally arrest someone as a material witness. Rather, a material witness can only be arrested if a judicial officer issues a warrant authorizing the arrest, based upon an application from the government that establishes probable cause to believe that a witness's testimony is material and that it would be impracticable to secure that witness's appearance by subpoena.

Third, material witnesses are not held incommunicado. A material witness has the right to be represented by an attorney, and can challenge his or her confinement in court. Counsel will be appointed if the material witness cannot afford to pay for a lawyer.

Fourth, once a material witness gives full and complete testimony, he or she is generally released, barring some other source of authority for continued detention (such as an immigration

detainer or criminal charges). Indeed, some material witnesses are released without testifying before the grand jury. For instance, if following the arrest of a material witness he or she provides information to federal agents and prosecutors and they determine either that the witness does not have information that would be useful to the grand jury or that the information provided by the witness can be presented to the grand jury in another form, the witness is then released by the court.

Permit me to turn to the material witness statute and related provisions. Specifically, 18 U.S.C. 3144 provides that a *judicial officer* may order the arrest of a person whose testimony appears to be material in a criminal proceeding if there is a showing - pursuant to the probable cause standard - that it may become impracticable to secure the presence of the person by subpoena (e.g., the person is likely to flee the United States or go into hiding if subpoenaed to testify). Further, once the warrant is issued and the witness is arrested, a *court* employs the standards in the Bail Reform Act, 18 U.S.C. 3142, to decide whether to detain the witness pending his or her testimony. The material witness is entitled to a speedy detention hearing before the court at which he or she is represented by counsel, can present evidence, and can cross-examine government witnesses, see 18 U.S.C. 3142(f), and the government must establish that "no condition or combination of conditions will reasonably assure the appearance of the person as required." 18 U.S.C. 3142(e). Moreover, judicial supervision does not end there. Under Federal Rule of Criminal Procedure 46(h), a court must supervise the detention of material witnesses to eliminate unnecessary detention, and an attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days, and explaining why the witness should not be released.

In short, there are numerous judicial safeguards built into the long-established practice of detaining material witnesses pursuant to a warrant. See *United States v. Awadallah*, 349 F.3d 42, 62 (2d Cir. 2003) (the material witness statute and related rules "require close institutional attention to the propriety and duration of detentions"). However, the material witness statute may not be used as a broad preventative detention law, to hold suspects indefinitely while investigating them without filing charges. That is not the purpose of the material witness statute. At the same time, the fact that a person who is detained as a material witness is also a suspect in the underlying criminal investigation should not prevent the Government from attempting to obtain the person's testimony through lawful means. In other words, it may be perfectly appropriate to arrest and detain a suspect as a material witness if he or she in fact meets the statutory criteria contained in 18 U.S.C. 3144, as authorized by a federal judge. If a material witness before the grand jury is also a target of the grand jury's investigation, then pursuant to the United States Attorneys' Manual that witness will be advised of the right against self-incrimination, of the right to confer with counsel, and of the fact that the witness's conduct is being investigated for possible violation of federal criminal law.

In sum, Mr. Chairman, the material witness statute is an important, constitutional tool to secure the testimony of a witness whose testimony might otherwise not be available. It has a long

historical pedigree, and has been used repeatedly in terrorism and non-terrorism investigations alike. The pertinent statutes and related rules contain many safeguards, and the entire process is authorized and closely supervised by the Federal judiciary.

I look forward to answering any questions that Members of the Committee may have.

Mr. COBLE. Mr. Rosenberg, I think you have established a record. You did it in less than 3 minutes

Mr. ROSENBERG. Well, I wanted to be invited back a third time, Mr. Chairman.

Mr. COBLE. Very well. All right, sir. Mr. Berry, you're recognized.

TESTIMONY OF MATTHEW BERRY, COUNSELOR TO THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. BERRY. Chairman Coble, Ranking Member Scott, Members of the Subcommittee. It is a pleasure to appear before you today.

The Subcommittee's work in conducting oversight of the Department's use of the PATRIOT Act has been exemplary. Your series of hearings has allowed us the opportunity to explain how we have utilized the Act to protect the safety of the American people in a manner consistent with the preservation of civil liberties.

The Department strongly believes that the record established in these hearings demonstrates the need for Congress to reauthorize those provisions of the Act that are currently scheduled to sunset, and we look forward with you to working on accomplishing this goal.

My written testimony today, however, discusses two provisions of the Act that are not scheduled to sunset, sections 505 and 804. And in my oral statement today, I will focus only on section 505, which relates to national security letters or NSLs.

NSLs, as the Chairman indicated, are similar to administrative subpoenas, and, as is the case with other types of subpoenas, an NSL merely constitutes a request for the production of information.

If the recipient of an NSL declines to produce this information, the FBI's only recourse is to turn to a Federal court for an enforcement order. We can't just go in and seize the records.

The FBI's authority to issue NSLs preceded the PATRIOT Act by many years. Section 505 of the Act simply revised the standards governing their issuance. Section 505, in particular, amended three NSL statutes.

The first allows the FBI to obtain subscriber information and other records from a wire or electronic communications service provider, such as a telephone company.

The second allows the FBI to obtain financial records from financial institutions, and the third allows the FBI to obtain specified data from consumer reporting agencies.

The information acquired through NSLs is extremely valuable to national security investigations. Pursuing and disrupting terrorist plots often requires the FBI to seek information relating to the electronic communications of particular individuals. Likewise, tracking the movement of funds through financial institutions is often essential to identifying and locating those supporting or engaging in terrorist operations.

Unfortunately, however, NSLs were of limited utility prior to the PATRIOT Act. While records held by third parties may generally be subpoenaed by a grand jury in a criminal investigation so long as those records are relevant, the standard for obtaining such records through an NSL was much higher before October of 2001.

The FBI had to have specific and articulable facts that the information requested pertained to a foreign power or an agent of a foreign power. This requirement often prohibited the FBI from using NSLs to develop evidence at the early stages of an investigation, which is precisely when they are the most useful.

The prior standard, Mr. Chairman, put the cart before the horse. Agents trying to determine whether or not there were specific and articulable facts that a certain individual was a terrorist or spy were precluded from using an NSL in this inquiry because, in order to use an NSL, they first had to be in possession of such facts.

Suppose, for example, investigators were tracking a known al-Qaeda operative and saw him having lunch with three individuals. A responsible agent would want to conduct a preliminary investigation of those individuals and find out, among other things, with whom they had recently been in communication.

Before the passage of the PATRIOT Act, however, the FBI could not have issued an NSL to obtain such information. While investigators could have demonstrated that this information was relevant to an ongoing terrorism investigation, they could not have demonstrated sufficient specific, and articulable facts that the individuals in question were agents of a foreign power.

Thankfully, however, section 505 of the USA PATRIOT Act corrected this problem. In the last three and a half years, section 505 has proven to be of enormous benefit to the Department in national security investigations. While the details regarding the Department's use of NSLs necessarily remain classified, information obtained through NSLs has significantly advanced numerous sensitive terrorism and espionage investigations and has assisted the FBI in discovering links to previously unknown terrorist operatives.

I'm aware that some on this Subcommittee have expressed concerns about NSLs and have suggested modifying the statutes authorizing their use. One bill, for example, would forbid the FBI from using NSLs to obtain information from libraries and would sunset section 505 at the end of this year.

The Department believes that both of these ideas are seriously flawed and should be rejected.

To the extent that libraries function as wire or electronic communication service providers, they should be treated the same as all such providers. The record before the Subcommittee clearly demonstrates that terrorists use libraries to access the Internet.

For example, information provided to this Subcommittee last month strongly suggests that the 9/11 hijackers used two public libraries in the United States prior to their attacks. Given this evidence, it simply does not make any sense to say that NSLs should be used to obtain information from any wire or electronic communications service provider other than a library.

Returning to the pre USA PATRIOT Act standard for NSLs by sunsetting section 505 would also be a serious mistake. As I explained earlier, the previous standard denied the FBI relevant information in terrorism and espionage investigations. Allowing section 505 to expire would impede the FBI's ability to conduct effective terrorism and espionage investigations and risks harm to the safety and security of the American people.

In closing, I would like to thank the Subcommittee for inviting me to appear before you today, and I look forward to answering your questions.

[The prepared statement of Mr. Berry follows:]

PREPARED STATEMENT OF MATTHEW BERRY

Testimony of Matthew Berry
Counselor to the Assistant Attorney General
Office of Legal Policy, U.S. Department of Justice
May 26, 2005

Chairman Coble, Ranking Member Scott, and Members of the Subcommittee, it is a pleasure to appear before you today to discuss two important provisions of the USA PATRIOT Act: Sections 505 and 804. The Subcommittee's work in conducting oversight of the Department's use of authorities contained in the USA PATRIOT Act has been exemplary. The Subcommittee's series of hearings has provided the Department with the opportunity to explain to both the Members of the Subcommittee and the American people how we have utilized the Act to protect the safety and security of American people in a manner consistent with the preservation of civil rights and civil liberties. The Department strongly believes that the record established in these hearings demonstrates the need for Congress to reauthorize those provisions of the Act that are currently scheduled to sunset at the end of this year, and we look forward to working with the Members of this Subcommittee on legislation to accomplish this goal. Today, however, I will be discussing sections 505 and 804, two provisions of the Act that are not scheduled to sunset.

Section 505

National Security Letters (NSLs) are similar to administrative subpoenas and are used by the FBI to obtain specified information from specified entities in international terrorism and espionage investigations. As is the case with other types of subpoenas, an NSL merely constitutes a request for the production of information and is not self-executing. The FBI therefore cannot enforce NSLs either through administrative

procedures or self-help. Rather, if the recipient of an NSL declines to produce the requested information, the FBI's only recourse is to turn to a federal court for an enforcement order.

The FBI's authority to issue NSLs preceded the USA PATRIOT Act by many years; section 505 of the Act simply revised the standards governing the issuance of NSLs. Section 505, in particular, amended three statutes authorizing the use of NSLs: (1) 18 U.S.C. § 2709, which allows the FBI to obtain subscriber and toll billing records information and electronic communication transactional records from a wire or electronic communications service provider, such as a telephone company or an Internet Service Provider (ISP); (2) 12 U.S.C. § 3414(a)(5)(A), which allows the FBI to obtain financial records from financial institutions, such as a bank or credit union; and (3) 15 U.S.C. § 1681u, which allows the FBI to obtain from consumer reporting agencies information regarding the financial institutions at which a consumer maintains accounts as well as the consumer's name, address, former addresses, places of employment, and former places of employment.

The information acquired through NSLs is extremely valuable to the Department's terrorism and espionage investigations. Electronic communications, for example, often play a vital role in advancing the operation of terrorist organizations. As a result, pursuing and disrupting terrorist plots often requires the FBI to seek information relating to the electronic communications of particular individuals. Likewise, money is critical to terrorist organizations, and the ability to track the movement of funds through financial institutions is often essential to identifying and locating those supporting or engaging in terrorist operations.

Unfortunately, however, NSLs were of limited utility prior to the passage of the USA PATRIOT Act. While records held by third parties may generally be subpoenaed by a grand jury in a criminal investigation so long as those records are relevant to the investigation, the standard for obtaining such records through an NSL was much higher before October of 2001; not only did the requested records have to be relevant to an investigation, the FBI also had to have specific and articulable facts giving reason to believe that the information requested pertained to a foreign power or an agent of a foreign power, such as a terrorist or spy.[1]

This requirement often prohibited the FBI from using NSLs to develop evidence at the early stages of an investigation, which is precisely when they are the most useful, and often prevented investigators from acquiring records that were relevant to an ongoing international terrorism or espionage investigation. The prior standard, in essence, put the cart before the horse. Agents trying to determine whether or not there were specific and articulable facts that a certain individual was a terrorist or spy were precluded from using an NSL in this inquiry because, in order to use an NSL, they first had to be in possession of such facts.

Suppose, for example, investigators were tracking a known al Qaeda operative and saw him having lunch with three individuals. Investigators knew little about the

[1] However, one exception to this general requirement allowed the FBI to use an NSL to request the name, address, and length of service of a person or entity from a wire or electronic communication service provider if: (1) the information sought was relevant to an authorized foreign counterintelligence investigation; and (2) there were specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity had been used, through the services of such provider, in communication with either : (a) an individual who was engaging or had engaged in international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act (FISA) or clandestine intelligence activities that involved or may have involved a violation of the criminal statutes of the United States; (b) or a foreign power or an agent of a foreign power under circumstances giving reason to believe that the communication concerned international terrorism as defined in section 101(c) of FISA or clandestine intelligence activities that involved or may have involved a violation of the criminal statutes of the United States. *See* 18 U.S.C. § 2709(b)(2) (2000).

other individuals except that they had eaten lunch with an al Qaeda operative, which would not constitute specific and articulable facts giving reason to believe that each and every one of them was a terrorist. As an investigative matter, however, a responsible agent would want to conduct a preliminary investigation of those individuals and find out, among other things, with whom they had recently been in communication. Before the passage of the USA PATRIOT Act, however, the FBI could not have issued an NSL to obtain the telephone or electronic communications transactional records of those individuals. While investigators could have demonstrated that this information was relevant to an ongoing terrorism investigation, they could not have demonstrated sufficient specific and articulable facts that the individuals in question were agents of a foreign power, as the law required.

Section 505 of the USA PATRIOT Act corrected this problem. Now, just as criminal investigators can use grand jury subpoenas to obtain records so long as they are relevant to their investigation, the FBI can now use NSLs to obtain specified records so long as they are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment of the Constitution of the United States." In explaining the need for this change, the House Judiciary Committee in its report on the USA PATRIOT Act stated: "The additional requirement of documentation of specific and articulable facts showing the person or entity is a foreign power or an agent of a foreign power cause substantial delays in counterintelligence and counterterrorism investigations. Such delays are unacceptable as our law enforcement and intelligence community works to thwart

additional terrorist attacks that threaten the national security of the United States and her citizens' lives and livelihoods." House Report 107-236, at 61-2 (2001).

In the last three-and-a-half years, section 505 of the USA PATRIOT Act has proven to be of enormous benefit to the Department in international terrorism and espionage investigations. While the details regarding the Department's use of NSLs necessarily remain classified, information obtained through NSLs has significantly advanced numerous sensitive terrorism and espionage investigations and has assisted the FBI in discovering links to previously unknown terrorist operatives.

I am aware that some on this Subcommittee have expressed concerns about NSLs and have suggested modifying the statutes authorizing their use. H.R. 1526, for example, would forbid the Department from using NSLs to obtain information from libraries and would sunset section 505 of the USA PATRIOT Act at the end of this year. The Department believes that both of these ideas are seriously flawed and should be rejected.

To the extent that libraries function as wire or electronic communications service providers, they should be treated the same as all such providers and should not be allowed to become a safe haven for terrorists or spies. The record before this Subcommittee clearly demonstrates that terrorists use libraries to access the Internet. As recently as the winter and spring of 2004, a member of a terrorist group closely affiliated with al Qaeda used Internet service provided by a public library to communicate with his confederates. Moreover, information provided to this Subcommittee last month strongly suggests that 9/11 hijackers used two public libraries in the United States prior to their attacks. Given this evidence, it simply does not make sense to say that NSLs should be able to be used to obtain information from any wire or electronic communications service

provider except a library. Indeed, were this proposal to be adopted, we could expect our public libraries to become the Internet communications avenue of choice for terrorists and their associates.

Returning to the pre-USA PATRIOT Act standard for NSLs by sunsetting section 505 would also be a serious mistake. As explained earlier, the previous standard denied the FBI relevant information in terrorism and espionage investigations and made it harder for the FBI to use NSLs to obtain records from third parties than for criminal investigators to obtain third-party records through the use of grand jury subpoenas. Allowing section 505 to expire would impede the FBI's ability to conduct effective terrorism and espionage investigations and risk harm to the safety and security of the American people.

Before concluding my discussion of section 505 of the USA PATRIOT Act, I would like to briefly address ongoing litigation over the constitutionality of 18 U.S.C. § 2709, the statute authorizing the use of national security letters to obtain information from wire or electronic communications service providers. In a recent decision, the United States District Court for the Southern District of New York held this statutory provision to be unconstitutional. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2005). Some have therefore argued that the court concluded that the changes made to 18 U.S.C. § 2709 in section 505 of the USA PATRIOT Act were unconstitutional. This, however, is completely false.

The court concluded that the statute was unconstitutional for two reasons: (1) as applied, it effectively barred a recipient from challenging an NSL in court; and (2) the

provision permanently barred the recipient of an NSL from disclosing its existence. Neither of these rationales, however, is related to section 505 of the USA PATRIOT Act.

Section 505 had no effect whatsoever on the availability of judicial review of NSLs. In any event, the Department has argued that current law allows for a recipient to obtain pre-enforcement judicial review of an NSL. Indeed, Department witnesses testified last year before this Subcommittee in favor of H.R. 3179, a bill that, among other things, would have explicitly authorized the Department to enforce NSLs in court and NSL recipients would have been free in such enforcement proceedings (as they are now) to challenge the validity of an NSL.

In addition, section 505 did not in any way change the nondisclosure requirement accompanying NSLs. This nondisclosure requirement has been in place since enactment of the Electronic Communications Privacy Act of 1986. While the court concluded that a permanent nondisclosure requirement violates the First Amendment rights of NSL recipients, the Department has argued that such a requirement is necessary because a recipient's disclosure of an NSL directly threatens the ability of the government to investigate and disrupt foreign intelligence and terrorist operations. A suspected terrorist or foreign intelligence operative who learns he is under investigation through the disclosure of an NSL may destroy evidence, create false leads, tip off others, or take other steps to avoid detection. Moreover, such disclosures can reveal the Department's intelligence-gathering methods, from which spies or terrorists could learn better how to avoid detection.

For the aforementioned reasons, the Department respectfully disagrees with the district court's decision and is appealing to the United States Court of Appeals for the

Second Circuit. Our appellate brief, in fact, was just filed on Tuesday, May 24. It is important to recognize, however, that the district court's decision in this case does not call into question either the wisdom or the constitutionality of the changes made in section 505 the USA PATRIOT Act to those statutes authorizing the use of NSLs.

