STATEMENT OF JAMES K. ROBINSON
FORMER ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY
AND HOMELAND SECURITY

June 22, 2004

Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to offer my views on the topic of S.___, the "Judicially Enforceable Terrorism Subpoenas Act." The issues before this subcommittee today are of critical importance to the Country and I commend the subcommittee for holding this hearing. I also want to thank you personally Mr. Chairman and Senator Feingold for your serious attention to the terrorist threat posed today to the United States and the world. While serving as the Assistant Attorney General For The Criminal Division, I was honored to work with the Judiciary Committee on many important criminal justice issues, and I am honored to appear here today to address these measures designed to help law enforcement in waging the war against terrorism.

As September 11, 2001 taught us all too well, terrorism presents a grave threat to our national security and to the safety of American citizens throughout the world. Indeed, recent events, including the heinous and vicious killing of Mr. Paul Johnson last week, demonstrate that Al-Qaeda and other terrorist groups wage their war against freedom and America without respecting human life and the fundamental principles of human rights. Thus, America must bring all of its resources to bear in the fight for freedom and against terrorism. The bill sponsored by Senator Kyl with respect to administrative subpoenas in terrorism cases is an example of America's continuing commitment to winning the battle against terrorism by examining all potential tools to assist law enforcement in this war. I appreciate this personal commitment to making America and Americans everywhere safer.

While I have no doubt that this bill and representative Feeney's bill in the House, HR 3037 (the "Antiterrorism Tolls Enhancement Act of 2003") are offered with America's best interests in mind, some of their provisions merit very careful consideration from both a law enforcement and a civil liberties perspective. These proposals merit the very careful analysis that the subcommittee is undertaking, and I congratulate the subcommittee for holding this hearing to give appropriate attention to the issues they present. I would like to address my remarks to an issue I trust the subcommittee cares deeply about: the importance of maintaining the critical balance between arming law enforcement with effective tools necessary to do its job quickly and effectively, while still continuing to protect the liberty rights of American citizens to be free from undue interference with their rights by their government. As the subcommittee may already appreciate, enacted as currently written, these proposals would fundamentally change the traditional limits on the power of law enforcement to interfere with the liberty rights of American

citizens in dealing with their government. More specifically, I encourage the subcommittee to carefully scrutinize how the new devices contained in these proposals curtail important checks and balances and could well create legal and constitutional challenges that could, in the end, cause the war on terrorism more harm than good.

As I read Senator Kyl's Judicially Enforceable Terrorism Subpoenas Act of 2004, the proposed bill would allow the Attorney General to delegate to law enforcement agents the power to issue administrative subpoenas to compel the attendance and testimony of American citizens at secret Executive-branch-only proceedings, and to require the production of any records found relevant or material to a terrorism investigation. Those who failed to comply with such a subpoena would be subject to civil and/or criminal penalties. Those who violate these bill's secrecy requirements could be prosecuted for doing so. Further, such subpoenas would be subject to judicial review only if a person who receives a subpoena challenges it in court through a motion to quash or some other means, and then only on very limited grounds. Congressman Feeney's bill is similar but broader in that the compelled testimony is not limited to custodians of subpoenaed materials concerning their production and authenticity.

Over the years, Congress has been reluctant to expand the powers of criminal law enforcement agents to interfere with the liberty and privacy rights of American citizens through administrative subpoenas used exclusively to conduct criminal investigations. While Congress has authorized administrative subpoenas in a variety of civil – and some criminal – contexts, the use of such subpoenas for criminal investigations raises a host of constitutional and policy issues not present in civil administrative matters. To my knowledge, Congress has never authorized the creation of a potentially secret Executive branch police proceeding of the type contemplated by these proposals. The benefit to law enforcement of granting this power must be carefully balanced against the potential loss of liberty involved. With limited exceptions, absent judicial process such as a search warrant, a grand jury subpoena or a trial subpoena, American citizens have always had the right to decline to answer questions put to them by the police or to deliver their documents without a search warrant. Just yesterday the Supreme Court, in *Hiibel v. Sixth Judicial District Court Of Nevada, Humboldt County, __U.S.__(2004),* while holding that a person stopped by the police in a proper *Terry* stop with reasonable suspicion must give his name to the police under a state statute requiring him or her to do so, the Court recognized that American citizens under our constitutional system generally have the right to refuse to answer questions put to them by the police or to agree to a request that he or she appear at the police station for questioning or face contempt of court charges and potential imprisonment until submitting to the questions of the police.

