Testimony of

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Chairman Kyl, Senator Feinstein, and members of the Subcommittee on Terrorism, Technology and Homeland Security, thank you for inviting me here this afternoon. It is an honor to testify before you, particularly on a matter of such importance to our national security.

I am currently an attorney in private practice in the New York area and a Senior Fellow at the Foundation for the Defense of Democracies, a non-partisan, non-profit policy institute here in Washington that is dedicated to defeating terrorism and promoting freedom. For close to eighteen years up until October of 2003, I served as an Assistant United States Attorney in the Southern District of New York.

While I held several executive staff positions in our Office and had the opportunity to participate in a number of significant cases, the most important work that I participated in, along with teams of dedicated Assistant United States Attorneys working arm-in-arm with our colleagues in the FBI and other federal and state law enforcement agencies, was in the area of counterterrorism.

From a time shortly after the World Trade Center was bombed on February 26, 1993, through early 1996, I was privileged to lead the prosecution against Sheik Omar Abdel Rahman and eleven others for conducting against the United States a war of urban terrorism that included, among other things: the WTC bombing, the 1990 murder of Meir Kahane (the founder of the Jewish Defense League), plots to murder prominent political and judicial officials, and a conspiracy to carry out what was called a "Day of Terror" – simultaneous bombings of New York City landmarks, including the United Nations complex, the Lincoln and Holland Tunnels (through which thousands of commuters traverse daily between lower Manhattan and New Jersey), and the Jacob K. Javits Federal

Building that houses the headquarters of the FBI's New York Field Office (a plot that was thwarted).

After defending those convictions on appeal, I also participated to a lesser extent in some of our Office's other prominent counterterrorism efforts – including pretrial litigation in the prosecution against the bombers of the U.S. embassies in Kenya and Tanzania, and the appellate defense of convictions in the case involving the conspiracy to bomb Los Angeles International Airport during the Millennium observance. Finally, following the 9/11 attacks, I supervised the U.S. Attorney's command post in lower Manhattan, near ground zero, working closely with all our colleagues in the law enforcement and intelligence communities to try to do what we have been trying to do ever since that awful day: prevent another attack against our homeland.

It is for that reason that I am happy to come here today to respectfully and enthusiastically urge the committee to vote in favor of the proposed "Material Support to Terrorism Prohibition Improvements Act of 2005."

The proposed bill focuses on what are two of the most critical aspects of our national struggle to defeat the network of Islamic militants that is waging a terrorist war against us: (a) the need to beef up the statutory arsenal that enables law enforcement to stop attacks at an early stage, before they endanger Americans; and (b) the need to recognize the threat posed by paramilitary training.

Both of these concerns emerged as serious problems from the very start of our confrontation with militant Islam in the early 1990s. When the WTC was attacked in 1993, it was not only the American public and political system that were taken by surprise. Although terrorism was not unknown in the United States, its incidents – at

least since the Civil War – had been neither frequent nor threatening on the scale with which we have become all too familiar in recent years. As a result, the then-existing legal system was not sufficiently prepared to deal with the onslaught.

The inadequacy of the legal tools for combating terrorism came into sharpest relief in the months immediately following the WTC bombing. By then, it had become clear that an international jihad army, under the leadership of Sheik Omar Abdel Rahman – the blind cleric who led the murderous Egyptian Gama'at al Islamia (or Islamic Group), which had played a key role in the 1981 assassination of President Anwar al-Sadat – had been had been forming since the late 1980's. This militia had actually been surveilled by the FBI during 1988 and 1989, the time during which it first started conducting paramilitary exercises in marksmanship, assassination tactics and explosives training in remote outposts like Calverton, Long Island, and western Connecticut.

While it is difficult in our post-9/11 world to look at history without the prism of all we have been through for the past twelve years, it is important to underscore that this was what might be called the pre-terror era. We now know that paramilitary training – not only in the U.S. but overseas – is perhaps the surest sign that people are committed to doing our nation harm. But at the time, the U.S. government was not investigating the nascent group in the New York area as a terrorist organization. Rather, understanding that the training might, at least in part, be geared toward supporting the Afghan mujahideen, the FBI's concern was that the group could be violating federal "neutrality" laws, which generally prohibit American persons (citizens and legal aliens) from helping make war on a country with which the United States is at peace.