Section 804

Turning to section 804 of the USA PATRIOT Act, in this provision Congress added a new paragraph to the statute defining the "special maritime and territorial jurisdiction of the United States" ("SMTJ"), 18 U.S.C. § 7. This new paragraph states, in relevant part, that, with respect to offenses committed by or against a United States national, "premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States" are included in the SMTJ. 18 U.S.C. § 7(9). This new paragraph, however, does not apply with respect to offenses committed by persons described in 18 U.S.C. § 3261(a), which codifies a provision of the Military Extraterritorial Jurisdiction Act; such persons are those who, while employed by or accompanying the Armed Forces, or while members of the Armed Forces subject to the Uniform Code of Military Justice, engage in conduct outside the United States that would constitute a felony if engaged in within the SMTJ. Such persons are instead subject to federal law pursuant to the Military Extraterritorial Jurisdiction Act or the Uniform Code of Military Justice.

Section 804 of the USA PATRIOT Act was intended to ensure jurisdiction over crimes committed by or against United States nationals on the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign states. Prior to the passage of the Act, the courts of appeals were divided over the

extraterritorial application of section 7(3) of the statute defining the SMTJ, which has long provided that the SMTJ includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," 18 U.S.C. § 7(3). *Compare United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (holding that section 7(3) does not apply extraterritorially), *with United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that it does), *and United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (same). Section 804 was intended to address this conflict, *see* H.R. Rep. No. 107-236, pt. 1, at 74 (2001), and to codify the longstanding position of the United States that the SMTJ did extend to overseas bases.

Section 804 was simply intended to ensure that Americans who engage in wrongful conduct on United States Government premises overseas are subject to federal law. The Department is committed to investigating and prosecuting crimes taking place within the SMTJ, including those facilities covered by section 804, and will continue to investigate and prosecute such offenses in the future.

Conclusion

In closing, I would like to thank the Subcommittee for inviting me to appear before you today. The Department appreciates the leadership that this Subcommittee has demonstrated in giving us the tools we need to protect the safety and security of the American people and in conducting appropriate oversight of our use of the USA PATRIOT Act. I look forward to answering your questions.

Mr. COBLE. Thank you, Mr. Berry. And you beat the 5-minute mark as well.

Mr. BERRY. Thank you.

Mr. COBLE. The pressure is on, Mr. Nojeim. Good to have you with us, sir.

TESTIMONY OF GREGORY NOJEIM, ACTING DIRECTOR OF THE WASHINGTON LEGISLATIVE OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. NOJEIM. Thank you, Mr. Chairman, Ranking Member Scott, and Mr. Nadler.

It's a pleasure to be testifying before you on behalf of the ACLU about national security letters and the material witness statute.

I'll first discuss section 505 of the PATRIOT Act, which expanded national security letters, and which does not sunset, as other witnesses have noted, but that raises some of the same concerns as does section 215 of the PATRIOT Act, which does sunset and has some of the same civil liberties problems.

I'll then discuss the material witness statute, which the PATRIOT Act did not alter.

Section 505 of the PATRIOT Act expanded national security letter authority to allow the FBI to issue a letter compelling Internet service providers, financial institutions, and consumer credit reporting agencies to produce records about people who use or benefit from their services.

This power was later expanded to include the records of car dealers, boat dealers, jewelry dealers, real estate professionals, pawn brokers, and others.

In the case of both NSLs and section 215, the PATRIOT Act removed from the law the requirement that the records being produced pertained to an agent of a foreign power; that is, a foreign country, foreign business, or a foreign terrorist organization. This significantly expanded law enforcement access to records pertaining to Americans.

And this is not, as Mr. Rosenberg indicated—I'm sorry as, Mr. Berry indicated, putting the cart before the horse in an investigation. The records that are accessible are very sensitive. The agent of a foreign power standard puts the cart right where it belongs, behind the horse, because it ought to be the case that before those records are accessed, there ought to be some suspicion about the person to whom the records relate.

The NSL statutes do not require that the recipient of a letter can challenge it—do not require notice that the recipient of a letter can challenge it in court. They indicate that the recipient can tell no one that the recipient has received an NSL, including any attorney with whom they might like to consult.

In common parlance, the recipient is gagged. And under the statutory language, the gag stays in place forever.

We do not ask that you repeal section 505. Rather, we ask that you restore the agent of a foreign power requirement and that you amend the statute to time limit the gag, exempt attorney-client communications from it, and allow for court challenges.

If these changes are made to the NSL statues, they would likely satisfy the court that struck down as unconstitutional the statute that applies to NSL's directed at Internet service providers.

We also recommend that you require the Government to report publicly about the number of times it uses this power.

And I'll turn to the material witness statute.

Your oversight of the Department of Justice's use of the material witness law is welcomed. Congress enacted it to enable the Government in narrow circumstances to secure the testimony of witnesses who might otherwise avoid testifying in a criminal proceeding.

If a court finds that a person has information material to a criminal proceeding and is otherwise unlikely to appear, the witness can be detained until he testifies or is deposed.

Since September 11, however, the Department of Justice has misused the law for a very different purpose: to incarcerate terrorism suspects without public scrutiny and without proving to a judge probable cause to believe that the individual has committed a crime.

A large number of these witnesses are never even brought before a grand jury or a court to testify.

To head off the misuse of the material witness statute, we suggest that Congress request an investigation by the Inspector General on the Department of Justice's use of the material witness law since September 11, and renew its request to the DOJ to inform Congress of the names, bases, and detention details of the material witnesses detained since September 11.

We also suggest that you amend the material witness statute to take a cue from what many of the States have done, They have a heightened standard for arresting and detaining a material witness. And many States limit the Government's ability to hold the witness for a grand jury proceeding or for a trial to a specific short period, such as 5 days.

We also suggest that you require the Government to affirmatively inform witnesses of the basis of their detention and of their immediate right to a lawyer upon request.

We're not asking that these law enforcement powers be taken away. Rather, we're asking that they be made subject to reasonable checks and balances, such as meaningful judicial and congressional oversight, meaningful access to counsel, and appropriate disclosure to the public of the use of the power. Thank you very much.

[The testimony of Mr . Nojeim follows:]

PREPARED STATEMENT OF GREGORY T. NOJEIM

Chairman Coble, Ranking Member Scott and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights. This is an oversight hearing on sections of the USA PATRIOT Act of 2001 expanding national security letter powers and extraterritorial jurisdiction for federal criminal prosecutions,[1] as well as the very important topic of the Justice Department's use of the material witness statute.[2]

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[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272.

[2] 18 U.S.C. § 3144. The material witness law provides in full:

Release or detention of a material witness.—If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial

This statement's main focus is on national security letters and material witness detention. While these powers are not set to expire at the end of the year, their unrestricted use poses a serious threat to basic civil liberties and should be the subject of this subcommittee's careful scrutiny. The statement also briefly addresses extraterritorial jurisdiction.

SECRET RECORDS SEARCHES WITHOUT JUDICIAL REVIEW, PROBABLE CAUSE OR AN ABILITY TO CHALLENGE: NATIONAL SECURITY LETTERS

Perhaps no sections of the Patriot Act have become more controversial than the sections allowing the government secretly to obtain confidential records in national security investigations—investigations "to protect against international terrorism or clandestine intelligence activities."

National security investigations are not limited to gathering information about criminal activity. Instead, they are intelligence investigations designed to collect information the government decides is needed to prevent—"to protect against"—the threat of terrorism or espionage. They pose greater risks for civil liberties because they potentially involve the secret gathering of information about lawful political or religious activities that federal agents believe may be relevant to the actions of a foreign government or foreign political organization (including a terrorist group).

The traditional limit on national security investigations is the focus on investigating foreign powers or agents of foreign powers. Indeed, the "foreign power" standard is really the only meaningful substantive limit for non-criminal investigations given the astonishing breadth of information government officials might decide is needed for intelligence reasons. The Patriot Act eliminated this basic limit for records searches, including the FBI's power to use a "national security letter" to obtain some records without any court review at all.

Section 505 of the Patriot Act expanded the FBI's power to obtain some records in national security investigations without any court review at all. These "national security letters" can be used to obtain financial records, credit reports, and telephone, Internet and other communications billing or transactional records. The letters can be issued simply on the FBI's own assertion that they are needed for an investigation, and also contain an automatic and permanent nondisclosure requirement.

Although national security letters never required probable cause, they did require, prior to the Patriot Act, "specific and articulable facts giving reason to believe" the records pertain to an "agent of a foreign power." The Patriot Act removed that standard.

As a result, a previously obscure and rarely used power can now be used far more widely to obtain many more records of American citizens and lawful residents. Because the requirement of individual suspicion has been repealed, records powers may now be used to obtain entire databases of private information for "data mining" purposes—using computer software to tag law abiding Americans as terrorist suspects based on a computer algorithm.

In *Doe v. Ashcroft,* 334 F. Supp. 2d 471 (S.D.N.Y. 2004), a federal district court struck down a "national security letter" records power expanded by the Patriot Act, agreeing with the ACLU that the failure to provide any explicit right for a recipient to challenge a national security letter search order violated the Fourth Amendment and that the automatic secrecy rule violated the First Amendment. The case is now on appeal before the United States Court of Appeals for the Second Circuit.

There has been some confusion about whether *Doe v. Ashcroft* struck down a provision of the Patriot Act. In fact, *Doe v. Ashcroft* struck down, in its entirety, 18 U.S.C. § 2709(b), the national security letter authority for customer records of communications service providers, as amended by section 505(a) of the Patriot Act. The court referred repeatedly to the Patriot Act in its opinion. To be clear, the court invalidated *all of section 505(a) of the Patriot Act.*[3] It is simply inaccurate to imply that the court's decision was unrelated to the Patriot Act, or that it did not strike

officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[3] Please see attachment A illustrating precisely what the court in *Doe v. Ashcroft* struck down.

down a provision of the Patriot Act. If the court's decision is sustained on appeal, section 505(a) of the Patriot Act will no longer have any force or effect.[4]

National security letters can be used to obtain sensitive records relating to the exercise of First Amendment rights. A national security letter could be used to monitor use of a computer at a library or Internet café under the government's theory that providing Internet access (even for free) makes an institution a "communications service provider" under the law.

While national security letters cannot be issued in an investigation of a United States citizen or lawful permanent resident if the investigation is based "solely" on First Amendment activities, this provides little protection. An investigation is rarely, if ever, based "solely" on any one factor; investigations based in large part, but not solely, on constitutionally protected speech or association are implicitly allowed. An investigation of a temporary resident can be based "solely" on First Amendment activities, and such an investigation of a foreign visitor may involve obtaining records pertaining to a United States citizen. For example, a investigation based solely on the First Amendment activities of an international student could involve a demand for the confidential records of a student political group that includes United States citizens or permanent residents.

The government defends national security letters as analogous to a administrative subpoenas, which they point out do not require probable cause and can be issued without prior review by a judge. As explained above, national security letters are dramatically different from both administrative and grand jury subpoenas because they provides no explicit right to challenge and contain an automatic, permanent gag order that even the Attorney General concedes should be amended to ensure it permits conversations with attorneys.

Moreover, this argument fundamentally misunderstands the difference between foreign intelligence investigations, criminal investigations, and administrative agency regulation, and the impact of that difference on First Amendment freedoms. Foreign intelligence investigations are domestic investigations of the activities of foreign governments or organizations, including foreign terrorist organizations. Foreign intelligence investigations may involve investigation of criminal activities, such as espionage or terrorism, but may also involve intelligence gathering for foreign policy or other purposes involving lawful activities. The guidelines for conducting foreign intelligence investigations (including what level of suspicion is required for certain intrusive techniques) are classified.

As Justice Powell, writing for the Supreme Court in a landmark case involving intelligence gathering, observed:

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . .
>
> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power.[5]

Moreover, as a result of section 203 of the Patriot Act, information properly obtained in a criminal investigation of terrorism (including information obtained with a grand jury subpoena) can be freely shared with intelligence agents. National security letters are an entirely different, and more intrusive, power—a power for intelligence agents to obtain highly personal records unbounded by any need to show relevance to any criminal investigation.

The administration has disclosed little useful information about the use of national security letters. For example, in response to repeated requests for information about the use of national security letters under the Freedom of Information Act, the government has responded with page after page of heavily redacted documents that do not provide the public with any way to judge how the power is being used.[6]

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[4] While the use of national security letters are secret, the press has reported a dramatic increase in the number of letters issued, and in the scope of such requests. For example, over the 2003–04 holiday period, the FBI reportedly obtained the names of over 300,000 travelers to Las Vegas, despite casinos' deep reluctance to share such confidential customer information with the government. It is not clear whether the records were obtained in part with a national security letter, with the threat of such a letter, or whether the information was instead turned over voluntarily or to comply with a subpoena.

[5] *United States v. United States District Court,* 407 U.S. 297, 313–14 (1972).

[6] Please see attachment B, a blacked-out list of NSL requests provided to the ACLU in response to a request under FOIA. Even the total number of NSLs issued is redacted.

The disclosure of information about how often a different controversial intelligence records power (section 215 of the Patriot Act) has been used, and the types of records it has been used to obtain, calls into serious question the government's long-standing position that similar information about the use of national security letters is properly kept secret.

We do not ask that you repeal section 505 of the Patriot Act. Rather, we ask that you restore the "agent of a foreign power" requirement and that you amend the statute to time limit the gag, exempt attorney-client communications from it, and allow for court challenges. If these changes are made to the NSL statute, they would satisfy the court that struck down that statute under the First and the Fourth Amendment.

The SAFE Act ("Security and Freedom Ensured Act," H.R. 1526) would subject section 505 to the Patriot Act's sunset provision, thus restoring the requirement of "specific and articulable facts giving reason to believe" the records "pertain to a foreign power or an agent of a foreign power" for national security letters. Restoring this requirement is needed to ensure section 505 of the Patriot Act is not used to obtain the personal records of ordinary Americans.

The Senate version of the SAFE Act (S. 737) makes additional improvements which should be added to the House version should the SAFE Act move forward to committee consideration. S. 737 makes explicit the right to file a motion to quash the national security letters because they are unreasonable, contrary to law, or seek privileged information. The Senate bill also sets standards for a judicially-imposed, temporary secrecy order that can be challenged by the recipient of a national security letter. Finally, the Senate bill provides a right to notice, and an opportunity to challenge, before information from a FISA records search or national security letter search can be used in a court proceeding.

SECRET DETENTION WITHOUT CHARGE: THE MISUSE OF THE MATERIAL WITNESS STATUTE

This subcommittee's oversight of the Justice Department's use of the material witness statute to arrest and detain scores of people without charge is long overdue. Since September 11, the abuse of the material witness law has thrust many into a world of secret detention, secret evidence, and baseless accusations of terrorist links. The prolonged incarceration of hundreds of immigrants on routine visa violations until cleared by the FBI of presumed terrorist connections is well documented.[7] Less well known is the misuse of the federal material witness law to arrest and imprison scores of people—including United States citizens—indefinitely without criminal charges.

The Justice Department has tried to keep hidden its use of the material witness law, refusing to respond to Congressional inquiries and keeping courtroom doors closed and material witness cases off court dockets. This testimony draws from results of extensive research by the ACLU and Human Rights Watch (HRW), which will be released shortly in a joint report detailing the experiences of scores of individuals whom the federal government arrested as material witnesses in connection with its anti-terrorism investigations.

That report will identify serious, systemic abuses of civil liberties that occurred as a direct result of the Justice Department's policy of abusing the material witness law for purposes Congress never intended, and will make detailed recommendations for corrective action. The report is based on interviews, affidavits, and court records of scores of individuals who were detained as material witnesses.

The material witness statute, 18 U.S.C. § 3144, comprises a single paragraph that simply states if it appears from an affidavit that a witness has testimony that is "material" to a "criminal proceeding," the witness may be arrested and held "if it is shown that it may become impracticable to secure the presence of the person by subpoena." A deposition is required, instead of detention, if a deposition would "adequately" secure testimony and if "further detention is not necessary to prevent a failure of justice."

Congress enacted the material witness law to enable the government, in narrow circumstances, to secure the testimony of witnesses who might otherwise avoid testifying in a criminal proceeding. If a court accepts an affidavit that says a person has

[7] American Civil Liberties Union, *America's Disappeared: Seeking International Justice for Immigrants Detained after September 11* (January 2004); Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (August 2002); U.S. Department of Justice, Office of the Inspector General (OIG), *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003).

information "material" to a criminal proceeding and is otherwise unlikely to appear, the witness can be locked up until he testifies or is deposed.

Since September 11, however, the Department of Justice has misused the law for a very different purpose: to secure the indefinite incarceration of those it wanted to investigate as possible terrorist suspects. This allowed the government to evade public scrutiny and to avoid the constitutional protections guaranteed to suspects, including probable cause to believe the individual committed a crime and time-limited detention.

The report will show that the post-September 11 material witnesses were incarcerated for periods ranging from a few days to upwards of a year. Many spent at least two months in jail. Witnesses were typically held round the clock in solitary confinement, subjected to the harsh and degrading high security conditions typically reserved for the most dangerous inmates accused or convicted of the most serious crimes. Indeed, they were often arrested at gunpoint in front of families and neighbors and transported to jail in handcuffs; any time they were taken out of their cells they were handcuffed and shackled. They were interrogated without counsel about their own alleged wrongdoing.

While the government has contended that almost all material witnesses had useful information, our report will show that a large number of witnesses were never brought before a grand jury or court to testify. More tellingly, in repeated cases the government has now apologized for arresting and incarcerating the "wrong guy." The material witnesses were victims of the federal investigators and attorneys who were to quick to jump to the wrong conclusions, relying on false, unreliable and irrelevant information. By evading the probable cause requirement for arrests of suspects, the government made numerous mistakes.

