STATEMENT FOR THE RECORD
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I.
INTRODUCTION

Chairman Sánchez, Ranking Member Cannon, members of the Subcommittee, it is an honor to appear before you today to discuss the performance of the United States Justice Department in the prosecution of terrorism cases.

I come to today's hearing with both a professional and academic interest in the prosecution of terrorism cases. As you may know, I have handled national security related cases for many years, including terrorism cases. I am currently lead counsel in the cases of Dr. Ali Al-Timimi and Dr. Sami Al-Arian before different judges in the United States District Court for the Eastern District of Virginia. I also teach in the areas of constitutional criminal law and litigation at George Washington University.

Despite my work as a defense attorney in terrorism and national security cases, I support a vigorous and comprehensive effort to combat terrorism. Like others, my wife and four children live minutes from the Capitol. Terrorism is a threat to us all. Moreover, for everyone living in this area, terrorism is no abstraction. Indeed, American Airlines Flight 77 crashed in my rear view mirror as I passed the Pentagon on September 11, 2001. I do not know a single lawyer or person who does not want terrorists to be prosecuted and punished. The problem is that the Bush Administration is not punishing terrorists. For the most part, the terrorism cases cited by the Administration through the years have targeted non-terrorists for conventional crimes – only to add them to the list of successful cases. Ironically, in major terrorism cases, the Administration has suffered repeated defeats in court.

I also want to stress that the criticism in this testimony is not meant to paint all Justice Department attorneys as unprofessional or unethical. The fact is that I know and I have worked with many ethical and professional prosecutors in the Justice Department. Indeed, I have heard many complaints about the policies of this Administration and the political pressures placed on prosecutors. There are many talented prosecutors who want to take serious terrorism cases. However, they tend to be displaced by prosecutors who are known for their blind pursuit of terrorism cases. This is

a small percentage of the prosecutors who work in this field, but they play a dominant role in setting priorities for local offices.

Since the 9-11 attacks, the Bush Administration has rightfully placed a priority on the investigation and prosecution of terrorism cases. The long controversy over the Administration's handling of terrorism cases has never been about the goal of increased terrorism investigation but rather over the means used to achieve it. President Bush has been criticized by many, including myself, for his continuing effort to circumvent the federal courts and try individuals in a legal system of his own making. That effort, which was the subject of the recent decision in *Boumediene v. Bush*, ___ U.S. ____ (2008), 2008 U.S. LEXIS 4887, is beyond the scope of today's hearing. However, it reflects a certain hostility of the Administration toward what it calls the "law enforcement approach" to terrorism cases. That hostility and suspicion toward the federal courts is, in my view, a contributing factor in the dismal performance of Administration in this area. The creation of a two-track system for terrorism suspects has served to distort and undermine the prosecution of terrorism suspects. The abusive treatment of Jose Padilla is an example of how the Administration effectively undermined its own of a legitimate terrorism target. Ultimately, it was unable to prosecute Padilla for the original allegations and was left with charging under the material support provision.

Terrorism prosecutions are too important to reduce to yet another subject for partisan spin and distortion. In my view, the record is clear. The Bush Administration has assembled arguably the worst record in prosecuting terrorism cases of any modern presidency. Indeed, the Administration's high profile losses may have fueled the desire to inflate prosecution figures through the years. Despite the recent claims of success, the Administration's record, when stripped of the statistical gloss, is hardly a matter for commendation or celebration. What is more troubling, however, are the reasons for these failures and the motive to inflate the numbers of prosecutions.

II.
THE BUSH ADMINISTRATION'S RECORD OF TERRORISM PROSECUTIONS

Soon after the 9-11 attacks, former Attorney General John Ashcroft launched what he promised would be a clean sweep of homegrown and

foreign terrorists lurking in the homeland. To that end, he demanded and received unprecedented powers under the PATRIOT Act and other legislation. Ashcroft's dire predictions and expanded authority created a need to produce cases to show that there was a true need for the increased budget and powers – as well as a decrease in civil liberties. Ashcroft prodded U.S. Attorneys to produce such annual figures to show, in his words, that "the Patriot Act is al-Qaida's worst nightmare." In his first 29-page report to Congress, Ashcroft cited 310 such cases as "a mountain of evidence that the Patriot Act continues to save lives." On closer examination, this report (like so many that followed it) was found to be inflated with immigration and non-terror related cases. In order to "make the grade," U.S. Attorneys converted various common offenders into terrorists. For example, in New Jersey, prosecutors had only two cases to offer to Mr. Ashcroft in their annual body count, so they included 65 Middle Eastern men prosecuted for lying on visa applications as terrorism cases.