The true significance of this training emerged only after the WTC bombing. It was then that the old surveillance photos of the training were reviewed and found to depict key members of the bombing conspiracy. These included Mohammed Salameh, Nidal Ayyad and Mahmud Abouhalima, all later convicted of the WTC bombing; Clement Hampton-El, later convicted of terrorism charges relating to the bombing; and El Sayyid Nosair, later convicted not only of the same terrorism charges but also the 1990 Kahane homicide. I should note here that Abouhalima and Hampton-El, even then, even before any of the atrocities that followed, were already prominent figures in what was a growing jihadist movement. Why? Precisely because they had gone to Afghanistan, they had participated in the rigorous training there, they had fought with the mujahideen, and they had come back to the United States to share what they had learned with the new recruits.

The crucial role of paramilitary training – especially the kind imported from overseas – was also evident from the activities of two other men who were central to the WTC bombing conspiracy. Ahmed Ajaj had settled in Houston, Texas, upon first arriving in the United States on September 9, 1991, and petitioning for political asylum. He was permitted to remain at liberty – despite failing to show up for his immigration hearing. He used that liberty to make some necessary militant contacts. These helped him arrange to attend a terrorist training camp in Afghanistan.

Ajaj left the United States to do precisely that in April 1992. When he returned from the training on September 1 of that year, he was not alone. His traveling companion, aboard a flight to New York City from Pakistan, was Ramzi Ahmed Yousef, a trained explosives expert who would later become the chief architect of the WTC

bombing. Nor was Ajaj empty-handed. He had in tow items that his training had taught him would be most valuable: bomb making manuals and instructions on the creation of false identity documents.

Tragically, while Ajaj was arrested on immigration charges upon attempting to enter our country, Yousef was permitted to enter and remain at liberty upon claiming asylum. He immediately took up residence with Salameh in New Jersey and spent the next six months experimenting with various compounds and finally constructing the powerful urea nitrate explosive that was detonated at the WTC, killing six people including a pregnant woman, injuring countless others, causing hundreds of millions of dollars in damages, and, effectively, declaring war on the United States.

Yousef, of course, eluded capture for nearly two years, fleeing the U.S., returning to militant strongholds overseas, and planning what became known alternatively as the "Bojenka" conspiracy or the "Manilla Air" conspiracy – a plot to bomb U.S. airliners while they were in flight over the Pacific, which claimed the life of one man, and nearly took down a crowded flight, as a result of one of Yousef's test runs during which a bomb was detonated using a timing device.

The realization in early 1993, after the WTC bombing, of an emergent, international jihad army with members stationed inside the United States had immediate consequences. An acceptance of responsibility letter penned by Yousef warned that the terrorist militia had many trained members and was fully prepared to strike again. This proved instantly to be the case. An FBI informant soon learned that a plot for even greater devastation was underway: the aforementioned "Day of Terror" conspiracy.

Once again, paramilitary training proved critical to this plot, which was to be carried out by members of different cells under Sheik Abdel Rahman's influence.

Of course, by the spring of 1993, in the wake of the WTC bombing, we already knew that while the Afghan mujahideen was quite real, it had also been ostensibly valuable as a cover in the United States for the true purpose of the training. This was plainly to have trained individuals, infiltrated into our community and at the ready to perform violent jihadist activities, on short notice, whenever and wherever the opportunities presented themselves. Still, in the investigation of the Day of Terror plot by the FBI and the New York Joint Terrorism Task Force, the obvious was made explicit.

An informant became accepted into one of the aforementioned cells, a primarily Sudanese group under the leadership of a man named Siddig Ibrahim Siddig Ali. Siddig Ali repeatedly stressed to the informant the importance of training, and detailed how members of his cell had conducted training exercises in a public park in Jersey City, New Jersey as well as in days-long ventures to rural Pennsylvania. As was the case with the purported Afghanistan training in the late 1980's and early 1990's, participants in the training had a cover story: they were readying themselves to take up arms in the former Yugoslavia on behalf of the Bosnian Muslims. But Siddig Ali explained to the informant that the essential point was to have people "ready for action" whether in the U.S. or overseas. As the leader of the cell, Siddig Ali elaborated that this arrangement meant he could plot terror operations, get the necessary approval from Sheik Abdel Rahman, and then follow the practice of not "speak[ing] to these people about what we are going to do until the last moment" since these people had already been instructed to stand "ready" for further instructions.

Indeed, in the early spring of 1993, Siddig Ali had planned to use the cell to carry out the assassination of Egyptian President Hosni Mubarak during the latter's scheduled visit to New York City. The plot was aborted when Siddig Ali learned that law enforcement had become suspicious and was taking some investigative steps. But Amir Abdelgani, a member of Siddig Ali's cell, later confirmed for the FBI's informant the "sleeper" nature of the cell by telling the informant that even though Siddig Ali had not told Abdelgani about targeting Mubarak, Abdelgani had been trained and would have been willing and able to carry out an attack.