- **Brandon Mayfield**—When armed agents took Brandon Mayfield, a lawyer in Oregon, into custody in May 2004 on the basis of a sealed material witness warrant, a criminal indictment seemed likely to follow. The FBI appeared to believe that Mr. Mayfield—a U.S. citizen, veteran of the U.S. Army and a married father of three—himself was a perpetrator of the bombing because their experts claim to have made a "100% positive identification" of Mr. Mayfield's fingerprint as being the print found on a bag of detonators found near the Madrid bombing site. For two weeks, the government held Mr. Mayfield, mostly in maximum security conditions, and urged in closed court proceedings that Mr. Mayfield was involved with the crime. Prosecutors threatened him with capital charges and refered to him as a target in court papers—even though there was no evidence that Mr. Mayfield had traveled to Spain, or otherwise had been out of the country for more than ten years. These logical gaps were explained when three weeks after his arrest, the Spanish government apprehended an Algerian man whose fingerprint accurately matched the print found near the site, after weeks of the Spanish launching protests to the U.S. government that Mr. Mayfield's fingerprint was not a match. The Justice Department has since apologized to Mr. Mayfield and has issued an internal report sharply criticizing the FBI investigation and fingerprint match.
- **Al Badr al-Hazmi**—In the early morning of September 12, 2001, five FBI agents visited the house of Dr. Albader al-Hazmi, a medical doctor doing his residency in San Antonio, Texas, who lived with his wife and young children. The government based its arrest of Dr. al-Hazmi on the fact that he shared the last name as one of the hijackers and had been in phone contact months earlier with someone at the Saudi Arabian embassy with the last name "bin Laden." After the government held Dr. al-Hazmi in solitary confinement in Texas and New York for two weeks, and restricted his lawyers' access to him, Dr. al-Hazmi was released without ever testifying. The harrowing experience prompted Dr. al-Hazmi to send his wife and children back to Saudi Arabia. Although he was cleared of any involvement with the September 11 investigation, the government never unsealed his records or apologized to Dr. al-Hazmi.

These examples demonstrate the pattern of the abuse of the law to hold a suspect to make an end-run around establishing probable cause, as well as the dangers of circumventing criminal safeguards which protect both rights and good government. These cases represent only two of a much larger series of mistakes the government made in its secret arrests of material witnesses.

In part, the abuses resulted from an absence of real judicial scrutiny. Judicial scrutiny of arrest warrants was frustrated in part because the Justice Department sought the arrest of most of the witnesses in connection with grand jury investigations—although material witness arrests, prior to September 11, had been used very

rarely in grand jury investigations. Because the government has broad powers in grand jury investigations, courts often deferred to the government's requests for testimony. Moreover, the government urged that witnesses urgently needed to remain detained for national security reasons.

Public proceedings and records of arrests and detentions are another criminal justice safeguard that was not available for the post-September 11 material witnesses. Historically, proceedings about whether to detain or release material witnesses—*(including proceedings involving whether to detain grand jury witnesses*—have been public under the long-standing American principle that secret arrests are odious to a democracy. Yet the Justice Department insisted on conducting proceedings behind closed doors and sealing virtually all documents connected with the witnesses' arrests and detentions, including warrants, affidavits, transcripts, legal briefs, and court rulings.

Although the Justice Department claimed some witnesses preferred not to speak publicly, they nevertheless insisted on obtaining orders gagging witnesses' attorneys and family members, barring reporters from meeting with witnesses, and keeping witnesses off the public docket altogether—so as to deny the basic fact of their incarceration. For example, Brandon Mayfield's family members and lawyers were gagged, and Dr. al-Hazmi's court proceedings were not publicly docketed.

Grand jury rules required such secrecy, the Justice Department maintained, but those rules only prohibit revealing what happens inside a grand jury room. Prior to September 11, the Justice Department did not insist on secrecy; detention hearings for material witnesses in grand jury proceedings were public. Had the proceedings been open, the government's mistakes would have come to light far more quickly and the witnesses released much sooner.

While material witnesses (unlike immigration detainees) have a right to court-appointed counsel if they cannot afford an attorney, the Justice Department prevented attorneys for the material witnesses from being able to adequately protect their clients' interests. It often refused to give the witnesses or their attorneys a copy of the affidavit supporting the arrest, or put constraints on their ability to review this crucial document. Some were even restricted from revealing the contents of the affidavits to their clients—which made preparing an effective response next to impossible.

Attorneys were not able to protect their clients in other ways, as well, most notably while they were interrogated. While calling them witnesses, the government clearly viewed most of these individuals as suspects. Nevertheless, federal agents often refused to tell them of their right to remain silent or to have an attorney present at their custodial interrogations; interviewed witnesses without counsel; and failed to honor witnesses' requests for an attorney or stop interrogations when witnesses did ask for counsel. In many of the cases where witnesses later faced criminal charges, the Justice Department based the charges on statements the witnesses—including unsworn statements made with no attorney present—made during such interrogations.

After weeks and months of detention without charge had passed—in some cases without the so-called "witness" ever being brought before a grand jury—some courts' patience was exhausted. The result varied:

- Many were released, and in more than a dozen cases, the Justice Department apologized for arresting them in the first place;
- Some were charged with criminal offenses unrelated to terrorism (including, in some cases, the offense of allegedly lying to the grand jury or even making false, unsworn statements during interrogations);
- Some non-citizens left the country, either voluntarily or after being ordered deported for immigration violations unrelated to terrorism;
- Two (including one American citizen) were designated "enemy combatants" and held in military brigs without charges, trial or access to counsel;
- A small minority were charged with terrorism crimes and were convicted, pled guilty, or continue to await trial.

Apologies are poor compensation for loss of liberty. Material witnesses were often arrested in highly public settings, with little chance to clear their name because all substantive proceedings were closed. All the information the public learned of these arrests was what the government chose to leak. Even after their release, some continued to face lasting repercussions to their reputations, businesses, families and community lives.

Because of the serious abuses that have resulted from the material witness law, Congress must take action that will ensure that the investigation and arrest of per-

sons suspected of having material information to an investigation are conducted with regard for the rights of all persons in the United States.

We specifically urge Congress to:

- Request an investigation by the Inspector General on the Department of Justice's use of the material witness law since September 11.
- Renew its request to the Justice Department to inform Congress of the names, basis, and detention details of material witnesses since September 11.

We also urge Congress to amend the material witness law to:

- Heighten the standard for arresting and detaining a material witness. More than half of the state material witness laws have greater protections for witnesses, permitting such detention only if a witness has refused to guarantee that he or she will appear to testify at a scheduled proceeding.
- Limit the government's ability to hold a witness for a grand jury proceeding or trial to a specific, short period of time, such as five days, that would allow testimony to be taken but would not allow the statute to be abused for other purposes.

Congress should explicitly recognize rights for material witnesses, including: requiring the government to inform witnesses of the basis of their detention upon the arrest and providing a copy of the warrant; informing witnesses of their immediate right to a lawyer upon arrest; providing Miranda-type rights before any interrogation and comply with witnesses' requests for lawyers.

In addition, Congress should also require that material witnesses be detained in a separate detention center than criminal suspects and defendants and prohibit detention of witnesses in conditions of high security unless their specific and personal behavior in detention warrants it.

EXPANDING EXTRATERRITORIAL CRIMINAL JURISDICTION

Section 804 of the Patriot Act expands the "special maritime and territorial jurisdiction of the United States" to include a criminal offense by or against a United States national committed on the premises of any diplomatic, consular, military or other United States government mission or entity, or on a residence used for those purposes or used by personnel assigned to those missions or entities. Section 804 could be used as a basis for prosecuting terrorism crimes committed abroad, but is not limited to terrorism crimes.

Section 804 is part of a trend in increased extraterritorial application of American law. The federal criminal code now permits United States courts to try criminal defendants for a wide variety of crimes, including terrorism, war crimes, and other offenses, that are committed overseas and over which the federal courts traditionally have not had jurisdiction.

The ACLU does not object to the exercise of extraterritorial jurisdiction in cases of terrorism, war crimes, crimes against humanity or other grave offenses where there is a legitimate nexus to the United States, as is required by section 804. Indeed, the wide array of extraterritorial offenses calls into serious doubt any claim by the Bush administration that United States district courts are not the appropriate forum for terrorism trials.

For example, the 1998 trial of Al Qaeda terrorists implicated in the bombings of United States embassies in Africa resulted in convictions even though the crimes occurred overseas, much of the evidence had been obtained overseas in areas plagued by civil conflict, and much of the evidence involved classified information requiring the use of the special procedures of the Classified Information Procedures Act.

While the exercise of extraterritorial jurisdiction could be stretched too far, the United States district courts are clearly the right forum for the trial of terrorism suspects. The ACLU supports efforts by Congress and the Justice Department to bring terrorists to justice in the time-honored American way—through a criminal compliant alleging terrorism crimes in a federal district court bound by all the principles of the Bill of Rights.

The availability of extraterritorial jurisdiction for a wide array of serious crimes, and the successful use of the criminal courts to try and convict terrorism suspects in such cases, shows there is no reasonable excuse for the government's failure to provide justice in the case of so many it is now holding as "enemy combatants" without trial. It also calls into serious doubt the need for inadequate and second-class substitutes for a full and fair trial, such as the "military commissions" the Department of Defense has established.

CONCLUSION

This committee's review of the Patriot Act and related legal measures in the ongoing effort to combat terrorism is needed to ensure continued public support for the government's efforts to safeguard national security. The controversy over the Patriot Act reflects the concerns of millions of Americans for preserving our fundamental freedoms while safeguarding national security.

Resolutions affirming civil liberties have been passed in 383 communities in 43 states including seven state-wide resolutions. These communities represent approximately 61 million people. While these resolutions are often called anti-Patriot Act resolutions, they also take aim at other serious abuses of civil liberties, including the detention without charge of many Americans through a variety of pretexts such as the material witness laws.

A nationwide coalition under the banner "Patriots to Restore Checks and Balances" has formed under the leadership of former Congressman Bob Barr (R-GA), and includes groups as diverse as the ACLU, the American Conservative Union, the Free Congress Foundation, and Gun Owners of America.

Such widespread concern, across ideological lines, reflects the strong belief of Americans that security and liberty need not be competing values. As Congress considers renewal of the Patriot Act, we strongly urge this subcommittee to look beyond the expiring provisions to review other legal issues, both inside and out of the Patriot Act. Now is the time for Congress to restore basic checks and balances to Executive Branch powers.

Section 2709 Before the Patriot Act

18 U.S.C. § 2709 Counterintelligence access to telephone toll and transactional records

(a) Duty to provide.--A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification.--The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director, may--

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his 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--

(A) the name, address, length of service, and toll billing records sought are relevant to an authorized foreign counterintelligence investigation; and

(B) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); and

(2) request the name, address, and length of service of a person or entity if the Director (or his 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--

(A) the information sought is relevant to an authorized foreign counterintelligence investigation; and

(B) there are specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity have been used, through the services of such provider, in communication with--

(i) an individual who is engaging or has engaged in international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States; or

(ii) a foreign power or an agent of a foreign power under circumstances giving reason to believe that the communication concerned international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States. (footnote omitted)

(c) Prohibition of certain disclosure.--No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(d) Dissemination by bureau.--The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(e) Requirement that certain congressional bodies be informed.--On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

Section 2709 As Amended By the Patriot Act

18 U.S.C. § 2709 -- Counterintelligence access to telephone toll and transactional records

(a) Duty to provide.—A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification.—The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may—

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his 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—

(A) the name, address, length of service, and toll billing records sought are relevant to an authorized ~~foreign counterintelligence~~ investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and ~~(B) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)~~

(2) request the name, address, and length of service of a person or entity if the Director (or his 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—

~~(A)~~ the information sought is relevant to an authorized ~~foreign counterintelligence~~ investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; ~~(B) there are specific and articulable facts giving reason to believe that communication facilities registered in the~~ name of the person or entity have been used, through the ~~services of such provider, in communication with~~ -

(i) an individual who is engaging or has engaged in international terrorism as defined in section 101(c) of the ~~Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a~~ violation of the criminal statutes of the United States; or ~~(ii) a foreign power or an agent of a foreign power under circumstances giving reason to believe that the~~ communication concerned international terrorism as ~~defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that~~ involve or may involve a violation of the criminal statutes ~~of the United States.~~

(c) Prohibition of certain disclosure.—No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(d) Dissemination by bureau.—The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(e) Requirement that certain congressional bodies be informed.—On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

Section 2709 After Doe v. Ashcroft

2709 -- Counterintelligence access
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electronic e provider to which the request is
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(e) Requirement that certain co nformed.--On a
semiannual basis the Director of the Fe tigation
shall fully inform the Permanent Select Com e of the
House of Representatives and the Select Com of
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Representatives and the Committee on the Judiciary
concerning all requests made under subsection (b) of th

ATTACHMENT B

SECRET

Transactional Records NSLs Since 10/26/2001

Project Number	*NSL to Field Date*
[redacted]	[redacted]

ALL INFORMATION CONTAINED HERE IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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CLASSIFIED DECISIONS FINALIZED
BY DEPARTMENT REVIEW COMMITTEE (DRC)
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CA # 02-CV-2077

Dervied From: G-3
Declassify on: X1

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Project Number	NSL to Field Date
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Project Number	NSL to Field Date
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Mr. COBLE. Thank you, Mr. Nojeim. Mr. Kadidal, you're recognized for 5 minutes.

TESTIMONY OF SHAYANA KADIDAL, STAFF ATTORNEY, CENTER FOR CONSTITUTIONAL RIGHTS

Mr. KADIDAL. Thank you.

Mr. COBLE. If you'll suspend a minute, Mr. Nojeim. We have been joined by the distinguished gentleman from Texas and Florida and the gentleman from Arizona was here earlier, Mr. Flake. Mr. Gohmert from Texas, Mr. Feeney from Florida, and the distinguished gentleman from New York, Mr. Nadler. Mr. Nadler does not sit as a Member of the Subcommittee, but is a Member of the full House Judiciary Committee.

Mr. Kadidal.

Mr. KADIDAL. Thank you, Mr. Chairman and Members of the Committee for inviting me here to testify on behalf of the Center for Constitutional Rights on two of three of the important issues up for discussion today—the abuse of the material witness statute and the need to ensure that extraterritorial criminal jurisdiction extends over all members of our Armed Forces and their civilian employees and private contractors.

First, the material witness statute. CCR's greatest concerns with the statute are with the abuse of the statute to detain individuals in connection with grand jury proceedings. Because the investigative scope of grand jury proceedings is very wide and flexible, almost any testimony is material to a grand jury proceeding. And because grand jury proceedings are shrouded in secrecy, abusive uses of the statute for these purposes are slow to come to light in the media.

CCR believes that such uses of the statute are tantamount to unconstitutional preventive or investigative detention. The conditions of confinement of material witnesses since 9/11 have been more suitable for suspected terrorists than for mere witnesses.

First some examples. Osama Awadallah was held in solitary confinement and stripped searched repeatedly during his detention. Adbullah Hijazi was induced to give a false confession relating to an aircraft radio found in the World Trade Center hotel by his conditions of confinement and by the fact that, as a witness and not a suspect, he could be questioned without a lawyer or without Miranda warnings.

Almost half the post-9/11 material witnesses never were called to testify before any proceeding. In one notorious case, where a witness was held for a non-grand jury proceeding, Abdullah Al Kidd, a football star at Idaho, was held for weeks to testify at a material support trial for someone else that fell apart. And he was never called during the actual trial.

The one criminal charge that he was to be called in support of turned out to be utterly trivial: his acquaintance's overstay of a student visa. That would be akin to holding me to testify about a visa overstay of one of CCR's many foreign law student interns. And in this case, it utterly destroyed Mr. al Kidd's life.

Secrecy and the lack of substantive judicial oversight has led to abuse of the statute. Of the 70 material witnesses held in relation to terrorism investigations, 69 were Muslim and 68 were of South

Asian or Arab ethnicity. CCR recommends strongly that Congress amend the statute to make it utterly clear to the courts that it was never intended for use in relation to grand jury proceedings. We believe anything short of that would leave the statute too susceptible to abuse as a tool for preventive detention.

And now to section 804. Section 804 of the PATRIOT Act allows Federal civilian prosecutors to prosecute certain crimes that take place overseas. It's part of a series of statutes that overlap and interact in complex ways, spelled out in some detail in my written testimony.

Mercifully, I'm not going to try to repeat that discussion in full here, but I will try to summarize it very quickly.

The Uniform Code of Military Justice gives military courts, courts-martial jurisdiction over crimes by servicemen, but not—at least during—undeclared wars over crimes by civilian employees and private contractors. Congress closed this gap in 2000 with the Military Extraterritorial Jurisdiction Act, MEJA, which gives Federal prosecutors here at home the power to prosecute Federal felonies by persons employed by or accompanying the Armed Forces outside of the United States. But the MEJA does not cover members of the Armed Forces while they are subject to the UCMJ.

Now, the best interpretation of PATRIOT Act section 804 is that it is a residual statute, intended to sweep into the Federal prosecutor's power all conduct by any American on all facilities or lands used by the military except when the prosecutions are already authorized by MEJA.

So section 804 gives U.S. Attorneys the power to prosecute all UCMJ violations, and conduct by civilians who are not employed by or accompanying the Armed Forces. 804 thus ensures that prosecution of civilian contractors can occur, and also creates concurrent authority in U.S. Attorneys over UCMJ violations that could also be prosecuted by courts-martial.

Congress would do well to keep this provision, which is not designed to sunset, and preferably clarify and extend it, since courts do tend to interpret extraterritorial application of statutes very narrowly.

I believe section 804 is useful for a number of reasons. First, military prosecutions under the UCMJ have proved slow and ineffectual. U.S. forces and private contractors have committed the worst abuses of detention possible over the last 3 years—torture and murder—in the name of the American people. Yet, of the 341 military investigations that have taken place through March 2005, only a third have been found to be substantiated. Only 47 court martials have resulted. The majority of the substantiated allegations have led to weak punishments, like reprimands, rank reductions, or lesser sanctions. Of the 79 detainee deaths investigated, there have only been two homicide courts-martial. There's only been one prosecution in Federal criminal court for the many serious violations occurring in Abu Ghraib, Afghanistan, Guantanamo, and elsewhere. And that has been brought under section 804.

Preserving this parallel jurisdiction over UCMJ violations under section 804 would allow U.S. Attorneys to move more quickly than the military prosecutors in instances where those investigations have bogged down. It would ensure the ability to prosecute civilian

contractors and non-DOD employees. It would allow prosecution of high level civilian DOD officials. And, like all extensions of extraterritorial criminal jurisdiction, it will probably make it easier for the military to negotiate status of forces agreements with our military allies.