A. The Justice Department's Broad Definition of Terrorists

Despite criticism for years over the exaggeration of case numbers and the over-charging of many cases, the Justice Department has been undeterred. For example, a recent study of cases cited as terrorism matters in Nevada showed the same pattern. In the case of Moez and Gina Zakraoui, the prosecutors were faced with a garden-variety arson case. They were accused of burning down the pizza parlor. However, the U.S. Attorney listed them as two of the 28 terrorists prosecuted by that office.[1] Many of the cases involved people from Asian and Latin American countries with immigration problems. Other "terrorists" included (1) a Connecticut man who was fined $275 for going through airport security with a knife; (2) a California man convicted of having counterfeit social security card and money orders; (3) a man who took a security device off a military fence; and (4) a man who threatened a couple with a claim of having anthrax and had to undergo mental health treatment.

United States Attorneys obviously strive to land on the top of the list for such cases. It turns out, for example, that Utah is a hotbed of terrorism. With 96 such terrorist prosecuted one year, Utah led the nation in per capita

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[1] Alan Maimon, *Changing Definitions*, Las Vegas Review-Journal, August 27, 2006, at 6.

prosecutions. It turns out that most of the terrorists in Utah seek to undermine the nation through identity theft.[2]

The tendency to convert conventional crimes into terrorism cases is also a signature of the Joint Terrorism Task Force (JTTF). In one of its more notable investigations in November 2001, the JTTF led Operation Tarmac and checked the credentials of airport workers. As would be found in most large workplaces, it found false social security numbers, fake driver licenses, and other types of fraud. It counted every arrest as a terrorist charge despite the view of the Inspector General that they had nothing to do with terrorism.

Since Main Justice has been pummeled with public questions and a fair degree of ridicule for years, the failure to reform these practices indicates that it is obviously content with allowing such inflation to occur. Notably, it has not tried to narrow the definition of terrorism cases that is found in places like the Legal Information On-line System (LIONS) Manual. This definition allows prosecutors to count virtually any prosecution intended to disrupt potential terrorist threats. The Justice Department also has not sought more accurate reporting standards despite the criticism of its own Inspector General in its recent report "*The Department of Justice's Internal Controls Over Terrorism Reporting.*" The accuracy of such reporting has been criticized for years. *See* General Accounting Office, *Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Conviction Statistics*, January 2003.

B. Creation of a Body Count Culture of Prosecution

The Justice Department's inflation of terrorism prosecution numbers is a case of history repeating itself. In Vietnam, the Defense Department learned how the "body count" approach was corrosive and counterproductive to actual war fighting. Commanders eager to meet perceived quotas or expectations began to count civilians and even animals killed as dead enemy soldiers. It led to a false sense of security and success that came crashing down with the Tet Offensive. The same phenomenon has occurred at the Justice Department. Ordered to produce body counts, U.S. Attorneys quickly learned how to game the system; to pad their reports by counting immigration cases and unrelated prosecutions. Worse yet,

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[2] *Id.*

prosecutors began to bring terrorism charges in conventional cases – often triggering public ridicule and criticism.[3] These have included the prosecution of protesting nuns, protesters, and performance artists in national security cases.

The pressure to produce body counts is obvious in the padding of the accounts to Congress. Consider the figures since 2001.[4] From 2001 to 2007, the Justice Department claimed to have prosecuted 632 people in terrorism cases. Of those, only 202 were actually charged under a terrorism statute. Looking at those 202, sixty-nine percent were convicted. By adding the non-terrorism charges, the Justice Department increases its performance. Those 430 individuals were charged with such things as immigration violations (7.54% of charges), commercial fraud (8.57%), general fraud (13%), racketeering (17%), and other crimes. The conviction rate for those non-terror offenses was 92%. By intermixing non-terror cases, therefore, the Justice Department can claim a high number of prosecution as well as a higher level of success in such prosecutions.