The administrative subpoenas for terrorism cases contemplated by the proposals under review in today's hearing would compel American citizens to appear for compelled questioning in secret before the Executive branch of their government without the participation or protection of the grand jury, or of a pending judicial proceeding, to answer questions and produce documents. No showing of reasonable suspicion, or probable cause or imminent need or exigent circumstances would be required to authorize such subpoenas. Years ago Justice Hugo Black, dissenting in *Anonymous v. Baker***,** 360 U.S. 301, 299 (1959), condemned procedures authorizing "compelled testimony to be given in communicado," saying: "in fact it was Star Chamber judges who helped make closed door proceedings so obnoxious in this country that the bill of rights guarantees public trials and the assistance of counsel. And secretly compelled

testimony does not lose its highly dangerous potentialities merely because it represents only a 'preliminary inquisition . . . ."

The United States Supreme Court has held that witnesses appearing before federal grand juries need not be given the Miranda warnings in such proceedings because these proceedings are very different than the type of proceedings envisioned by the administrative subpoena proposals under review today. The Court in *United States v. Mandujano,* 425 U.S. 564, 579-80 (1976), made the point "that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial interrogation." the Court noted that: "the marked contrasts between a grand jury investigation and custodial interrogation have been commented on by the Court from time to time. Mr. Justice Marshall observed that the broad coercive powers of a grand jury are justified, because 'in contrast to the police--it is not likely that [the grand jury] will abuse those powers." (citations omitted). While my experience has been that federal agents act in good faith in conducting their investigations, nevertheless, as Mark Twain is quoted as having once said: "to a man with a hammer, a lot of things look like nails!" To an agent with an administrative subpoena, a lot of things may look like they need a subpoena. The Supreme Court noted that there are important safeguards present in the grand jury system that would simply not be present in the context of the secret *ex parte* proceedings contemplated by the proposed administrative subpoenas system. In *United States v. Williams*, Justice Scalia explained that the grand jury is "[r]ooted in long centuries of Anglo-American history" and "acts "as a kind of buffer or referee between the government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992)

While noting that the investigative power of federal grand juries are very substantial, the Supreme Court in *United States v. R. Enterprises,* 498 U.S. 292, 299 (1991), said: "the investigatory powers of the grand jury are nevertheless not unlimited . . . . Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or intent to harass." Critical to the integrity and effectiveness of the grand jury system for the investigation of federal crimes is the active participation of the skilled prosecutors of the Department of Justice and their supervisors acting pursuant to the detailed guidelines set forth in the United States Attorney's Manual. Their involvement not only makes for more effective investigations, it minimizes the likelihood of legal problems that can cause difficulties in the prosecution of the case at the post-investigative stage.

Today, with very few exceptions, subpoenas requiring Americans to provide secret sworn testimony and/or produce documents to the government in a criminal investigation, may only be issued by a grand jury with the active involvement of federal prosecutors. The secret proceeding contemplated by the proposals under review today appear virtually unprecedented, as is the potential that administrative subpoenas could be issued by federal agents without the approval of federal prosecutors. Indeed, the proposal creates a secret system not even available in the current grand jury system where under Rule 6(e) of the Federal Rules Of Criminal Procedure, witnesses are free to discuss the subject of their grand jury testimony on the courthouse steps after their appearance if they choose to do so. Under the proposals being considered today, such conduct with respect to an administrative subpoena would become a new federal crime. As a core constitutional institution adopted in this nation’s earliest days, the grand jury has been the primary instrument used to investigate and charge federal crimes for well over two hundred years. The United States grand jury is a body of ordinary citizens that serves to protect the

innocent and indict those as to whom the grand jury has probable cause to believe to be guilty of a crime. Similarly, Justice Department prosecutors and federal judges protect the innocent and ensure that the justice system operates fairly and with due process. The United States Attorney's Manual has an elaborate system of checks and balances on the powerful investigative powers of the grand jury. Thus, the current subpoena issuance process serves as a check on the mistaken, or perhaps improper, use of power each time a subpoena is issued in a criminal case. As Assistant Attorney General, I testified before Congress against "reform" proposals to weaken the grand jury system by requiring lawyers in the grand jury and other measures. I did so because I believe this system has served America well over hundreds of years and that changes, including the creation of an alternative system not subject to those protections, should be undertaken with great caution.

Under Senator Kyl's proposed Judicially Enforceable Terrorism Subpoena Act of 2004 and Representative Feeney's proposed Antiterrorism Tools Enhancement Act of 2003, however, the grand jury or judge could be largely removed from the criminal investigative process in terrorism cases. The potential for checks on the abuse of governmental power would only exist where the person subpoenaed hires a lawyer to challenge the subpoena in federal court. Such a challenge would require a person to expend potentially substantial resources, and in many cases, the subpoenaed party holding information concerning third parties would have little incentive to expend the resources to do so. In many instances the person's whose privacy rights might be adversely impacted by the issuance of such a subpoena would never be notified that their documents have been sought by the government and they would have no standing to challenge the propriety of the subpoena in any case. At this point, it seems to me that the present system for investigating terrorism is far more consistent with our traditional notions of freedom and individual liberty than the system contemplated in these proposed bills.