CCR, therefore, encourages Congress to preserve and extend this sort of concurrent civilian jurisdiction over our military forces and their associated civilian employees and private contractors, but we would also encourage Congress to create authority for independent prosecutors to deal with situations where the DOJ and Attorney General are deeply implicated in setting policies that underlay the worst detention abuses—torture and resulting deaths in military custody— wherever they occur in the world. Thank you.

[The prepared statement of Mr. Kadidal follows:]

PREPARED STATEMENT OF SHAYANA KADIDAL

May 26, 2005

Chairman James Sensenbrenner, Jr.
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Re.: Oversight Hearing of the Subcommittee on Crime, Terrorism and Homeland Security regarding the Material Witness Statute and USA PATRIOT Act Sections 505 and 804

Chairman Sensenbrenner:

Thank you for providing the Center for Constitutional Rights with the opportunity to discuss abuses in the application of, and needed reforms to, the Material Witness Statute, and the need to ensure that United States criminal jurisdiction extends over all members of our armed forces and their contractors and support personnel.

Material Witness Statute

Congress enacted 18 U.S.C. § 3144, known as the "material witness statute," in 1984 to allow for a *limited exception* to the general rule that an individual may not be detained or otherwise suffer a loss of liberty without a showing of probable cause to believe that he or she has committed a crime. The statute authorizes arrest and detention for a "reasonable period of time" of any person upon a showing that "the testimony of [that] person is material in a criminal proceeding" and "it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. Before September 11, 2001, the statute was used according to the plain meaning of its text—to briefly detain witnesses to crimes who were likely to flee or otherwise avoid testifying at criminal trials. Since September 11, however, the Bush Administration has reinvented the meaning of the material witness statute, and has misused it to preventively detain criminal or terrorist suspects against whom it cannot show probable cause of criminal activity while it carries out its investigation and builds its criminal case. This expansive exercise of executive power under the material witness statute has led to serious violations of constitutional and international law by: (1) allowing for arbitrary and indefinite detention upon a minimal showing; (2) limiting the ability of the press and the public to monitor the actions of our executive; and (3) facilitating racial and religious profiling and harsh treatment of suspected terrorists.

The Bush Administration's misuse of the material witness statute has primarily been accomplished through detention of alleged material witnesses in connection to grand jury proceedings—proceedings that allow prosecutors almost unbounded investigative power and discretion[1] and frequently operate in complete secrecy.[2] Use of the material witness statute in

[1] *United States v. Dionisio*, 410 U.S. 1, 8 (1973)
[2] *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 298-99 (1991).

connection to grand jury proceedings allows the Justice Department to detain any individual on the "mere statement" by a government official that an individual has information material to a grand jury proceeding.[3] "Materiality" of course, is extremely broad when considered in relation to the unbounded investigative power of the grand jury. Once a grand jury is convened, its investigation may continue indefinitely, with an ever-expanding or shifting focus and the grand jury has the power to subpoena any and all testimony and information unless there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the investigation.[4]

Since 9/11, material witnesses have frequently been treated in a manner suggesting that the Justice Department considers them suspected terrorists, rather than mere witnesses to terrorist or criminal acts. According to an investigation by the ACLU and Human Rights Watch, material witnesses described their arrests as high profile and intense, involving many armed agents with drawn guns, and followed by extremely restrictive and prolonged confinement.[5] Osama Awadallah is one example. The District Court Judge who considered the legality of Mr. Awadallah's detention stated that: "without any claim that there was probable cause to believe he had violated any law—Awadallah bore the full weight of a prison system designed to punish convicted criminals as well as incapacitate individuals arrested or indicted for criminal conduct … [and] the conditions of his confinement were more restrictive than that experienced by the general prison population."[6] Mr. Awadallah was held in solitary confinement, shackled and strip searched whenever he left his cell, and prohibited from having family visits.[7] He also complained of physical abuse while incarcerated, evidenced by bruises on his arms, shoulders, and ankles, and other signs of beating.[8]

That the Administration is currently misusing the material witness statute as a form of preventive detention for suspected terrorists is proven not just by the treatment of these witnesses, but by the outcome of the detentions. According to the ACLU and HRW report, only a little more than half of the material witnesses detained since 9/11 actually testified in a criminal proceeding.[9] The case of Abdullah al Kidd provides one striking example of the human consequences of this unrestrained power. Mr. Kidd is a U.S. citizen who was arrested as a material witness, confined for several weeks, and then ordered to remain within a four-state territory and reside with his wife's parents.[10] Mr. Kidd was never called to testify, but his detention and living restrictions did cost him his job and his marriage.[11] Compounding the injury, the charge he was detained to testify in relation to was an utterly trivial one—overstaying a student visa.

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3 *United States v. Awadallah*, 349 F.3d 42, 70 (2d Cir. 2003)

4 *R. Enterprises, Inc.*, 498 U.S. at 301.

5 *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges,* by Anjana Malhotra, in 2004 ACLU Civil Liberties Report, Dec. 10, 2004 at 3.

6 *United States v. Awadallah*, 202 F.Supp.2d 55, 60 (S.D.N.Y. 2002)

7 *Id.*

8 *Id.* at 61.

9 *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges,* by Anjana Malhotra, in 2004 ACLU Civil Liberties Report, Dec. 10, 2004 at 3.

10 Adam Liptak, *For Post-9/11 Material Witnesses, It is Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004.

11 *Id.*

Because material witnesses are not held as criminal suspects, they receive none of the procedural protections the United States Constitution guarantees for suspected criminals. They may be arrested without a showing of probable cause; interrogated without the benefit of Miranda warnings; held without immediate access to an attorney, and denied the benefit of knowing the charges or evidence against them. Moreover, recent case law has embraced an extremely low threshold for meeting the second requirement of the material witness statute: that it would be impracticable to secure the witness's testimony without a subpoena. Mr. Awadallah, for example, was held to be a flight risk largely because he did not step forward on his own, to share information with the Government.[12] This low standard allows for prolonged detention without the necessity of complying with Constitutional protections, and has facilitated the Department of Justice's ability to engage in aggressive interrogation and investigation throughout the detention period. These investigations have often resulted in criminal charges or other forms of control, including detention as alleged enemy combatants. In fact, the only alleged enemy combatants known to have been arrested on United States soil, Jose Padilla and Ali Saleh Kahlah Al-Marri, were both initially arrested as material witnesses.

Moreover, because grand jury proceedings may be kept under seal, and material witnesses need not be charged with a crime, the media and the public often lack access to these individuals' stories. The secrecy of the detentions and the lack of judicial oversight allows for the executive overreaching and abuse described above, as well as disproportionate enforcement against racial and religious minorities. As with the other law enforcement techniques seized upon by this Administration after 9/11, the Justice Department has disproportionately used the material witness statute against Arab, South Asian, and Muslim men. Of 70 documented arrests of material witnesses in terrorism related cases, only one witness was not Muslim, and only two witnesses were not of Middle Eastern or South Asian descent.[13] The unbounded discretion and limited judicial oversight endemic to this Administration's interpretation of the material witness statute serves to facilitate their demonstrated willingness to use religion, race, and national origin as a proxy for dangerousness, suspicion and flight risk.

In conclusion, the Administration has transformed a narrow and carefully crafted exception to the prohibition of detention without probable cause into authorization for unbounded and indefinite detention for the purposes of criminal investigation, without the procedural protections required by the United States Constitution for such detention. It is unsurprising that the resultant secret detentions have been marred by executive overreaching, evidentiary mistakes, and physical abuse. The Center for Constitutional Rights recommends that Congress amend section 3144 to clearly prohibit use of the statute in connection to grand jury proceedings, or as a form of preventive detention. Should Congress wish to authorize the type of preventive detention already occurring under this Administration, it must do so by crafting a carefully limited detention scheme bounded by procedures relevant to the particular purposes of the detention, and mindful of the potentially severe intrusions on personal liberty. Anything less

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[12] *United States v. Awadallah*, 349 F.3d 42, 81 (2d Cir. 2003)

[13] *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, by Anjana Malhotra, in 2004 ACLU CIVIL LIBERTIES REPORT (Dec. 10, 2004) at 5.

violates the central tenet that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[14]

USA PATRIOT Act Section 804

1. Background

Crimes are usually outlawed, prosecuted and punished by the nations where they are committed. However, many federal statutes have extraterritorial application. Title 18 of the United States Code defines the vast majority of federal crimes. Most sections of the criminal code provide that acts taking place within the "special maritime and territorial jurisdiction of the United States" are crimes which may be prosecuted by United States Attorneys in the federal courts. Section 804 of the USA PATRIOT Act amended the provision of Title 18 that defines the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7. Before the PATRIOT Act, the "special maritime and territorial jurisdiction" was defined to stretch this domestic criminal jurisdiction to United States territorial waters, U.S. registered vessels, aircraft belonging to the United States or Americans, spacecraft of the United States, and, where an offense is committed by or against an American,[15] to those places not under the jurisdiction of any other nation and to certain vessels of foreign nations.

Certain United States facilities located in other countries were also covered by the definition of "special maritime and territorial jurisdiction" as it existed prior to the PATRIOT Act. *See* 18 U.S.C. § 7(3) (encompassing "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof ... for the erection of a fort, magazine, arsenal, dockyard, or other needful building."). However, the federal courts could not resolve exactly what this section covered. In *United States v. Erdos*,[16] a 1973 decision, the Court of Appeals for the Fourth Circuit held that § 7(3) covered acts committed on the grounds of United States embassies. However, when prosecutors attempted to apply § 7(3) to allow prosecution in domestic federal courts of crimes committed on overseas military bases and in apartments leased by the United States government overseas, the Courts of Appeals split, with several decisions finding that the "special maritime and territorial jurisdiction" did not extend to such places.[17]

The number of American troops stationed overseas has grown radically since the end of the Second World War, when the main outlines of 18 U.S.C. § 7 were laid out. With them has come "an unprecedented number of American civilian dependents and non-military government employees accompanying those troops." Glenn R. Schmidt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55, 56 (2001). Some such civilians and employees are not constitutionally subject to the jurisdiction

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[14] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

[15] Technically, against a "national" of the United States, a term defined in the Immigration and Nationality Act to be somewhat broader than "citizen."

[16] 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973).

[17] Compare *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (finding Congress failed to make a clear statement in favor of extraterritorial application of § 7(3)) with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (finding jurisdiction, with a dissent by Judge McKeown, who agreed with *Gatlin*).

of military courts (courts-martial). As a result, the gap created by the split Circuit decisions in the applicability of domestic criminal law to places overseas presented a serious problem.

Congress closed this gap by enacting the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"). The MEJA states that "[w]hoever engages in conduct outside of the United States" that would constitute a federal felony if it had been within the "special maritime or territorial jurisdiction of the United States" can be prosecuted in the federal courts if their actions occurred while "employed by or accompanying the Armed Forces outside the United States" or "while a member of the Armed Forces subject to the" Uniform Code of Military Justice ("UCMJ"), the statutory authority for military courts-martial. 18 U.S.C. § 3261(a). However, where the violation charged is a violation of the UCMJ itself, no member of the Armed Forces may be charged under the MEJA unless they are no longer a member of the armed forces, or they were acting with someone who was not a member of the armed forces subject to the UCMJ. *See* 18 U.S.C. § 3261(d). In sum, "[t]he Act effectively establishes federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces. It also extends federal criminal jurisdiction to members of the Armed Forces who commit crimes abroad but who are not tried for those crimes by military authorities and who are no longer under military control." Schmidt, 51 CATH. U.L. REV. at 56.

The PATRIOT Act added subsection (9) to 18 U.S.C. § 7, stating that "[w]ith respect to offenses committed by or against a national of the United States ... the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities" and the residences of personnel assigned to those missions or entities, all fall within the "special maritime or territorial jurisdiction of the United States." The new § 7(9) does make an exception for persons described in part (a) of MEJA, 18 U.S.C. § 3261. The Congressional Research Service report states that Section 804 "[i]s intended as a residual provision and therefore does not apply where it would conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act (18 U.S.C. 3261)." Congressional Research Service, *Terrorism: Section by Section Analysis of the USA PATRIOT Act* (Dec. 10, 2001) at 48.[18]

2. The interaction of the UCMJ, MEJA and USA PATRIOT Act

The UCMJ is applicable to the persons specified in 10 U.S.C. § 802, including all members of the armed forces who have not yet been discharged, and various other categories of persons. The text of UCMJ § 802 makes certain persons "serving with, employed by, or accompanying the armed forces outside the United States" subject to the UCMJ, 10 U.S.C. § 802(10), and thus subject to trial by court-martial for offenses spelled out in the UCMJ. However, the federal courts have repeatedly held that courts-martial have no jurisdiction to try civilian employees of the military during peacetime, *see, e.g.*, *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960), and the military courts have refused to extend the principle to "undeclared" wars such as Vietnam. *See United States v. Averette*, 19 C.M.A. 363 (Court of Military Appeals 1970). "With this comprehensive narrowing of court-martial jurisdiction under [UCMJ § 802](10) and 2(11), predictably there have not been any

[18] Available at http://www.epic.org/privacy/terrorism/usapatriot/RL31200.pdf.

cases [brought against civilian military employees under these provisions] in over thirty years. Except in times of declared war, court-martial jurisdiction over civilians is effectively dead." Major Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 Mil. L. Rev. 92, 98 (2001).

Since MEJA applies to military contractors and employees so long as they are not subject to the UCMJ, and contractors and employees are not subject to UCMJ except during wars declared by Congress, the MEJA extends federal civilian prosecutorial power to civilian contractors and employees guilty of federal felonies in connection with misconduct in Afghanistan and Iraq. However, MEJA exempts active members of the armed forces from such prosecution (unless acting with others not subject to the UCMJ). Under subsection (d) of MEJA, such prosecutions must wait until the possibility of prosecution by military officials has passed—typically, until discharge from the military.

In light of this, one could read § 804 of the Patriot Act in two ways. It could be the case that it was intended, as the Congressional Research Service stated, "as a residual provision [that] does not apply ... where the offender is covered by the Military Extraterritorial Jurisdiction Act." If that is the case, active military personnel, who are subject to the UCMJ, would therefore not be subject to prosecution under the MEJA (unless their foreign misconduct was done in concert with others not subject to the UCMJ, like civilian contractors and/or employees), and would therefore be subject to prosecution under PATRIOT Act § 804. On this reading, such military personnel would be subject to prosecution by military prosecutors under the UCMJ at the same time as they are subject to civilian prosecution under PATRIOT Act § 804.

Alternately, one could read PATRIOT Act § 804 narrowly and literally, to mean that all "person[s] described in [18 U.S.C.] section 3261(a)" are exempt from prosecution by civilian authorities under that section. On this reading, only those active duty personnel who committed misconduct with persons not subject to the UCMJ (*e.g.* contractors and employees) would be subject to prosecution by civilian authorities (under the MEJA).

Whichever reading prevails,[19] there are good reasons for Congress to seek to ensure that there is always some available civilian prosecutorial authority over military personnel worldwide, even where these personnel are simultaneously subject to prosecution in courts-martial under the UCMJ.

3. The Military's own prosecutions have been too slow and ineffective

Of the 341 investigations for abuses in Iraq and Afghanistan, the Pentagon found that 70% were not substantiated. Of the 30% that were substantiated, only around a third were referred to trial by court martial. According to Human Rights Watch, as of March 2005, the 300-plus investigations resulted in only 14 convictions by courts-martial. While 33 additional servicepersons were referred for trial by court-martial, the vast majority of the substantiated investigations resulted in either non-judicial punishments (reprimands, rank reductions, or

[19] To date it appears that the prosecution of CIA operative David A. Passaro is the only domestic criminal prosecution to invoke the jurisdictional provisions of Section 804. *See* Indictment, *United States v. Passaro*, No. 5:04-CR-211-1 (W.D.N.C.). The case awaits trial, which is scheduled to begin July 11, 2005.

discharge) or lesser administrative sanctions, despite the fact that "many of the alleged abuse cases involved serious abuses or homicides." (Cases resulting in non-judicial punishments have been included in statistics the Pentagon has released to the press to document the number of soldiers punished for prisoner abuse.)[20]

There are many reasons that serious criminal charges like murder are brought to trial quickly in the domestic arena. Prosecutors have an incentive to keep evidence and witness memories fresh, and a mission to bring swift justice. Defendants have the same concerns for preserving exculpatory evidence, and, because their names become public, they usually wish to seek a swift resolution of charges for the sake of their reputations. The Constitution accordingly mandates speedy trials. Despite all these imperatives, the pace of military trials for even the most serious criminal allegations—the deaths of detainees—has been exceedingly slow. Human Rights Watch reports that, as of February 2005, there have been "68 detainee death investigations with 79 possible victims. Yet only two homicide cases have resulted in recommended courts martial for homicide; one has been postponed and in another, most of the implicated personnel were brought before non-judicial administrative hearings instead of court-martial, and most received only administrative punishments. Many cases involving detainee deaths in Afghanistan in 2002, over two-and-a-half years ago, have gone unresolved."[21]

Courts-martial have received a great deal of media attention recently with the trials and plea bargains of the enlisted servicepersons implicated at Abu Ghraib. Under the UCMJ, seven soldiers have been convicted of abuses at Abu Ghraib: six who had guilty pleas accepted and one, Charles Graner, convicted after trial. Two more await trial. However, "[u]ntil the publication of the Abu Ghraib photographs forced action, almost all military investigations into deaths and mistreatment in custody were languishing."[22] To our knowledge, no criminal prosecutions are underway against any officers or contractors at Abu Ghraib despite the fact that the Taguba and Fay Reports named a number of officers who the authors found or suspected to have both direct and supervisory responsibility for the abuses.[23]

Various commentators and academics have noted that the manner in which various stages of the Abu Ghraib investigation were carried out was skewed towards an ultimate resolution which absolved higher-level officers from responsibility and instead promoted the notion that the abuses were the product of a rampage by a "handful of 'rotten apples.'"[24] Major General Fay interviewed soldiers in the presence of their commanding officers, reminding them in these meetings that any soldier who witnessed abuse and did not report it could be charged for that failure. In the end only lower-ranking individuals were prosecuted, many of whom had the sense that they were selected for letting photos out to the public rather than for perpetrating abuse.[25] The presiding judge, by refusing to grant immunity to certain higher-ranking witnesses, effectively foreclosed testimony that might have implicated high-level defendants.[26]

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[20] See Human Rights Watch, *Getting Away with Torture? Command Responsibility for Abuses at Abu Ghraib* (April 2005), http://www.hrw.org/reports/2005/us0405/us0405.pdf, at 26.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 78-80.