The fact that the Justice Department did not bring terror charges in these collateral cases is telling. The Administration has shown little hesitation to charge individuals under terrorism statutes with the slimmest possible evidence. Indeed, with changes in the material support provisions, the standards are so low that they act as a virtual strict liability offense – often compelling pleas. If there were serious evidence of terrorism, it is highly doubtful that the Administration would simply bring a general fraud charge or immigration charge.

There is an obvious institutional interest in producing impressive numbers of terrorism cases. It is difficult to convince Americans that expanded powers and shrinking privacy is necessary without a steady stream of prosecutions to show the continuing danger at home. This is particularly important when the Justice Department has received an increase of funds

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[3] *See generally* Jonathan Turley, Political Critics, Protesters and Artists Are Among Victims of Ashcroft's Policy, Baltimore Sun, July 23, 2004, at 19A; Jonathan Turley, Students, Nuns and Sailor-Mongers, Beware, Los Angeles Times, October 17, 2003, at 15.

[4] These figures are taken from “Terrorist Trial Report Card: Update January 1, 2008” by The Center on Law and Security at the New York University School of Law.

from $737 million in fiscal year 2001 to $3.6 billion in 2006 for counterterrorism efforts. Thousands of personnel have been shifted over to terrorism investigations and prosecutions. Not only does this create an obvious incentive to justify budgets with inflated numbers, but it increases the likelihood that conventional crimes will be defined in terrorism terms by investigators tasked with such cases. As Abraham Maslow stated, "if the only tool you have is a hammer, you tend to see every problem as a nail." With this new massive enforcement system looking for terrorism in every corner of the country, it is not surprising that they tend to see terror-elements in the most conventional cases.

C. The Distortive Effect of This Culture on the Legal System

The pressure to produce terrorism cases has tended to distort the legal system. It has led to extended grand juries that seem solely designed as endless fishing expeditions.[5] One such example that I have witnessed involves the continuing investigation related to International Institute of Islamic Thought (IIIT). The IIIT investigation has been ongoing for many years without a single indictment. The Justice Department can cite only one indictment, which was unrelated to IIIT. Yet, the Justice Department continues to call various witnesses to the grand jury to discuss matters unrelated to IIIT.[6] Many defense attorneys have complained that grand juries like IIIT are being used for perjury traps and fishing expeditions by JTTF attorneys and designated AUSAs. Regardless of whether actual IIIT charges ever emerge from this grand jury, it has clearly been used to trawl for any possible charges that might be brought, including in areas far removed from the focus of the investigation.

The pressure to bring cases has also led to alarming allegations of prosecutorial abuse and possible crimes. This was evident in the terrorism

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[5] When terrorism charges are impossible, we have seen them use the grand juries for perjury traps – particularly for individuals who have been acquitted in earlier trials of terrorism charges like Abdelhaleem Ashqar, Dr. Sami Al-Arian, and Sabri Benkahla. Thus, after these men were acquitted, they received subpoenas to appear before grand juries with immunity. The pattern is always the same. If your client testifies, he is charged with some false statement. If he does not testify, they charge him with criminal contempt after an extended civil contempt confinement.

[6] My client Dr. Sami Al-Arian is one such witness.

case in Detroit where Judge Gerald Rosen threw out the convictions of Abdel-Ilah Elmardoudi and Karim Koubriti, after finding evidence of possible crimes committed by the Justice Department. The Justice Department eventually dropped all terrorism charges in the case. In throwing out the convictions, Judge Rosen found "[a]lthough prosecutors and others entrusted with safeguarding us through the legal system clearly must be innovative and think outside the conventional envelope in enforcing the law and prosecuting terrorists, they must not act outside the Constitution. Unfortunately, that is precisely what has occurred in the course of this case."

This pressure may also be a contributor to some of the documented misconduct by the Justice Department. We have seen admissions from the Justice Department that it has destroyed evidence in federal cases and given false information to federal judges. In one of my cases, I have seen such abuses first hand. For years, in the case of Dr. Ali Al-Timimi, we have struggled to show that the Justice Department withheld information from his trial. Recently, I was allowed to see some classified information in the case before Judge Leonie Brinkema. While this information is classified and I cannot share the details, I can state that the material reveals clear abuse of ex parte filings by the Justice Department and confirms that material evidence was withheld in the case. We are in the process of seeking the public disclosure of this record and pursuing further evidence of the withholding of evidence from the court and counsel.