I believe that any effort to change the current system in the dramatic way contemplated by these proposals should be supported by compelling evidence that there is a real need for federal agents to be granted this new investigative power. Furthermore, any power granted by Congress to meet such a need (if one is found) should be narrowly tailored to address the demonstrated need. If, for example, it is concluded that there is a real danger that the absence of the administrative subpoena power might prevent law enforcement from addressing a "imminent threat" to national security or from protecting the lives of American citizens from imminent danger, it might be appropriate to use the approach Congress took with respect to authorizing administrative subpoenas by the Secretary of the Treasury in cases where there is an imminent threat against a person protected by the Secret Service such as the President. I was pleased to see that the administrative subpoenas authorized by Senator Kyl's proposed bill uses a more tailored approach by proposing far less sweeping administrative subpoena powers than the bill proposed by Representative Feeney. As I understand it, Senator Kyl's bill would limit administrative subpoenas, at least in the first instance, to the production of "records or other materials" and testimony "by the custodian of the materials to be produced concerning the production and authenticity of those materials." I was, however, uncertain about the reasons, or the need, for authorizing a broader, court-ordered administrative subpoena in the event of "contumacy" or in cases where the documents are not produced in response to the subpoena. As I understand the proposal, in such cases, the court could compel "testimony touching the matter under investigation" that would not be limited to the production or authenticity of the documents

covered by the subpoena. Once the matter has reached this stage, the reason for not simply seeking a grand jury subpoena rather than pressing for an administrative subpoena is unclear.

As drafted, nothing in the bills proposed by Senator Kyl and Representative Feeney would prevent the administrative subpoena power from being delegated to federal prosecutors, agents of the Federal Bureau of Investigation or other law enforcement agents to use in their discretion without supervisory approval. While the bills direct the creation of Justice Department guidelines to "ensure the effective implementation" of this authorization for the use of administrative subpoenas, Congress would be delegating very substantial power to the Executive branch without knowing by whom that power would be employed or what limits, if any, would be placed upon its use. While our Nation's federal prosecutors and agents are extraordinary individuals and represent some of our Nation's best and brightest, I question whether - even if the case for administrative subpoenas in terrorism cases is made - it is wise for Congress to delegate such significant governmental power without insisting that its use be approved at the highest level of the government and be limited to the least intrusive implementation required to accomplish the objective of the legislation. For example, when Congress empowered the Secretary of the Treasury in 18 U.S.C. § 3486(a)(1)(ii) to approve the issuance of administrative subpoenas with respect to "an investigation of an imminent threat . . . against a person protected by the secret service," Congress required that the Director of the Secret Service determine that a threat against the Secret Service protectee be "imminent." When a finding of "imminence" is not appropriate, the Secret Service investigation proceeds in the normal course through the grand jury process. Perhaps a similar approach should be considered for terrorism cases when there is an imminent threat of harm to the national security or to human life.

Of course, individual rights are not absolute; those rights must be balanced against the need effectively to fight terrorism – perhaps the greatest danger to America that exists today. I am not yet convinced, however, that the administrative subpoena power is a necessary change in the law or that the subpoena power proposed in these bills are narrowly tailored enough to avoid unnecessary intrusion on the liberty rights of American citizens. I am also concerned that the easy availability of this new tool would result in federal agents bypassing the checks and balances built into our current grand jury system that requires the active involvement of federal prosecutors and compliance with the guidelines set forth in the United States Attorney's Manual for issuing grand jury subpoenas. The government already has numerous legal tools to obtain records and compel witnesses to testify. In exigent circumstances, a search without a warrant is even possible—assuming, of course, probable cause. Federal prosecutors routinely and easily receive grand jury subpoenas today. In addition, there are likely other ways of altering the subpoena issuance process in terrorism investigations that retain the checks on executive power discussed earlier. Additionally, the FBI presently uses national security letters that require businesses to turn over many kinds of records in counter-terror and counter-intelligence investigations. Another tool that the government presently uses to obtain records and evidence in terror probes is the FISA warrant, including an emergency FISA warrant approved personally by the Attorney General that provides a 72-hour window for wiretapping or eavesdropping before review by an intelligence court.

I believe that we must fight against terrorism and for freedom with all of our resources. However, as we fight for freedom, we must live freely, and in a way that shows the world that

we respect, honor, and cherish our individual freedoms. Mr. Chairman and members of the subcommittee, that completes my prepared testimony. I appreciate the opportunity to appear before you and will be pleased to attempt to respond to your questions at this time.