[24] Declaration of Scott Horton, Esq. (Jan. 28, 2005) at ¶12.

[25] *Id.* ¶18.

[26] *Id.* ¶19.

Despite the slow and ineffective progress of the military justice system in holding military personnel accountable for their misconduct, we have relied on the courts-martial exclusively. With one exception,[27] no criminal prosecutions in federal court have been initiated for the torture, violations of the Geneva Conventions, other abuses and deaths that have occurred at Guantánamo, at the secret locations around the world where so-called "ghost detainees" have been detained at the behest of the United States, and in the third countries where the United States has sent detainees to be tortured. Not a single agent of the government or military has been prosecuted for torture or war crimes under the Anti-Torture Act of 1996, 18 U.S.C. § 2340, the War Crimes Act of 1996, 18 U.S.C. § 2241, or the MEJA, 18 U.S.C. § 3261.[28]

4. Other factors supporting extension of civilian prosecutorial power over members of the armed forces overseas

Increasingly, military contracting support is obtained through interagency purchasing schemes, where the final contracts are between a private party and an agency other than the Department of Defense. For example, the Interior Department and the Government Services Administration have been used recently to obtain contractor support in Iraq. The administration has privatized even the most sensitive functions related to intelligence and the security of foreign heads of state—private contractors replaced the special forces as the U.S.-provided security detail for Afghan President Hamid Karzai, and they notoriously comprise many of the translators and interrogators at Abu Ghraib and Guantánamo. The Fay Report expressed concern that because some of the private contractors at Abu Ghraib were not under contract to the Department of Defense, they might not be subject to the Military Extraterritorial Jurisdiction Act[29] (which reaches persons "employed by or accompanying the Armed Forces outside the United States"). While this is an undecided question of law, the fact that the military itself believes this is an open question highlights the need for residual statutes like Section 804 that plug gaps in the MEJA.

Although the issue has not been resolved definitively in the federal courts, the UCMJ may not be constitutionally applicable to civilian military officials, such as Secretary Rumsfeld, Undersecretary of Defense for Policy Douglas J. Feith, Undersecretary for Defense for Intelligence Stephen A. Cambone, or others implicated in the interrogation and detention policies at Abu Ghraib and Guantánamo.[30] The use of military—as opposed to civilian—courts also may be inappropriate to many prosecutions for detainee abuse. The Constitution, as interpreted by the courts, does allow for military criminal prosecution over active duty soldiers in a variety of situations far from the context of the battlefield. However, the ultimate justifications for allowing a system of military justice are rooted in the idea that battlefield imperatives make civilian process unworkable.[31] Today's UCMJ jurisdiction extends far beyond such situations, to many

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[27] The prosecution of CIA agent David Passaro; see footnote 19, *supra*.

[28] Amnesty International, *Guantánamo and beyond: The continuing pursuit of unchecked executive power*, AMR 51/063/2005 (May 13, 2005) at 93.

[29] *See* Steven L. Schooner, *Contractor Atrocities at Abu Ghraib*, 16 Stan. L. & Pol'y Rev. 549, 570 (2005), citing MAJOR GENERAL GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 50 (2004).

[30] Horton Declaration, at ¶17.

[31] Some of these commonly-stated justifications are: it may be too difficult to bring witnesses into civilian courtrooms from the field, and too burdensome to make military personnel distract themselves with the tasks of

ordinary crimes carried out far from the chaos and urgency of the battlefield, such as the detention abuses at Guantánamo or Abu Ghraib. Even where the Constitution allows the UCMJ to provide for jurisdiction over some of the matters discussed above, we should be hesitant to encourage exclusive military prosecution of these matters by diminishing the parallel jurisdiction of civilian prosecutors under PATRIOT Act 804.

The extension of United States criminal jurisdiction to bases and facilities in foreign countries is important for diplomatic reasons as well, for it enhances the credibility of United States delegations that negotiate status-of-forces agreements (SOFAs) with those foreign countries. Typically, SOFAs provide that, for criminal acts committed by Americans on foreign soil, each nation may prosecute those offenses that violate only its own law, but where the actions are crimes under the laws of both nations, a SOFA usually provides that one nation has primary jurisdiction. "The position of a U.S. delegation negotiating provisions of a SOFA on foreign criminal jurisdiction is strengthened by assuring the receiving state that, if it declines to prosecute, the United States has both jurisdiction and the will to prosecute Americans accused of committing crimes within that state's territory."[32]

5. Conclusions

Ideally, civilian federal prosecutors should have jurisdiction to bring federal charges against United States military personnel and contractors wherever they operate around the world, regardless of whether the UCMJ also provides military court jurisdiction over their crimes. Such parallel jurisdiction would allow prosecutors outside of the military and its chain of command to make independent decisions about when to prosecute the worst cases of abuse, and would undoubtedly expedite the progress of cases involving abuse which the military might have a disincentive to prosecute (due to the potential for public scrutiny and embarrassment accompanying trial).

Even if such a statute existed today, however, it would clearly not be enough to deal with the widespread and high-reaching detention abuses carried out by our government at Abu Ghraib, Guantánamo and elsewhere in the world. Attorney General Gonzales, who would be ultimately responsible for federal prosecutions for these abuses, is personally implicated in the formulation of some of the official policies at issue in the current detention abuse scandals.[33] The Center for Constitutional Rights and other groups have called for the appointment of an independent prosecutor to investigate the full scope of these abuses.

Because of the United States' failure to investigate and prosecute torture and other abuses at Abu Ghraib and elsewhere in Iraq, CCR and four Iraqi victims brought a complaint in Germany against high-level United States officials for war crimes under the doctrine of universal jurisdiction. The German Federal Prosecutor decided that it would not prosecute, stating that it

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gathering evidence; the fog of war may make any reliable evidence more difficult to garner, thus justifying lower standards of evidentiary admissibility; and so forth.

[32] Mark J. Yost and Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 A.J.I.L. 446, 447 (2001).

[33] In his Senate confirmation hearings, Attorney General Gonzales declined to assure that he would recuse himself from any investigation of detainee abuse matters.

is up to the United States to pursue initial legal action against the alleged perpetrators of torture and their superiors, and that the German prosecutors would intervene only if U.S. authorities failed to act. Congress should ensure that federal prosecutors have sufficient jurisdictional reach to aggressively pursue such crimes—and lesser abuses—in the future.

Respectfully submitted,

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Mr. COBLE. Thank you, Mr. Kadidal, and I commend you all. Mr. Kadidal violated the 5-minute rule but not severely so, so you won't be punished for that.

Mr. KADIDAL. Thanks.

Mr. COBLE. Folks, don't think I'm obsessed with the 5-minute rule, but Mr. Scott and I do try to comply with that because if we don't, we can be here all day and that would be to your detriment as well as ours.

We will now start a line of questioning, and I am told, folks, that we will probably have votes on or about 11 a.m.

Mr. Berry, let me start with you. Mr. Berry, if you would like to, I'd like for you to respond to Mr. Nojeim's comments regarding your testimony and his suggestion, as I understood it, that an NSL should be used after a person was deemed an agent of a foreign power, if I read that correctly?

Mr. BERRY. I would be happy to, Mr. Chairman. I think that Congress wisely recognized that the standard prior to the PATRIOT Act was unduly restrictive, and let me give you an example of how that is the case.

Let's say that post-2001—and this has happened—you capture a terrorist, and on the terrorist's computer you have a series of phone numbers. Any investigator worth his or her salt would want to take those phone numbers and figure out the subscriber information, whose phone numbers they are, and in many cases toll billing records, who has—what numbers have been calling that phone number and what numbers has that phone number been calling.

Prior to the PATRIOT Act we couldn't use NSLs to obtain that information because we had no idea whatsoever whose phone numbers they were. They could be a terrorist associate's phone numbers. They could be the drycleaner's phone numbers. We needed the basic information to forward the investigation. We couldn't use it for that purpose.

Now, because the standard is relevance, the same standard that we have in criminal investigations with grand jury subpoenas, we can obtain that information. And I can report that—that such uses of the NSLs have been very valuable to the Department and have allowed us to identify terrorist operatives that we previously did not know about. So I think that it would be a major, major mistake to return back to the prior standard.

Mr. COBLE. Thank you, Mr. Berry.

Mr. Rosenberg, it is my belief that the USA PATRIOT Act did not, in fact, create the material witness law. Am I correct about that?

Mr. ROSENBERG. You are, Mr. Chairman.

Mr. COBLE. Well, let me ask you this: Comment, if you will—and I have heard pros and cons on this question—as to whether or not the material witness provision has been abused, if you will enlighten us about that.

Mr. ROSENBERG. Thank you for the question. I don't believe it has. To be very clear, this is not a power that the FBI or a Federal prosecutor can take onto itself. In other words, we must go to a Federal judge who must authorize the arrest of a witness if there's probable cause, as determined by the judge, to believe that the witness has material information and we can't otherwise secure it.

Moreover, the witness has a whole bunch of rights that are then conferred on him: the right to counsel, the right to challenge the detention in a detention hearing pursuant to the provisions of the Bail Reform Act, and to challenge it again, in other words, to revisit that detention decision down the road, to confront witnesses and to confront evidence at that hearing. And in addition, Mr. Chairman—and I don't think any one of us mentioned it earlier—rule 46(h) of the Federal Rules of Criminal Procedure require us to report on a biweekly basis to the court about the status of those who are material witnesses and being held.

So there's a whole bunch of protections, statutory and constitutional, built into this provision.

Mr. COBLE. Thank you, Mr. Rosenberg.

Mr. Nojeim, you will agree—well, strike that. Maybe you don't agree. What is your opinion as to whether our laws should be enforced? That is to say, we—it is my belief that we should not aid and abet terrorists by providing intelligence-related information, nor should we assist them in the detection—we should assist in the detection and apprehension of terrorists who may be planning to harm this country and those who reside herein. Do you agree with that? Your mike, Mr. Nojeim.

Mr. NOJEIM. Of course, the Government should prevent terrorism, and it has adequate authority to do that. But let me address the point that Mr. Berry—Mr. Berry made.

What he fails to acknowledge is that the records that we're talking about are very private records, the financial records, what you bought, where you bought it, your credit scores, your credit records, the ISP records, the records from a car dealer, the records from a boat dealer. They're very sensitive. They show a person's personal life.

What he's saying basically is that those records should be open to the Government even when it's not investigating a crime. Even when it's not investigating a crime. And what we're saying is that, no, an intelligence investigation is different. Intelligence investigations typically involve allegations that a person is engaging in activity that is typically protected by the first amendment, and so they're very sensitive. And the reimposition of the agent of a foreign power standard would put the statute right back where it belongs, because should the Government actually be investigating a crime, it could get the information with a subpoena. What they're saying is that they don't want to have to be investigating a crime. They don't want there to be a solid potential charge. They're just gathering information. And in those circumstances, they ought to be gathering information about agents of a foreign power, potential spies, and terrorists who might be dangerous.

Mr. COBLE. Well, now, the red light now appears into my eyes, so we will visit—we will revisit it. I am pleased to recognize the gentleman from Virginia, but first let me recognize that the gentleman from Massachusetts, I see at the far end, my friend Mister—Bill, good to have you with us—Mr. Delahunt.

Mr. Scott is recognized for 5 minutes.

Mr. SCOTT. Thank you.

Mr. Berry, what's—if you want to get these National Security Letters without the normal probable cause or, I thought I heard, without even articulable suspicion, what is the standard?

Mr. BERRY. Congressman Scott, the standard is relevance, which is the same standard that one would use in a criminal investigation to obtain those same records through a grand jury subpoena.

Mr. SCOTT. Now, the records that you're looking for are not the records of the agent of a foreign government but relevant to the investigation of the agent of a foreign government. Is that right?

Mr. BERRY. They would be relevant to either a terrorism investigation or an espionage investigation, and as the example I gave——

Mr. SCOTT. Wait a minute. Espionage? What about foreign intelligence?

Mr. BERRY. No, it has to be terrorism or espionage. I know that you have this concern about FISA where foreign intelligence information is included. That's not in the NSL statutes.

Mr. SCOTT. Okay. So it has to be—at least we're talking about crimes in this situation.

Mr. BERRY. We are talking about terrorism and espionage investigations. That is correct.

Mr. SCOTT. Okay. But the records could be records held by innocent people.

Mr. BERRY. It is certainly——

Mr. SCOTT. If it is relevant to that investigation.

Mr. BERRY. Well, it is certainly possible, and the example I gave with the phone numbers on the terrorist's computer, we need to do some basic information that—investigation that NSLs allow us to do to either get—obtain specific——

Mr. SCOTT. Well, what about phone numbers on the—an associate of the terrorist? If you know that—if you find out one of those numbers he's been calling or an e-mail address and you track down that e-mail, can you get—you can get all that information.

Mr. BERRY. Well, it really depends on the facts of a specific investigation.

Mr. SCOTT. You mentioned one of those numbers may be the cleaners.

Mr. BERRY. Right.

Mr. SCOTT. Okay. So you go to the cleaners and get all his little information.

Mr. BERRY. No, it depends on the facts of a specific investigation. If in the list of phone numbers we discover that one of them is a drycleaners, absent other information, I would say it would be 99.9 percent the case that we would not seek any more information on the drycleaners because, at that point, it doesn't appear to be relevant. But——

Mr. SCOTT. But if you decided it was relevant, you can go get that information. Mr. Nojeim, do you want to comment?

Mr. NOJEIM. Yeah, I do. Take the example that he used in his testimony, the written statement. Somebody is having lunch with an al-Qaeda operative. That alone in the Government's view allows them to get all these records about that person.

Take it to the next step. What if they had a discussion with the waiter? What if they talked? Would that alone also give them ac-

cess to records about the waiter? They would go to his Internet service provider and obtain records about his activity. They would go to the boat dealer and obtain records about what he bought. There is just no——

Mr. SCOTT. How is this different from the criminal investigation that Mr. Berry talked about, just a normal criminal investigation where the standard is relevance for a grand jury subpoena?

Mr. NOJEIM. It's different in many ways. First of all, remember what we're talking about is a case where there is no judge. There is no proceeding. There's no grand jury. What there is is the Government telling itself that the records are relevant to what the Government is seeking. And it's not that there's a particular charge. It's that the Government has decided that there's relevance. And there's—there's never a test, there need never be a test later on down the road where they have to actually go into a court and say this. They could go right up to the Internet service provider, present the National Security Letter, and get the records, and that's the end, and the person never knows.

Mr. SCOTT. Does the exclusionary rule ever—does the exclusionary rule ever kick in?

Mr. NOJEIM. It could kick in if they charged the person later on down the road, commenced a criminal proceeding.

Mr. SCOTT. Where is the—on the material witness, where is the judge in all this? What warrant do you need from—do you need a warrant from a judge to arrest somebody on a material witness.

Mr. ROSENBERG. Yes, Congressman, you do. You need a warrant from a Federal judge. And the judge also plays a role in the subsequent detention hearing, and the judge also plays a role in receiving the reports required under rule 46(h).

Mr. SCOTT. On the *Mayfield* case, what information was presented to the judge to justify locking him up?

Mr. ROSENBERG. You're going to find my answer wholly unsatisfactory, but because there's an internal Department of Justice investigation and civil litigation, I cannot comment on that.

Mr. SCOTT. What is the standard for getting the warrant generally?

Mr. ROSENBERG. As set out by the Second Circuit in the *Awadallah* case and the Ninth Circuit in the 1971 *Bacon* case, my understanding is it's probable cause, probable cause to believe that the witness is material—in other words, the information would be material—and that it would be impracticable to secure that testimony by some other means.

Mr. SCOTT. Is he advised of a right to deposition and then being released?

Mr. ROSENBERG. Well, he's given an attorney, and he has a right to an attorney, and it's that attorney's obligation to inform his client of what his rights are. We don't interpose ourselves in that relationship. And, by the way, Mr. Scott, if he can't afford an attorney, one is appointed for him.

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

In order of appearance, the Chair recognizes the distinguished gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

First, Mr. Berry, Mr. Nojeim mentioned the sensitivity and privacy of records that are sometimes sought. Could you illuminate for us on how courts have ruled on the privacy expectation, for example, of credit card records, things like that?

Mr. BERRY. I don't think that there is any dispute that the Government can obtain these standards—these records, whether they be records from financial institutions, electronic communication transactional records, or records from consumer reporting agencies on a relevance standard. The Supreme Court pretty much decided this issue back in the 1940's in a case involving the Oklahoma Press Publishing Company. So this is done all the time through grand jury subpoenas——

Mr. GOHMERT. But it's relevant to what? A criminal investigation? Those cases deal with relevance to criminal investigations, correct?

Mr. BERRY. Right, but the Supreme Court has dealt with this in the context of administrative subpoenas, which generally don't deal with criminal investigations, but could deal with regulatory investigations or other types of investigations. And even the Southern District of New York in the *Doe v. Ashcroft* case made it very clear that relevance to a national security investigation is a sufficient standard.

Mr. GOHMERT. And let me ask Mr. Kadidal—correct me, please.

Mr. KADIDAL. Kadidal.

Mr. GOHMERT. Kadidal, all right. You had mentioned at one point that there were 70 individuals held as witnesses and 69 were Muslim, and I thought there was going to be another shoe dropped there, like, "And it turned out that there was nothing to the investigations, because to my knowledge, the terrorists that have attacked us like on September 11, the insurgents that are attacking our troops in Iraq, as best I understand, they're Muslim." So the mere fact that they held 69 people who are Muslim, there needs to be another shoe dropped if you're going to get me to be bothered by that. If you're investigating Muslim terrorist activity, then I would anticipate chances are they're going to talk to Muslims who may—can provide—shed light on that. Is there another factor that you didn't tell us, like those cases they were held on were meaningless or turned out to be trivial or minor, or—I didn't hear anything further when you said 69 were Muslim.

Mr. KADIDAL. Sure. Here's how I'd address that. First of all, you know, I did say that half of them never actually were called to testify in any proceedings.

Mr. GOHMERT. Okay.