D. The Administration's Record in Major Terrorism Cases

As noted earlier, the inclusion of non-terrorism cases tends to inflate not only the raw number of cases but the performance of the Justice Department in the area. In a surprising number of major terrorism cases, the Administration has performed poorly in court. In prior administrations, it was very rare to see the Justice Department lose a major terrorism trial. For the Bush Administration it is routine. A few such examples are illustrative of the problem.

Dr. Sami Al-Arian – The government spent an enormous amount of time and money prosecuting Dr. Al-Arian and defendants Ghassan Ballut, Hatim Fariz and Sameeh Hammoudeh in the United States District Court for the Middle District of Florida in Tampa. After a six-month trial and over 80 witnesses, a jury acquitted Dr. Al-Arian of eight of 17 counts. There were only two jurors who voted against

acquitting him of all of the remaining counts. Ballut and Hammoudeh were acquitted on all charges. No one was convicted of a single count and Dr. Al-Arian later agreed to plead guilty to a single count in exchange for being allowed to leave the country – an agreement that the Justice Department has broken as it continues to hold Dr. Al-Arian.

Dr. Sami Omar Al-Hussayen. The government billed the prosecution of Al-Hussayen in Idaho as a major terrorism prosecution. Al-Hussayen was a graduate student who ran an Islamic website. The Justice Department put on a six-week trial. The defense called only one witness. The jury in this conservative state acquitted him of all three terrorism charges, and three of the eight immigration charges. They deadlocked on the remaining immigration charges.

The Detroit Combat Cell Case. The Justice Department prosecuted Abdel-Ilah Elmardoudi and Karim Koubriti in Detroit under the claim that it had busted a major "sleeper operational combat cell." As previously noted, the convictions were thrown out after a judge concluded that the prosecution committed grave violations of federal law and professional ethics to secure the verdicts. Ultimately, the Justice Department dropped all terrorism charges.

Holy Land Defendants. The Bush Administration was widely criticized for its crackdown on the Holy Land Foundation (HLF), once one of the largest Muslim charities in the world. The HLF was given limited ability to challenge the evidence of its alleged support for Hamas by the Treasury Department's Office of Foreign Asset Control. Much of this evidence has been challenged as false or unreliable. Nevertheless, the government prosecuted HLF officials on such charges in a major case in Texas. A jury, however, acquitted or hung on all charges. The result reinforced the view that, absent the presumptions given the government in the administrative proceedings, HLF could have presented a robust defense to allegations of terrorism support.

Zacarias Moussaoui. The government spent years prosecuting Moussaoui despite his willingness early on to plead guilty to terrorism charges that carry a life sentence. However, Moussaoui was often called the 20th hijacker and used as an example of holding those

responsible for 9-11 accountable. Rather than simply secure a life sentence based on his admissions, the government spent millions seeking the death penalty. It lost when a jury refused to vote for capitol punishment. The government ultimately secured the sentence that it could have secured years earlier.

Liberty City Seven. Just recently, the third effort to prosecute the six defendants accused of plotting to blow up the Sears Tower ended in a mistrial. Notably, the six were charged with material support – a crime with a notoriously ambiguous and easily satisfied definition. The men were indicted in Miami in 2006 despite the fact that one Justice Department official admitted that the alleged plot was more "aspirational than operational." Three juries declined to indict.

These are but a few such examples of major losses in the last seven years – losses that once would have been viewed as alarming. It is also notable that many of these losses have occurred in very conservative judicial districts. The fact that these juries are rejecting these claims in the post-9-11 environment should be a cause of concern. The government tended to over-play and over-charge these cases – destroying its credibility with jurors. Despite enormous budgets and prosecution teams, the Justice Department has faced increasingly skeptical juries and judges around the country.