The paramilitary training we are talking about was no amateur hour. Its leaders had military experience, including combat, and trained would-be terrorist operatives in commando tactics, the use of small and large firearms, the construction of explosives, techniques for neutralizing sentries, and various other maneuvers. It should come as no surprise then that, before law enforcement interdicted the Day of Terror plot, the would-be bombers had engaged in a host of activities that were consistent with their training – including repeated and detailed surveillance of the targets.

Of course, unearthing this plot before it could be executed was an enormous public service. In matters of terrorism, the object for law enforcement (and for the rest of government) must always be to prevent attacks from happening rather than to bring terrorists to justice only after mass murder has already occurred. But one important effect of thwarting the Day of Terror plot was the revelation that there were gaping weaknesses in American anti-terrorism law – weaknesses that counterintuitively penalized investigators for foiling plots.

For example, under American criminal law, circa 1993, a successful bombing could be punished with a term of life imprisonment and, once capital punishment was revived under federal law in the mid-1990s, by execution if the bombing had caused any deaths. The criminal code, however, contained no specific provision for bombing *conspiracy*. Thus, if a group plotted a bombing but was interrupted by effective law enforcement, the plotters had to be charged under the catch-all federal conspiracy statute (18 U.S.C. ' 371), which punishes an agreement to violate any criminal statute with a maximum *five-year* penalty (and no requirement that the judge impose any minimum term of incarceration at all). Such a term was grossly insufficient for a conspiracy to kill tens of thousands.

Federal law also made it a crime to attempt to carry out a bombing (18 U.S.C. ' 844), which at least provided another charge against unsuccessful plotters. But the penalty was paltry: a maximum of ten years' imprisonment (and, again, no requirement that the judge impose any minimum term of incarceration at all). Attempt law, in addition, created a counterproductive tension between public safety and prosecution. Proving attempt requires the government not only to show that the plotters agreed to commit the crime at issue (here, bombing) and took some preparatory measures, but also that those measures amounted to a "substantial step" toward the accomplishment of the crime. But the difference between "mere preparation" (which is insufficient) and a "substantial step" (which is required to establish guilt) can be murky – made more ambiguous back in 1993 because the leading court case on attempt, which was not a model of clarity, came in the context of an attempted bombing.[1]

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[1] *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

The tension here was palpable. Because prosecutors and investigators must fear that purposeful actions to carry out a bombing could be construed as "mere preparation" rather than a "substantial step," their incentive is to let the conspirators go forward with their plans until the last possible second in order to bolster the chances of conviction. Public safety, however, strongly counsels against this approach, for if the investigators lose control of events – which can easily happen when dealing with organizations whose operations are by nature secretive – massive loss of life can result. Fortunately, this did not occur in the Day of Terror plot, but the possibility of its happening was too great in the WTC bombing era.

The Clinton Administration's Justice Department and the members of this Congress are to be greatly commended for energetically dealing with these grave problems in the best tradition of bipartisanship in the arena of national security. In 1996, anti-terrorism legislation was enacted which both ratcheted up the penalties for terrorism-related crimes and, perhaps more significantly, gave prosecutors urgently needed tools, designed to root out terrorist plots at an early stage, shut down funding channels, and place a premium on preventing terrorist acts rather than simply prosecuting them afterwards.

Among these much needed improvements were the material support statutes this subcommittee is again considering today, Sections 2339A and 2339B of Title 18, United States Code. Of course the greatest threats we face come from the frontline operatives who are actually willing to carry out attacks. But, as we have learned the hard way, those terrorists simply cannot succeed without support networks: people and entities willing to

fund them, to train them, to provide them with fraudulent documents that facilitate their travel, and to provide them with the other assets they need to carry out their savage deeds.

The material support statutes target just this type of behavior. Thus, it should come as no surprise that the material support statutes have become the backbone of anti-terrorism enforcement since they were enacted in 1996. And, I respectfully submit, it is no accident that we have not had another domestic terror attack since 9/11, during a period of time when the Justice Department under President Bush has been appropriately aggressive in using the material support statutes to isolate and disrupt activity that facilitates terror networks.

I strongly support the theory behind both statutes. Section 2339A is the most straightforward. If the government can prove that someone has contributed assets or any kind of assistance with the intention or awareness that these resources will be used to carry out the types of violent crimes we commonly associate with terrorism, the law must treat such contributions harshly – both to neutralize the contributors who have been identified and to convey an unambiguous message to other would-be contributors that this behavior will not be tolerated.