Mr. KADIDAL. You know, I would categorize this as part of a larger, you know, sort of problematic pattern of racial profiling. You know, the best analogue that we have a lot of information about—and, again, we don't have a lot of information, as Mr. Nojeim has pointed out, about the scope of material witness detentions. But the best analogue is the special interest detentions of immigration detainees right after 9/11. These were the people who were here, you know, as undocumented aliens, swept up in the first month or so after 9/11. Twelve hundred individuals by the Government's own accounting, and perhaps as many as 2,000, were held as so-called special interest detainees under very restrictive conditions of con-

finement with their immigration hearings closed to the press and public. None of them were ever charged with any terrorism-related crimes. What did they have in common? They were all Muslim men from South Asian or Arab countries.

Mr. GOHMERT. Okay.

Mr. NOJEIM. Mr. Gohmert, could I add one thing?

Mr. GOHMERT. All right.

Mr. NOJEIM. You had said, well, the other shoe didn't come down, that these people were all innocent. But really——

Mr. GOHMERT. No, I didn't say "were all innocent." I said there was some other factor, because if you're investigating, you know, Muslim terrorist activity—and I do have Muslim supporters, I got Muslim friends. But if we're being told that—if we're investigating Muslim terrorist activity, that, in order to avoid hurting someone's feelings, we really need to bring in some perhaps English and Irish and Hispanic and Japanese who have nothing to do with it just so it doesn't look like we're checking only with Muslims from the Middle East, then I think we're—you're asking us to waste time and resources.

Mr. NOJEIM. No. What we're actually asking is that you focus the time and resources that are involved in detaining people with respect to whom there is probable cause of crime.

Mr. GOHMERT. Right.

Mr. NOJEIM. And what's happened here——

Mr. GOHMERT. And, understand, I'm a big probable cause supporter for the number one reason it's in the Constitution. And I've had some concerns as we've gone through time and we keep lessening the standard. But since my time is so limited, let me ask, Mr. Berry, you mentioned this business about the numbers that were—you get numbers that had been dialed and you need information, you may need to submit an NSL, as I understood it, to get that information. And I'm sitting here thinking, well, if you'll just give me the numbers, I'll give you whose numbers those are without you going and demanding private information from somebody else that may be more than you need. I can tell you whether or not it's a drycleaner number, and most of the Federal agents that I'm friends with could do that, too, without sending a letter to somebody else saying tell me what these are. It's my understanding it's very easy to—no, it's not my understanding. I've done that. And so—and it's public information, and I see that different as pursuing as what some of the things Mr. Nojeim had pointed out.

Let me ask, though, Mr. Berry, do you—would you have a problem with a time limit as they suggested and maybe 6 months and then extend it? We discussed that in a prior hearing.

Mr. COBLE. And, Mr. Berry, very briefly if you will. The gentleman's time has expired.

Mr. GOHMERT. Oh, I'm sorry. I couldn't see the light very well.

Mr. COBLE. It's okay.

Mr. GOHMERT. I'm so far down the pecking order, I can't see the light down here.

Mr. COBLE. It's all right.

Mr. BERRY. If I could just address the first point very briefly, and then I'll move on to the second point.

With respect to the first point, toll billing records are not publicly available. You need some kind of Government process to get those records, and those are exceptionally important to our national security investigations.

With respect to subscriber information, in certain cases, you're absolutely right; that is publicly available. In other cases, it's not. It's on a case-by-case basis, and so NSLs do have value.

With respect to the non-disclosure requirement, we think that it is absolutely essential that the secrecy of national security investigations be safeguarded so that people are not tipped off that they are under investigation. Given our experience with national security investigations, we think that a 6-month non-disclosure requirement is an entirely unrealistic length of time, and we could not support that.

Mr. GOHMERT. Okay. In the prior hearing, I'd understood DOJ could support it if there was a provision for extension, if necessary, for another 6 months. But, anyway, my time's up, and I guess that's somebody else's idea.

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

We have been joined by the distinguished lady from California, Ms. Waters. Ms. Waters, good to have you with us.

The Chair recognizes the distinguished gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

I just want to focus for a moment on the material witness statute. Why don't you walk through for us, Mr. Rosenberg, in very simple terms so that everyone can understand how the material statute—how the material witness statute is implemented?

Mr. ROSENBERG. Yes, Congressman, I'd be glad to. And as a former Federal prosecutor, I've used it. I can talk about my example but without the specifics.

If you believe, in the course of an investigation, that there's a witness out there and that he or she will not cooperate or might flee if you try to subpoena them, you may apply to a Federal judge—in other words, not on my own accord, but I may apply to a Federal judge for a warrant authorizing the arrest of that witness, if I can demonstrate two things: one—and both, by the way, by the probable cause standard that Mr. Gohmert referred to earlier. If I can demonstrate, first, that the witness is material, in other words, in good faith we believe that they have information material to the underlying investigation; and, two, probable cause to believe that it's impracticable to secure their testimony by subpoena.

In the vast majority of cases, Mr. Delahunt, if I am conducting a grand jury investigation—and I know you know this. You're a former prosecutor. When you give a subpoena to someone, they show up and they give their testimony, and most of the time, fortunately, it's truthful.

Mr. DELAHUNT. So let's kind of fast forward a little.

Mr. ROSENBERG. Yes, sir.

Mr. DELAHUNT. So then an arrest is effected.

Mr. ROSENBERG. You get permission to make the arrest. You get the warrant. The agent goes out and makes the arrest, and that

witness is brought before the court. That court then appoints an attorney, if the witness cannot afford one, or——

Mr. DELAHUNT. Impractical. Let's go back to the standard of impractical.

Mr. ROSENBERG. Sure.

Mr. DELAHUNT. Is that defined in the material witness statute?

Mr. ROSENBERG. No, sir, it is not.

Mr. DELAHUNT. See, that, I think, gives angst, if you will, to many, and I would suggest that that really is a very serious issue that ought to be addressed in a legislative fashion.

Mr. ROSENBERG. No, and that's a fair point, although maybe I can give you some comfort when I tell you——

Mr. DELAHUNT. Give me a little bit of comfort.

Mr. ROSENBERG. I'm going to try awfully hard to give you some comfort. At least in my own case, we laid out a whole series of things we did to obtain the testimony of this witness: the number of times we had given subpoenas which were ignored——

Mr. DELAHUNT. You're giving me comfort by saying that you are an ethical prosecutor.

Mr. ROSENBERG. Well, I'm going to build on that, I hope. I'm going to build on that, I hope.

Mr. DELAHUNT. Okay.

Mr. ROSENBERG. We laid all of this out for the Federal judge, and then he authorized the warrant because we made a showing to his satisfaction of the impracticability, which is a word that I almost cannot pronounce. In any given case, the agent and the prosecutor would have to go to a Federal judge and satisfy him——

Mr. DELAHUNT. When would the statute require another appearance before that judge?

Mr. ROSENBERG. Yes, thank you. After the arrest, after the appointment of counsel, there is then, pursuant to statute, 18 U.S.C. 3142, the Bail Reform Act, a detention hearing. So not all material witnesses, by the way, are detained.

Mr. DELAHUNT. I understand.

Mr. ROSENBERG. Many are not.

Mr. DELAHUNT. But I'm only—I'm focusing on those that are detained.

Mr. ROSENBERG. That's the next appearance. Within 3 days at the request of the Government, within 5 days if the witness would like a little extra time to prepare.

Mr. DELAHUNT. And after that detention hearing, when is the next appearance before a magistrate, a judge?

Mr. ROSENBERG. Well, the witness through his attorney can ask for a reconsideration, so that's more flexible, as well——

Mr. DELAHUNT. Is it mandated?

Mr. ROSENBERG. Is it mandated? No, I don't believe it's mandated, but rule 46 of the Federal Rules of Criminal Procedure require us to report back to the judge on the status of the investigation. So there's some—the judge can engage——

Mr. DELAHUNT. Do you have any—I have another concern because, with all due respect to the Federal prosecutorial—I find it, as a former State prosecutor, amazing how lengthy Federal investigations can become. And I think that's something that is dis-

turbing. Is there any time limit as part of the material witness statute?

Mr. ROSENBERG. Within 3144, within the statute itself?

Mr. DELAHUNT. Within the material——

Mr. ROSENBERG. No, sir, there is not.

Mr. DELAHUNT. That's a concern.

Mr. ROSENBERG. I have done cases that have taken a long time, and I have done cases that have moved quickly. Not all delay is the fault of the Government.

Mr. DELAHUNT. I'm not suggesting it is.

Mr. ROSENBERG. For instance, often in litigation there will be all types of hearings and orders——

Mr. DELAHUNT. I'm very familiar with——

Mr. ROSENBERG.—that are appealed by the defendants.

Mr. DELAHUNT. I'm very, very familiar with that. But there comes—there comes a point where it is the responsibility of the Government—it is the responsibility of the Government to move——

Mr. ROSENBERG. I agree.

Mr. DELAHUNT.—to a conclusion on an investigation.

Mr. ROSENBERG. I agree with you. You're right.

Mr. DELAHUNT. And I would suggest that this Committee ought to seriously consider sounding out those such as yourselves—I say all four of you—what would be a responsible time limit.

Mr. ROSENBERG. I know the time has—may I just respond to that, Mister——

Mr. COBLE. Very briefly, Mr. Rosenberg.

Mr. ROSENBERG. Very briefly. I think the statute strikes the right balance because it has in it the flexibility we need and the monitoring of the court. You're right, we need to move these things along because it affects people's lives.

Mr. DELAHUNT. But we—I understand. But we also know this, too, that there are Federal judges that have vastly different views. You know, we have, for lack of—euphemistically, we have pro-defendant judges and we have pro-Government judges. And I really think that this is an issue that more appropriately lies for a determination by the United States Congress.

Mr. KADIDAL. Mr. Chairman, might I make a brief comment?

Mr. COBLE. Well, the gentleman's time has expired. I think we're going to come back for a second round.

In order of appearance, the Chair—well, hold that a minute. The Chair recognizes that the Ranking Member has joined us. Good to have you with us, Mr. Conyers.

The Chair recognizes the distinguished gentleman from Arizona, Mr. Flake, for 5 minutes.

Mr. FLAKE. I thank the Chairman and thank the witnesses.

Mr. Berry, I guess, on this—or Mr. Rosenberg, what are the consequences for a Federal agent, an FBI agent who abuses material witness statutes. Is that all caught by the judge? There has been testimony about witnesses being taken into custody simply for asking that they testify before a grand jury, for example? Can you cite any examples of FBI agents who have been penalized or reprimanded in any way?

Mr. ROSENBERG. Not off the top of my head, Congressman, but I will say this—and as I told Mr. Scott—it's not a case that I can talk about, but we have an internal investigation, both in the Office of Inspector General and in the Office of Professional Responsibility in the Mayfield matter. And, frankly, when there's a problem, that's what we should do. We should take a very hard look at it.

No, I don't know of folks who have been punished off the top of my head, but if an agent willfully engages in misconduct, willfully misleads the court, you know, swears out a false affidavit, there should be severe repercussions. I don't think anyone in the Department of Justice with tell you otherwise, sir.

Mr. FLAKE. Mr. Berry, do you have anything to add to that?

Mr. BERRY. I'll defer to Mr. Rosenberg on all questions related to the material witness statute.

Mr. FLAKE. Mr. Nojeim, do you have any comment there?

Mr. NOJEIM. I think that it's telling that there haven't been any people who have been disciplined for misuse of the material witness statute. There are just far too many cases. We reviewed a number of cases and found that in about 40 percent of the cases the person was never even brought—brought forward to testify, and that was the supposed purpose for them being detained.

Mr. FLAKE. Would that—would a substantial number of those be taken as evidence that an FBI agent has abused his authority if you continue to have 90 percent, 95 percent of those who are pulled in as material witnesses, nothing ever comes of it? At what point do you say they're overreaching here? Mr. Rosenberg?

Mr. ROSENBERG. I don't believe that's evidence of abuse at all. Because it may turn out that a witness does not have material information or that there's no need to call that witness before the grand jury doesn't make the underlying affidavit false or the probable cause determination wrong.

For instance, we get information all the time and we act on it in good faith, I hope, all the time. Sometimes we get bad information which we act on in good faith. If a material witness is arrested on the basis of bad information, in other words, an informant who is spinning us or who lies—it happens—then there may be absolutely—not only no need to have that person held, but they may never testify.

There's nothing wrong with that as long as the underlying actions are supervised by a judge and brought in good faith.

Mr. FLAKE. Mr. Berry, you mentioned in your oral testimony that these National Security Letters are needed because, as you put it, you may have a known al-Qaeda agent having lunch with somebody else, and the only way you can get to information is through a National Security Letter.

It strikes me that if there's somebody who's a known al-Qaeda agent, then a probable cause standard wouldn't be that difficult. Why do you need to go on a lesser standard of simply relevance?

Mr. BERRY. Congressman Flake, with respect to people having lunch with a known al-Qaeda operative, to the extent that we know that someone is an al-Qaeda operative, we certainly have probable cause in most cases to go after that person's records. But no magistrate judge in the United States would approve a probable cause determination just simply because you have lunch with an al-

Qaeda operative, that there's probable cause to believe that you are committing a crime. That is why in a grand jury context to get those records the standard is relevance. It has been one for decades to get these kinds of records held by third parties. All we're saying is that the standard on the national security side, that of relevance for NSLs, should be the same as on the criminal side to a grand jury investigation.

Mr. FLAKE. But if it were the same as on the criminal side, then you'd have a grand jury and not just a National Security Letter. Correct?

Mr. BERRY. The standard is the same, one of relevance. On the criminal side, it's relevance to an ongoing criminal investigation; on the national security side, it's relevance to a terrorism or espionage investigation.

Mr. FLAKE. But the difference in terms of standard is, one, you have somebody outside of the Federal agency okaying it, as opposed to a letter to yourself saying that this relevance standard applies.

Mr. BERRY. Congressman Flake, that's not correct. A grand jury subpoena is not issued with prior judicial approval, and the grand jury subpoena is normally issued by an Assistant U.S. Attorney signing a subpoena for the grand jury and sending that out. So I don't see any really meaningful difference between the context of the grand jury and the context of the NSLs when it comes to some kind of prior independent check. And I also think it's important to point out the process that the FBI goes through before issuing an NSL. The agent——

Mr. FLAKE. My time is up, but I'll come back to that. I know Mr. Nojeim looks like he wants to comment.

Mr. COBLE. The gentleman's time has expired. We'll get back to it. Thank you.

Mr. NOJEIM. What the argument is ignoring is that there is a grand jury that has been convened and it is receiving information that comes from a subpoena. The argument also ignores the fact that a National Security Letter is far different from a subpoena. A subpoena does not say you can't talk to anyone about this request, this demand for records that you have received. It doesn't say that you must comply. And it doesn't—I mean, it does say that you must comply, but it doesn't put you in the same position because you cannot consult with an attorney. In fact, it makes it clear you can't tell anyone.

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

The chair is now pleased to recognize the Ranking Member of the full Committee, the distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Chairman Coble and Members of the Subcommittee, I want to thank you for this important hearing and I really wish I had been here earlier.

But there are three matters. I'd like Greg Nojeim and Shayana Kadidal to pay attention to these three questions.

How can the Department of Justice be defending the FISA review and have already started approving the Senator from Kansas' proposal to allow administrative subpoenas to be issued under FISA? Now, this is all public information. It's like we're supposed to not be able to read the papers even. This is stunning. There is

now a live proposal that is suggesting that we skip all this business about the FISA court review.

The second question is how seriously is the Department misusing the material witness statute to indefinitely detain people?

And finally, what about the National Security Letters that are being directed to libraries and bookstores to find out what people are reading? When we've had Government witnesses say, first, there were no requests, there was nothing that was asked for or given by anybody. Now it's up to 215. But when you add on National Security Letters, I don't know where it ends.

Why don't you start off, Mr. Nojeim?

Mr. NOJEIM. I'd like to address the first and the third question and leave the second for Mr. Kadidal.

It's important to distinguish National Security Letters from section 215 orders. National Security Letters are for a limited class of records and they don't require any prior judicial review. What's happening in the Senate, and it might be happening even as we speak, is a discussion of a potential statute that renders all this discussion irrelevant because it would allow for administrative subpoenas for all records with no prior judicial review.

We believe also, Mr. Conyers, that the secrecy that the Government has insisted upon with respect to its use of the National Security Letter power is very troubling and completely inappropriate, given the disclosure that it has already conceded and done in other intelligence contexts.

This is an illustration of the six-page response that ACLU received from a Federal Freedom of Information Act request about the Government's use of National Security Letters.

Mr. CONYERS. Is it all blacked out?

Mr. NOJEIM. Yes. Page after page after page blacked out about the Government's use of this power. Won't even give raw numbers. And yet every single year the Government reports how many Foreign Intelligence Surveillance Act orders have been ordered by a court to conduct far more intrusive searches, like breaking into a person's home secretly, like listening in on their telephone conversations. They'll report raw numbers every year because Congress required it, and they do it without any damage to national security. And yet they won't report raw numbers of National Security Letters.

Even for section 215 orders, the Government at first said it's a secret, can't report it, it would damage national security. A few months later, actually a couple of years later, they did report. They've been used 35 times.

Mr. Conyers, we don't know how often National Security Letters have been used to get library records. I don't think the Government has disclosed that. What it has said is that it hasn't used section 215 orders to get those records.

Mr. CONYERS. Mr. Kadidal?

Mr. KADIDAL. Thank you. The short answer is that we don't know the extent of the misuse of the material witness statute. We don't know enough about it, and I think it's a good subject for a congressional——

Mr. CONYERS. Can I ask unanimous consent for one additional minute?

Mr. COBLE. Without objection.

Mr. KADIDAL. Thank you. My friend and Mr. Nojeim's colleague at ACLU, Anjana Malhotra, has undertaken to interview every single material witness, or every single person who is detained as a material witness, but it is a full-time job. It's something that I think that that sort of information could be compiled much more readily by the Government itself.

I'll mention one——

Mr. CONYERS. How many do you think there are?

Mr. KADIDAL. Well, I think we know about, I think, 70 that were linked to terrorism investigations. That sounds roughly about right, from the numbers that I've talked to her about. And as I said, 69 of them were Muslim men and 68 were of Arab or South Asian extraction.