E. A Pattern of Exaggerated Claims and Over-Charged Cases

The record of the Justice Department is also distorted by a history of over-selling terrorist cases. The Bush Administration often seems to reverse engineer cases: holding press conferences on major investigations and then trying to make the case fit the rhetoric. Many "major" cases have proven to be minor matters. The most recent example is the case of the two University of South Florida students arrested in Florida. Arrested on a highway, they were portrayed as possible terrorists seeking to bust Jose Padilla out of jail. Ahmed Abda Sherf Mohamed ultimately pleaded guilty to a material support tied to a YouTube video that he posted. A third student, Karim Moussaoui, was later arrested in the investigation. He was convicted of a federal weapons charge for simply posing with a rifle at a gun range. He held the gun for 2 1/2 minutes. Mohamed is still awaiting trial.[7]

[7] I was counsel in an analogous national security case: the prosecution

Even where the Justice Department has had strong cases for prosecution, it has sometimes undermined those prosecutions through abusive tactics or exaggerated claims. Moussaoui and Jose Padilla are two such examples. In his first press conference, Ashcroft insisted that the Justice Department had foiled a plan to destroy a city with a nuclear device with the arrest of Padilla. Later, the White House had to publicly deny that account and Padilla proved to be a relatively minor figure. Indeed, he was ultimately convicted of material support rather than any of the original allegations that led to his long and abusive confinement as an enemy combatant. Moussaoui was billed as a 9-11 hijacker, even though he proved to be a perfect barking lunatic with no role in the attack. Both Moussaoui and Padilla deserved to be prosecuted, but the Administration wasted years and millions to secure the convictions. Both men could have been convicted in a relatively short time had the Administration acted more reasonably in their treatment and prosecution.

The exaggeration of both the statistics and individual cases in this area follows a disturbing pattern for this Administration. We now have an enormous system committed to the investigation and prosecution of terrorism. It is a system that all too often seems to struggle to define acts as terrorism in a type of self-perpetuating act. Under this approach, a terrorist can literally be anyone who is charged with any crime that a terrorist might also commit -- from identity theft to a false employment application. There is a widespread view that the government is inventing its own terrorists to confirm its dire warnings of terrorism. By expanding the definition of terrorists, the government can create a target rich environment – and a further justification for the expansion of counter-terrorism budgets and personnel. It is a dangerous and perverse incentive for any free nation.

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of Dr. Thomas Butler, a respected professor at Texas Tech University. Ashcroft dispatched dozens of agents to Lubbock, Texas after Dr. Butler reported vials of plague missing in his laboratory. The Justice Department portrayed the case as a major terrorism investigation and ultimately charged Dr. Butler with a series of national security-related charges. The jury in Lubbock acquitted him of every national security charge. He was convicted on technical import/export charges and various contractual irregularities with the University.

III.
CONCLUSION

In closing, I wish to commend this Subcommittee for taking the time to critically review the record of the Justice Department in terrorism prosecutions. The country is made no safer by the current system of exaggerated prosecution claims and the over-charging of cases to inflate annual reports. To the contrary, these efforts have had their greatest impact not on Al Qaeda but citizens who find conventional charges converted into terrorism charges. It has also reduced cooperation in the Muslim community, where there is a well-founded fear of making any statements to a federal investigator. It has led to many defense attorneys discouraging their clients from voluntarily cooperating or appearing in grand juries. The clear sense in all of these communities is that the Justice Department is desperately looking for anyone to add to the list of accused terrorists.

Perhaps the most serious danger of the inflation of terrorism cases is that it deprives Congress and the public of a fair estimate of the current threat facing the nation. The fact is that, after 9-11, we did not find rampant terrorism threats in this country. Most of the terrorism suspects have proven to be unhinged or incompetent individuals. Nevertheless, there is obviously a continuing threat of terrorism that we must take very seriously. However, the inflation of these case numbers leaves a distorted picture of the size and scope of that threat. Both Congress and the public need accurate information to determine how to strike the balance between security and liberty concerns. They also need accurate information to determine how much money and resources are required. Obviously, the Justice Department has an institutional interest in securing such financial and public support. However, it cannot "cook the books" by representing a far greater incidence of terrorist crimes to justify continued support. The current debate over the loss of civil liberties in this country demands honest and accurate figures from the Justice Department.

Given the foregoing, the past inflation of prosecution numbers by the Administration should not be the sole concern for this Subcommittee. Members should look more deeply at the motivation and the means used to inflate these numbers. Congress has helped create a massive system that seems to demand a steady stream of individuals to investigate and prosecute. The abuses outlined in this testimony can be found across the country. They

manifest one of the greatest dangers to our system, as described most famously by Justice Louis Brandeis:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928). As a nation committed to the rule of law, it falls to Congress to act with understanding and to use its considerable authority to deter the abuses in this system.

I would be happy to answer any questions that the members may have at this time.

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