Section 2339B is at least equally important, although it has been subjected to more criticism. It stipulates that once an entity that has been designated a "foreign terrorist organization" (FTO) by the Secretary of State, it is illegal to provide material support to that organization. Because many terrorist organizations compartmentalize themselves into purportedly separate military wings, political wings and social services wings, it is sometimes contended that Americans should not be restrained from contributing assets, advice or expertise to the non-military activities.

I respectfully submit that this is ill-conceived. Our goal here, for the sake of national security, has to be to marginalize and eradicate terrorist activity. Organizations that practice terrorism must be made aware that, no matter what good they may seek to do, by participating in conduct that targets civilians and aims to extort concessions by force, they forfeit any claim on our good will. Once an organization has been designated an FTO, it must be considered radioactive – an entity that merits only our contempt, not our contributions.

It also bears noting here that Congress did not give the Secretary of State a blank check. Federal law provides for a rigorous administrative procedure, the State Department must support its conclusions with findings of fact, and key congressional members must be given an opportunity to object prior to the designation's publication in the Federal Register. Moreover, even though it may be an avowed enemy of the United States, an FTO is permitted to appeal the designation to the U.S. Court of Appeals for the District of Columbia — a system that provides due process but also centralizes all adjudication in a single tribunal that can develop the requisite competence and apply a uniform set of analytical standards.

These well-considered safeguards should give us confidence that only the organizations which deserve the designation are being targeted, and that an entity which is either wrongly accused of practicing terrorism or that convincingly renounces terrorism has an open avenue to challenge the designation. Given that, the law does not and should not allow individuals, however well intentioned they may be, to provide material support. Such individuals may sincerely believe they are acting in a socially beneficial manner by contributing resources to non-violent activities. Many resources that terrorists need,

however, are fungible. A dollar contributed for charity may be used for weapons. Expertise or other assets that help an FTO carry out seemingly innocent activity may allow it to shift a greater percentage of its resources to violence or to function more efficiently and more attractively – which inevitably helps its recruiting and its capacity to use force. If we are to win the war in which we are engaged, these organizations must be starved and ostracized, not fed and emboldened.

I strongly support the measures in the proposed bill to improve the effectiveness of the material support statutes, as well as the much needed crack-down on the menace of paramilitary training. I commend Senator Kyl for proposing them.

Last year's Intelligence Reform Act provided much needed clarification to statutory terms such as "personnel", "training", and "expert advice or assistance," to address constitutional vagueness objections; expanded the jurisdictional bases for material-support offenses; and clarified the mens rea element to require that the government need only show a defendant knew that the organization to which he gave material support either engaged in terrorism or was designated as a terror group. These changes both helped the government target appropriate offenders and promoted fairness and due process by ensuring clarity in the law.

Allowing such improvements to sunset would take us a step back to the uncertainty of judicial decisions that created doubt about the statutory requirements and thus reduced the effectiveness of material support laws as the vital law enforcement tool Congress intended them to be. I respectfully urge the committee that the sunsets be removed and the improvements enacted by the Intelligence Reform Act be made permanent.

I also support the increased penalties for material support offenses. Terrorism is the most profound national security challenge our country faces, and it must result in penalties that reflect that reality. The Supreme Court's recent ruling that the federal Sentencing Guidelines are advisory at best will obviously challenge this Congress in many ways to ensure that the worst offenders are subjected to commensurate terms of incarceration. Mandatory minimums are often unpopular, and in many instances they may be overkill. But here, we are not dealing with a blight we are merely seeking to prosecute. We are actually at war with a vicious terror network and our highest priority must be to eradicate terror networks. If there is any context in which mandatory minimums are proper and prudent, it is surely this one.

Finally, it is time to recognize in an assertive way the threat posed to our country by militant Islam's emphasis on paramilitary training. Recent expert estimates suggest that as many as 70,000 people may have gone through paramilitary training at al Qaeda camps over the years.[2] Obviously, not every one of those trainees becomes or has any intention of becoming an active terrorist operative. But we would be foolish not to recognize that some percentage will, that this percentage may well be higher than we'd like to think, and that even if it were only one percent that would be far too many. Nor can we close our eyes to the fact that paramilitary training by at least some defendants has been a staple of virtually all the major terrorist prosecutions in our country over the past dozen years. As we have seen, it is what makes effective sleeper cells possible.

I thank the subcommittee for its time and attention.

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[2] See, e.g., BBC Report ("Some 70,000 people received weapons training and religious instruction in al-Qaeda camps, German police say") (Jan. 1, 2005) (http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4146969.stm).