You know, one comment that I think needs to be recorded here is that any time you've got that sort of appearance of profiling, it leads to the loss of the best weapon that law enforcement has in the battle against terrorism domestically, and that's the trust and cooperation of immigrant and minority communities. These communities have to serve as the eyes and ears of the police on the street and they have to be willing to testify in judicial proceedings later in order to carry out effective law enforcement against terrorism. And when, you know, things like the abuse and the material witness statute are undertaken, that, you know, clearly at least convey the appearance that there's broad ethnic and religious profiling going on, that damages that trust. It makes people unwilling to serve as the eyes and ears of the police, and that in turn damages the national security of the United States.

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

The chair recognizes the distinguished gentleman from Florida for 5 minutes, Mr. Feeney.

Mr. FEENEY. Thank you, Mr. Chairman.

Maybe either Mr. Rosenberg or Mr. Berry, in the Southern District of New York, after *Doe v. Ashcroft,* are National Security Letters still available in that district, supposing the U.S. Supreme Court would uphold the lower court's decision? And I guess the second part of that question would be, should Congress now grant some explicit right to go to court and challenge it and—a letter to head off potential problems?

Mr. BERRY. Congressman Feeney, those are both excellent questions. With respect to your first question, it's my understanding that there's been a stay placed on the district court's ruling, so presently there's no effect on the issuance of NSLs. Were the 2nd Circuit or the Supreme Court to uphold the district court's ruling, then we would—it depends on the structure of the injunction we're issued, but if it came from the Supreme Court, we would effectively be precluded from using 18 USC 2709, which is the NSL statute dealing with wire or electronic communications——

Mr. FEENEY. And presumably at that point you would recommend that Congress go in and grant some explicit right to——

Mr. BERRY. Well, if I could address that question, because it is a very good question. We have taken the position in litigation that, number one, the recipient of an NSL can consult an attorney regarding that NSL. And I think that that is based on the specific

statute because the statute implicitly contemplates the idea that recipients of NSLs would be telling their agents. And we think the normal interpretation of the word "agent" would include one's attorney. And we're forwarding that argument in front of the 2nd Circuit.

We also believe that the recipient has a right to pre-enforcement judicial review of an NSL. Now, the district court disagreed with that argument, and we are forwarding it, again, before the 2nd Circuit.

Mr. FEENEY. So the court basically held that, because they disagreed with your interpretation of the recipient's rights, that that's one of the reasons they——

Mr. BERRY. Yes. And if I could just add, this is kind of an odd situation. Because the Department of Justice is saying yes, recipients have the right to pre-enforcement judicial review.

Mr. FEENEY. Was there anybody in the court arguing that the recipient did not have the right?

Mr. BERRY. The ACLU.

Mr. NOJEIM. Excuse me. Excuse me, that is not accurate. That is not accurate.

Mr. COBLE. Regular order. Regular order.

Mr. BERRY. Could I finish my point, please? The ACLU said that the statute does not allow for pre-enforcement judicial review. We said it does allow for pre-enforcement judicial review. If Congress wished to clarify that in the statutes——

Mr. FEENEY. Well, maybe we could make the ACLU and the Department of Justice happy if we clarify that.

Mr. NOJEIM. Why don't we just do that?

Mr. FEENEY. Well—and we may.

Mr. Berry, would you like to briefly comment on Mr. Nojeim's response to Mr. Conyers about when our Government can break into our house and violate our security in sort of a blanket way?

Mr. BERRY. Congressman Feeney, I'm not exactly sure which comments you're referring to, but if we're talking about breaking into a house, then we're talking about the need, except in exigent circumstances, which are exceptionally rare, to have a search warrant that demonstrates probable cause. And, in a criminal investigation, those are issued by article III Federal judges, and, in a foreign intelligence investigation, those are issued by a judge of the FISA court, again an article III judge. What we're talking about with National Security Letters has nothing to do with breaking into anyone's house.

Mr. FEENEY. I want to talk to Mr. Rosenberg about the material witness, because it does seem unfair that a material witness can be, without being charged with anything, held indefinitely. And the time they can be questioned I think is a reasonable one. I understand your response that it's not always the Government's fault that there are delays—Mr. Delahunt's question—but neither is it likely to be the material witness's fault about delays, and that's the person who is suffering the consequences.

Wouldn't there be some way where we could allow the Government, along with participation of the defendant's counsel, to videotape or otherwise record testimony of the material witness and have that testimony admissible, if we enacted a law that would

protect the material witness from indefinite detention? Isn't there some way that we can let these folks who are not charged with anything go and yet record their material testimony?

Mr. ROSENBERG. There is. I mean, Congressman, under the statute there is authority, and the *Awadallah* case recognized it—the 2nd Circuit case, excuse me, recognized it, to take a deposition in lieu of grand jury testimony. Now, again, part of that turns on the witness being cooperative and truthful. But it's the judge, not the Government, that orders the detention. And the judge can revisit that at the request of the witness.

So there are mechanisms already in place so that the court can ensure that it's not indefinite or delay is not undue or the fault of the Government. And as well, as I mentioned but perhaps not clearly enough—and forgive me for that—we do need to report back to the court on a regular basis, under rule 46 of the criminal rules, so that they can engage in this monitoring function. So I really do believe that there are safeguards that are built into the statute and the rules of criminal procedure.

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

The chair recognizes the gentlelady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much. Mr. Chairman and Members, again I'd like to commend you for the time that you've put in on this PATRIOT Act. You've really done a wonderful job in focusing us in this Congress on the PATRIOT Act, and I think that's very important. Because this is all about a discussion of how far does our Government go, how far do we support them in the fight on terrorism or the so-called efforts to keep us secure and safe.

And I think we're way over the line. I think we're way over the line. As a matter of fact, the example, I think, that is given in your testimony, Mr. Berry, about someone having lunch with suspected terrorists and your ability to issue NSLs, I think what's implied in your testimony is that the person having lunch with the suspected terrorist, despite the fact you have no information that should lead you to believe that this person is involved in any kind of plot or any kind of conspiracy, could be issued an NSL and all that goes along with that. Which means possible access to all records, including financial records, et cetera, et cetera.

Now, you argue in your testimony that the case that was just referred to did not cause the court to determine that section 505 was a violation of constitutional rights. And you argue, Mr. Nojeim, that the court did determine that it was a violation of constitutional rights. Why do you differ on this issue? I'd like to hear first from you, Mr. Berry, then you, Mr. Nojeim.

Mr. BERRY. Congresswoman Waters, let me respond to the first point first and then the second point. With respect to the first point, what I said in my testimony was that the FBI should be conducting preliminary investigations of people if they are seen having lunch with known al-Qaeda operatives. I believe that if we did not follow those leads and do some basic investigation of people having lunch with known al-Qaeda operatives, people from the FBI and people from the Justice Department would be hauled before this Committee and you would be demanding to know why we weren't doing that.

Ms. WATERS. May I stop you for one moment. And I'm sorry to interrupt you, but I want to be clear. I walk into one of these food courts. We have so many of them in the shopping malls. And there are some people sitting at the table. And you're always looking for someplace to sit. Aha, there's a table with one chair and I'm glad to get it. And I sit down and I have lunch and I say "Hello, how are you doing?"—you know, courtesy, just being decent. And they say, "Hello, how are you doing? Oh, what is that book you're reading, or that's a wonderful outfit that you have on." We're talking. We don't know each other. We have eaten our lunch, and then I go on and catch my plane. Am I now subject to investigation if these two turned out to be suspects that are under surveillance or suspects by the FBI who will be issued NSL letters? Can I now be issued one?

Mr. BERRY. Two quick points in answer to that question. Number one, I don't know what your personal experience is, about 99.5 percent of the time when I have physically been eating lunch at a restaurant or at a food court with other people, I do know who those other people are. But secondly——

Ms. WATERS. No, that's not my experience. I run through these airports, I run through these shopping centers, I'll take a chair anywhere. Given my experience, discuss the issue.

Mr. BERRY. Even in the rare case, I think, where you are sitting down in a food court and having lunch with someone that you do not know, there would be a basic preliminary investigation if you happened to have the misfortune of sitting down with a known al-Qaeda operative. And once the preliminary investigation turned up nothing, the Attorney General's guidelines——

Ms. WATERS. What's a preliminary investigation? Do they now get all of my telephone records? Do they get the Internet? Do they get my financial records? What's a preliminary investigation?

Mr. BERRY. It's a case-by-case determination given the predication in an individual case. But I think it would be a serious mistake for us to write our general guidelines so that the paradigmatic case is a case where you happen to be having lunch with a person you don't know in public. Does that happen? Yes. Is that a rare occurrence compared to all the times you have lunch with people that you do know? I would submit——

Ms. WATERS. I could give you 101 other circumstances under which you could end up having lunch—you could be invited to somebody's home who has other guests that you're meeting for the first time. I do that all the time. As a matter of fact, we all do that all the time. Members of Congress are invited to go places where we don't know half of the people in the room, and we sit with them, we talk with them. And other people in America do this also. Are we now subject—not just us, but any American—subject to an investigation because we happened to talk with, eat with, associate with for 15 minutes, 20 minutes, a half hour, an hour, somebody who may be under surveillance or may be suspected?

Mr. BERRY. Ms. Waters, my example involved an instance where you're eating lunch with a known al-Qaeda operative at a restaurant. It is, again, my experience, and I apologize if my experience is different from yours——

Ms. WATERS. Well, listen, sir, I hate to keep interrupting you——

Mr. BERRY.—that you generally know who you're eating lunch with when you're eating lunch at a restaurant.

Ms. WATERS. Some of those Saudis who were whisked out of the United States may have been providing funds for the madrassahs in Saudi Arabia that I was at a cocktail party with. I mean—so what I'm asking you is, not to view this based on whether it's rare, it's occasional, or whether or not it probably will not happen. I want to know if you support the law, and does the law say that I could be issued an NSL based on that association, whether it's rare or not.

Mr. COBLE. Mr. Berry, briefly if you can. The gentlelady's time has expired.

Mr. BERRY. It is possible, Congresswoman Waters, that if you sat down at the food court of an airport and you happened to have the misfortune of sitting down and eating with someone who is a known al-Qaeda operative, that the FBI would indeed do a preliminary investigation of you to determine whether or not you actually have any terrorist background.

Again, I would submit if we see someone in public sitting at a restaurant having lunch with a known al-Qaeda operative, and the FBI would do nothing to look into that person's background to see who they were, I guarantee you that members of the FBI, the people in the Department of Justice, perhaps including the misfortune of me, would be hauled before this Committee and asked why aren't you following up on a legitimate investigative lead.

Mr. COBLE. The gentlelady's time has expired. And Ms. Waters, I'll say to you if it would help you any, given that hypothetical, I would be happy to come forward in your defense if it would help.

Ms. WATERS. Well, if they thought you really meant it, I would be happy for you to.

Mr. COBLE. Oh, I'd do it.

Ms. WATERS. If you can't really convince somebody that you really mean it, then don't do it.

Mr. COBLE. I do indeed mean it.

Now comes the time, folks, when we're going to be a little irregular here. We have a gentleman who has hung tough with us for about an hour and a half. He does not sit as a Member of the Subcommittee. And the practice of the Subcommittee is that in order to question witnesses, you must sit as a Member of the Subcommittee. So I'm going to recognize Mr. Scott, the Ranking Member, who in turn would yield his time to the gentleman from New York, Mr. Nadler, to accommodate you, Mr. Nadler.

The chair recognizes the distinguished gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. I think I'll take my own 5 minutes. No, just joking. [Laughter.]

I yield to the gentleman from New York, who's been with us for the full Subcommittee meeting.

Mr. COBLE. The gentleman from New York.

Mr. NADLER. Well, thank you. Let me first express my appreciation to the Chairman and the Ranking Member for this indulgence.

Mr. Rosenberg, Mr. Berry, whichever of you cares to answer it, what bothers me about this section 505, we make all these nice legal distinctions and, you know, everything is a precedent for everything else—we've done it here, so we'll just move it a little fur-

ther; there's a precedent here, we'll just extend it a little further. There doesn't seem to be much left of the fourth amendment. There doesn't seem to be much left of you shall not seize any person's papers or effects without describing the particular place to be searched, the particular thing to be seized, and the reason for it and having probable cause to suspect a crime.

When Ms. Waters was talking about just sitting down, I mean, people do that all the time. You, Mr. Berry, may think that's rare, but people do sit down all the time in my district—maybe not in the mall, but you go into Starbucks or into Barnes & Noble in the cafe and you hope there's a seat, and you sit down next to God knows who. And they're reading books, and God knows what they're reading.

Mr. BERRY. Perhaps people want to stay away from me or something.

Mr. NADLER. In any event, it seems to me that there has to be some predicate other than—you're saying because I sat down with somebody, you can look at all of my ISP records, et cetera. Now, yes, I understand that if you don't follow up on someone who's seen having lunch with an al-Qaeda agent, someone would raise perhaps legitimate questions. But there's no review here. And there's secrecy here.

Now, would you agree that there should be some amendment to section 505 to put—now, we did have—Judge Marrero did rule section 505 unconstitutional as a violation of both the fourth amendment, because of no judicial review, and of the first amendment, because of the gag order. Would you agree that there ought to be some amendments made to section 505 to render it constitutional under the rirst and fourth amendments, perhaps a time limit on the gag order and ability to talk to counsel, or restoration of the standard that records sought relate to a suspected terrorist or a spy, things like that?

Mr. BERRY. That's an excellent question, I think, with respect to two issues. Number one, can you consult an attorney. We've taken the position that you can. The ACLU and Judge Marrero disagreed with us.

Mr. NADLER. Well, they didn't disagree that you ought to be able to, they just——

Mr. BERRY. No, that you couldn't under current law.

Mr. NADLER. You would agree that the statute ought to be amended to clarify that?

Mr. BERRY. The Department of Justice is not opposed in principle to such an amendment, and we could work with you on specific language.

Secondly, we have taken the position in litigation you can obtain pre-enforcement judicial review of the NSL.

Mr. NADLER. Cannot or can, did you say?

Mr. BERRY. You can. To the extent that Congress does not think that that is clear, we are not opposed in principle to——

Mr. NADLER. How can you get pre-enforcement judicial review if you don't know about it?

Mr. BERRY. Well, the recipient does know about it.

Mr. NADLER. The recipient. But the recipient is not the party of interest. In other words, you tell my Internet server that you want

all the records related to what I read or what sites I visited. Now, I might object to that. The recipient gives it to you as a matter of course.

Mr. BERRY. Well, that's no different than in the context of a subpoena. It is the recipient of a grand jury subpoena that has the right to move to quash; it's not the person whose records are being sought. They have no standing to move to quash, and, indeed, they almost never know that the records are being sought. So I think that's the appropriate analogy. And if I understand correctly, what the ACLU is advocating is that the recipient be allowed pre-enforcement judicial review. And again, we have no objection in principle to clarifying the statute in that regard if Congress deems it necessary.

Mr. NADLER. If the ISP in that case does not move to quash, do they have any civil liability to me if they should have? Under any circumstances?

Mr. BERRY. Under—and this isn't my area of expertise, but under 18 USC 2707, I don't believe in a typical case you would have civil liability. In an extreme case, where the ISP might have overwhelming evidence that an NSL was being issued——

Mr. NADLER. Let me ask Mr. Nojeim. How could we protect the interest of the party of interest whose records are being sought here?

Mr. NOJEIM. To do that, you would have to statutorily protect the records. You could——

Mr. NADLER. Statutorily protect what?

Mr. NOJEIM. The records. You could impose a notice requirement. We're not asking that that be done. I don't think that Congress would do that. I think that under the circumstances that we have here that what we ought to be focusing on is what's in the Senate version of the SAFE Act, which is time-limiting the gag, giving the recipient to the National Security Letter an opportunity to challenge it, and explicitly making it clear that a person who receives a National Security Letter can consult with an attorney.

Mr. NADLER. Those are the three?

Mr. NOJEIM. And additional disclosure about the use of National Security Letters.

If I could just—could I take a minute to respond to the argument that——

Mr. COBLE. Mr. Nojeim, if you'll be very brief. We have a gentleman from California I think has just joined, Mr. Lungren, and we're going to have votes imminently. So if you can be very brief, Mr. Nojeim, because Mr. Nadler's time has expired. Very briefly.

Mr. NOJEIM. I just want to illustrate, if I could, how the court struck down section 505 of the PATRIOT Act, section 505(a).

The first of these placards—and this is in my testimony—shows what the statute looked like before the PATRIOT Act amended it.

The next placard shows how the PATRIOT Act amended the National Security Letter statute. Everything that's in yellow was added. Everything that is struck through was struck from the statute. And as you can see, section 505(a) completely rewrote this statute.

The third placard shows what's left of the statute after the court struck it down. It struck down the entire statute—that which was added, that which was in the statute before.

And I just don't think that there's any credibility to the argument that the court struck a section of the PATRIOT Act. If the Government wants to concede that it went further and struck not just what the PATRIOT Act amended but what was already in the statute before the PATRIOT Act, fine.

Mr. NADLER. I thank you again, and again let me thank the Chairman for his indulgence.

Mr. COBLE. Good to have you with us, Mr. Nadler.

Mr. NADLER. Thank you.

Mr. COBLE. Now, we're going to try to start a second round here. Mr. Scott and I will kick it off, but there will be a vote and when that vote is called, we likely will terminate the hearing rather than keep you all here. And if Members of the Subcommittee have additional questions, we can always submit those in writing.

Mr. Berry, in Mr. Nojeim's testimony, he referred to the case of *Doe v. Ashcroft* which he claimed struck down a provision of the PATRIOT Act as unconstitutional. Another ACLU attorney, however, Mr. Jaffer, contradicts Mr. Nojeim's claim, stating that the provisions "that we challenged and that the court objected to were in the statute before the PATRIOT Act was passed." Mr. Jaffer noted that, "we could have raised the same objections before the power was expanded."

Now, which of the two ACLU attorneys is correct and on the money?

Mr. BERRY. Mr. Jaffer is a very wise man in many ways, and I agree with him in this instance.

Mr. COBLE. But that's not to say that Mr. Nojeim was not, is it, Mr. Berry?

Mr. BERRY. No. I respect him. But if I could just be more specific here. There were two provisions that were specifically identified as being unconstitutional. We don't agree with the court's ruling, but I'm just going to lay that out.

The first is the nondisclosure provision. The nondisclosure provision has been in the law since 1986, since the passage of the Electronic Communications Privacy Act. It was there before, it was there after the PATRIOT Act. The PATRIOT Act did not affect that at all.

The second issue was this fourth amendment issue about the ability of the recipient to obtain judicial review. There, that's a statutory interpretation issue. The court did not agree with us that the recipient has the ability to mount pre-enforcement judicial review. But the changing of the standard under section 505 of the PATRIOT Act had nothing whatsoever to do with whether or not you can obtain judicial review.

And the charts that Mr. Nojeim has, I will admit, make great props. But he omitted one important chart, and I wish I would have had it here today. If you would have had a chart about what is the result if we had never passed the PATRIOT Act and the ACLU had brought the same challenge to section 2709, under Judge Marrero's ruling you would still have that big ax. The changes in the PATRIOT Act had nothing whatsoever to do with

the ruling in that case, and the ACLU's attorney, Mr. Jaffer, who's actually litigating that case, correctly recognized that when he said, and I quote, "The provisions that we challenged and that the court objected to were in the statute before the PATRIOT Act was passed."

So I think that his statement is right on the money.

Mr. NOJEIM. Chairman Coble, I talked to Mr. Jaffer before the hearing and I asked him about that quote. You know what he said to me? He said, "I did say that." And then I added also that the challenge that we made would not have been successful, may not have been successful had the PATRIOT Act not amended the statute. And the court repeatedly referred to changes that the PATRIOT Act made in making its decision. In finding the statute unconstitutional under the fourth amendment, Judge Marrero said—he cited as an example the kind of abuse now authorized by the statute, that it could be used to issue an NSL to obtain the name of a person who posted a blog critical of the Government on a Web site. He said that—I'm sorry. Just a moment.

Or to obtain a list of the people who have e-mail accounts with a given political organization. The Government could not have obtained this information with an NSL prior to the PATRIOT Act amendment in section 505 unless the blogger or the people with such accounts were thought to be foreign powers or agents of foreign powers. The court also cited PATRIOT Act section 505 when it struck the statute down on first amendment grounds. The court determined that the tie to foreign powers eliminated by section 505 "limits the potential abuse" of the statute and distinguishes it from other intelligence search provisions that retain the requirement of such a tie and include a statutory gag provision.

Mr. COBLE. Well, let me recognize Mr. Berry again since I put the question to him. Mr. Berry? Then I'll recognize Mr. Scott.

Mr. BERRY. It is certainly true that the district court opinion discussed section 505. The key question is what was its ruling? Its ruling on the fourth amendment point was that the statute was unconstitutional because there was no pre-enforcement judicial review available to the recipient. I would like anyone to explain to me how section 505 of the PATRIOT Act impacted that issue.

Secondly, it was held unconstitutional under the first amendment because of the permanent nondisclosure requirement. We disagree with that opinion. But that same nondisclosure requirement was in place from 1986 on, and I think that Mr. Jaffer was very candid when he talked about the provisions being there before the PATRIOT Act and their being there now. And I think the answer here is one of statutory interpretation. It's really not a constitutional disagreement between us and Judge Marrero.

Mr. COBLE. Well, my time is about to expire. In fact it has expired.

I recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Berry, how many people have had their records sought through National Security Letters?

Mr. BERRY. Congressman Scott, Congress requires us to file regular reports on our use of each of the National Security Letter stat-

utes. We are up to date with our compliance, and that information is classified, but available to you.

Mr. SCOTT. When you get information from a National Security Letter, how many people can look at it?

Mr. BERRY. That matter is covered by the Attorney General's Guidelines for National Security Investigations. The NSL statutes specifically require that there be guidelines for dissemination and that there only be dissemination when dissemination would be relevant to the person's duties who's receiving that information. So that really is a case-by-case determination.

Mr. SCOTT. Is that subject to the records-sharing, where any national defense and law enforcement and everybody else in town can look at it? Or is that just the FISA information?

Mr. BERRY. Well, section 203(d), which you're referring to, refers to information that's obtained as to law enforcement investigations. The NSL generally is not any law enforcement investigation per se, so it's not really covered by 203(d). It would be treated as other intelligence information is.

Mr. SCOTT. We talked about, under the material witness, the arrest, you need probable cause, Mr. Rosenberg, you need probable cause for the arrest. How is this different from arresting somebody in the normal run-of-the-mill criminal warrant. Well, I guess it would allude to the Mayfield case, because he was arrested on a material witness warrant rather than a criminal warrant. Without referring to that case, what's the difference?

Mr. ROSENBERG. It's the same standard, Congressman, but it goes to a different question. In the routine criminal case, where you seek an arrest warrant, it's probable cause that a crime has been committed and the person you seek to arrest committed the crime. In the regular routine criminal search warrant, that a crime has been committed and—probable cause that a crime has been committed and that the fruits of the crime, evidence of the crime would be at a particular location. Here, it's simply probable cause to believe that testimony of a witness is material and that it would be impracticable to secure that testimony by other means, such as a subpoena.

So it's always probable cause, but it's just a different type of inquiry.

Mr. SCOTT. Well, can you use it against a suspect where his own testimony may—I mean, he was a suspect.

Mr. ROSENBERG. I understand your question, and it's an excellent one. It's not always the case that a witness is just a witness. They may also be a subject or a target of an investigation. It's not mutually exclusive. I mean, if you think of it——

Mr. SCOTT. So you can arrest a suspect if they're a suspect.

Mr. ROSENBERG. Let me finish, because I think I can help on this.

Mr. SCOTT. Okay.

Mr. ROSENBERG. It's almost always the case, or I would say it's probably always the case that someone who commits a crime is also a witness to the crime. You know, just common sense.

So that's not a grand revelation. But if we arrest someone as a material witness and then later learn through other sources that that witness is more than a witness, that the witness participated

in a conspiracy or the crime, then they could be subsequently charged. There's nothing that would preclude that.

Mr. SCOTT. Yes, but that's the little problem we have here. You arrest them when they're a suspect, when you don't have probable cause that they're guilty but you kind of think they are, so you use a material witness, drag them in, lock them up, and then go out and make the case, if you can. And meanwhile, they're locked up.

Mr. ROSENBERG. I've heard that criticism.

Mr. SCOTT. Can you get bond while you're under material witness?

Mr. ROSENBERG. Absolutely. Absolutely. Under 18 USC 3142, the Bail Reform Act, which is referenced specifically in the material witness warrant, a material witness arrested on such a warrant is entitled to a hearing under that provision. Absolutely.

Mr. SCOTT. Let me get extraterritorial, very quickly. Have we covered everybody overseas associated with the United States working, military, and otherwise, in Iraq so that they are under somebody's criminal code?

Mr. BERRY. Congressman Scott, it is our belief that Congress has done that. section 804 filled in, with respect to, you know, U.S. military bases and diplomatic bases, kind of the last remaining gap. We believe that you would always be covered either by the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act——

Mr. SCOTT. That's the 2000 law we passed.

Mr. BERRY. Yes. Or section 804 of the PATRIOT Act. And so we don't——

Mr. SCOTT. So you don't have anybody over there associated with the United States Government, playing poker or shooting somebody, not subject to any criminal code?

Mr. BERRY. We're unaware of any jurisdictional gap. Certainly, if anyone has evidence that one exists, we would definitely want to know about it and take a look at it. But I don't think one exists.

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

The chair recognizes the distinguished gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you.

I really just have one question, and it's for Mr. Berry and Mr. Rosenberg. I know at times I'm sarcastic and flippant, but I really have a very basic and important question to me that goes to the heart of all this for me and concerns about constitutional supervision and safety nets with regard to the immense powers under the PATRIOT Act.

And preface it by saying I respect the President, I like the President, I thank God he's there. I disagree with him on a couple of things, but I have such immense respect and admiration for the man. I'm just very glad he's there. I like Alberto Gonzales, I know a great deal about him. I just like the guy. And I have a tremendous number of friends in DOJ, Federal law enforcement officials.

But I'm going to paint a hypothetical. And I know it's so outlandish and so crazy, you may think it's just ridiculous, it could never happen. But just, you know, humor me on this, because the bottom line will be what in this situation would be the constitutional safety net. To me it's a very serious question.

Say hypothetically—I know it could probably never happen, but just say that it might have—that you had a White House that was so politically corrupt and abusive of constitutional rights that they would call for a thousand FBI files to be delivered to the White House, and that done so that they could review the information for, say, on the Chairman of the Judiciary Committee, something like that, or political enemies, people that had been a thorn in the side of the White House. They want information that they can use in the pressure to back off politically.

And this is a White House, hypothetically, that's so contemptuous of the law and the courts and truth that they've received subpoenas for records of perhaps a law firm that one of them had worked for, been partner in. And they don't even furnish the records even though they're present in the White House. So contemptuous of the law and truth that the White House would misrepresent the truth and answers to court discovery under oath.

And say the White House said the death of somebody that was an attorney at the White House, and people were seen taking material out of the dead man's office before the investigators get there. And you have a Department of Justice, right at the very top, an Attorney General who himself or herself is not perhaps that bright and so the person under him just completely manipulates, allows him to be kept in the dark so he doesn't really know everything that's going on, so he can go before the Judiciary Committee in the House and Senate and swear that things never happened because he didn't know that they were happening and going on, because he's kept in the dark by the people the White House put under him in the AG's office.

And say from that top of the DOJ you have orders to use NSLs, to get personal information on the political enemies or major contributors of opponents of the White House. There's a gag order in effect. The White House is the one demanding the information and so are the people at the top of the DOJ. It's hard to get congressional help or supervision because they're kept in the dark because the AG is not giving them information because he either doesn't know or doesn't come forth.

What is the constitutional safety net for people's rights and the privacy of their information in such a hypothetical?

Mr. COBLE. Mr. Berry, if you will, we have a vote, so if you can be terse, I would appreciate it. We're going to adjourn after this response.

Mr. BERRY. I'll try to be brief. That's certainly a large hypothetical.

Mr. GOHMERT. Well, it's a large hypothetical, but it should be a very short answer.

Mr. BERRY. I'm going to answer it in particular with respect to the NSL component. What I can tell you is that there is a process in place at the FBI with multiple layers of review before an NSL is issued. An agent has to write up a memo explaining what the predication is and requesting authority to issue an NSL. That memo is then reviewed by his or her supervisor. Then it would be reviewed by the Special Agent in Charge of the field office, who's a very high-ranking official, as well as, typically, the top lawyer in

the FBI field office. So you have multiple layers of review designed to guard against abuse.

Secondly, if the recipient of the NSL believes it to be an unwarranted NSL, we believe that, under the current statute, the recipient of that NSL may consult an attorney and seek pre-enforcement judicial review of the NSL. It should be clear under the statutes that we have no authority to enforce the NSL ourselves. We cannot go to the ISP, demand their records, and take them if they won't give them to us. The only way that we can enforce an NSL is in court, and the recipient of the NSL has every opportunity to contest that.

Now, with respect to people acting in bad faith, it's exceptionally important to know that the men and women at the FBI take their jobs very seriously and are excellent professionals. To the extent that you would have a rogue agent who would in bad faith type up an NSL request on false predication——

Mr. GOHMERT. Yes, but that wasn't part of the hypothetical. It was from the top the order came down to do it.

Mr. BERRY. I would also say that under congressional statutes, the Attorney General is obliged to "fully inform" appropriate congressional Committees regarding our use of NSLs, and that Congress should conduct appropriate oversight of our use of them.

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

I thank the Members of the Subcommittee, in addition to Mr. Nadler, for having attended today. I thank the witnesses as well.

Mr. DELAHUNT. Mr. Chairman, could I just ask one question before you adjourn?

Mr. COBLE. Very briefly, if you will. We do have a vote on.

Mr. DELAHUNT. You know the FOIA request that was put forward by the ACLU, and we saw the redactions, I mean why wouldn't that raw data be available?

Mr. COBLE. Again, Mr. Berry, very quickly. We're on a short leash here.

Mr. DELAHUNT. I mean, everybody can go and I'll just wait for the answer. [Laughter.]

Mr. BERRY. Two very quick points, then.

Mr. COBLE. Very quick.

Mr. BERRY. Number one is the information is available to Congress. And I would note, after——

Mr. DELAHUNT. No, my question, Mr. Berry, is why wouldn't it be available to the American people?

Mr. BERRY. Those in charge of the classification process have to weigh the damage to national security——

Mr. DELAHUNT. Raw numbers, Mr. Berry.

Mr. BERRY. Yes. The determination has been made that letting people know how often we are using one NSL statute versus another NSL statute versus another NSL statute would give those in foreign intelligence operations and our terrorist enemies an inclination of our——

Mr. DELAHUNT. Now, that is just absurd. That is really silly. Now, this is the problem that you have. You hear a lot of expression of concern here, and it goes way beyond just the Department of Justice. The feeling is that we have a Government now that has more information every day about us, and, at the same time, Amer-

ican citizens know less about their Government. And that, I would suggest is the problem that we all have, and please send that message back from me so when we negotiate——

Mr. COBLE. Mr. Berry, let me get you and the gentleman from Massachusetts together. Let me wrap up so we can go vote. In order to ensure a full record and adequate consideration of this important issue, the record will be left open for additional submissions for 7 days. Any written questions that a Member wants to submit should be submitted to the witnesses in the same 7-day time frame.

This concludes the oversight hearing on the implementation of the USA PATRIOT Act section 505 that addresses National Security Letters, section 804 that addresses jurisdiction over crimes committed at U.S. facilities abroad, and material witnesses provisions of the criminal code.

Thank you for your cooperation and for those in the audience who attended.

The Subcommittee stands adjourned.

[Whereupon, at 11:25 a.m., the Subcommittee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Today we're reviewing some of the most troubling aspects of this Administration's anti-civil liberties record.

Section 804 of the PATRIOT Act took the teeth out of the Military Extraterritorial Jurisdiction Act. Also know as MEJA, this law gave the Justice Department the authority to prosecute crimes committed by or against military personnel and those accompanying the military when the same act would be a felony in the United States.

However, Section 804, while at once clarifying the MEJA applied to military, consular, diplomatic premises over seas, also exempts military personnel from prosecution for their actions at these sites. In light of the horrific detainee abuse that has now been well documented by the press and human rights organizations, we must reconsider whether we really want to exempt the officials who torture and demoralize detainees from prosecution under this statute.

The material witness statute, which exists for the sole purpose of allowing law enforcement to briefly detain a witness until he or she can be deposed or testify, has become a blank check for the Justice Department. It has chosen to use this statute to detain men of middle eastern descent suspected of illegal activity when there is no probable cause to charge them with an actual crime.

The Justice Department will tell us today that the statute is fine because a judge holds a hearing before detention ensues. Yet when men disappear for months at a time, and never testify or give a deposition, something is wrong.

Finally, National Security Letters are among the most troubling parts of the PATRIOT Act, and regretfully are not scheduled to sunset. Issued without judicial oversight, and demanding an absolute gag indefinitely, these records demands aren't even directed at anyone suspected of any wrongdoing.

That there are now proposals to expand them to cover all records—not just telephone and internet records, financial documents, and consumer records as they do now—speaks to the absolute power grab of the Justice Department. If this now, what next? How many more freedoms are we going to throw away supposedly in the name of security?

As we go forward with legislation in the near future we must keep these questions in mind. We've compromised too many rights already, for too little in return. We must all sincerely consider whether a handful of guilty pleas given by people with little or no connection to September 11, is worth the privacy we're glibly handing over to the government.

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, section 505 of the Patriot Act and the Material Witness Statute, violate Americans' privacy rights and civil liberties and both provisions should be repealed. In section 505, notice to the subject of the investigation is not required and the powers granted under the section are not subject to judicial oversight. The material witness provision allows the government to indefinitely and secretly detain someone who is deemed a "material" witness to an investigation, without any requirement that the witness actually testifies.

Mr. Chairman, section 505, the "National Security Letters" section of the Patriot Act allows law enforcement to demand detailed information about an individual's

private records without judicial review, without the individual ever being suspected of a crime, and without a requirement that law enforcement notify the individual that they are the subject of an investigation. Furthermore, this section contains an automatic, permanent gag order on the recipient of a National Security Letter, not even allowing the recipient to consult with an attorney. And law enforcement can act independently—now any local law enforcement office can invoke the power of this section.

Mr. Chairman, this power represents a clear violation of the fourth amendment right against unreasonable search and seizure, as well as threatening speech protected under the first amendment. In fact, a U.S. District Judge struck down section 505 in a case involving the government's collection of sensitive customer records from Internet Service Providers and other businesses without judicial oversight. The judge found that the government's seizure of these records constituted an unreasonable search and seizure under the fourth amendment and found the broad gag provision to be an unconstitutional prior restraint on free speech.

Mr. Chairman, the Material Witness Statute is just as detrimental as section 505. Under this statute, the government can detain and arrest anyone, indefinitely, without any criminal charges being filed, as long as it appears from an affidavit that the individual has testimony that is "material" to a "criminal proceeding." This statute was created to be applied only in particular situations where the witness was deemed a flight risk and the witness would only be detained until he/she testified or was deposed. However, it appears that since 9/11, the Department of Justice has been misusing this statute to indefinitely detain individuals the government suspects as possible terrorists. The government has not been advising the "material witnesses" of their constitutional rights to an attorney and has not been complying with the witness' requests for an attorney.

Mr. Chairman, the government has even been making these arrests in secret by gagging the lawyers and family members involved, and sealing all court proceedings related to the "material witness." In fact, since 9/11 many cases involving the Material Witness Statute have resulted with a public apology from the government for wrongly detaining an individual who actually had nothing to do with the investigation at hand.

Mr. Chairman, we must limit the powers invoked under the Material Witness Statute and under section 505 of the Patriot Act. The government's powers to secretly detain an individual, even if they are deemed a "material witness" that is a flight risk, must be checked, and the government's power to the secret search and seizure of an individual's personal records must be checked. Though national security has become top priority since 9/11, we must not overstep the boundaries set by the Constitution to protect our civil liberties and our right to privacy.

Mr. Chairman, absent a clear demonstration from law enforcement that these provisions are necessary, section 505 should be repealed and some limitations need to be implemented into the Material Witness Statute to protect the rights guaranteed to us by the Constitution. I yield back the balance of my time.