

Testimony of  
**Mr. Michael Battle**

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Chairman Kyl, Ranking Member Feinstein, and Members of the Subcommittee:

Good afternoon, and thank you for the opportunity to testify before you today. I currently serve as the United States Attorney for the Western District of New York. In that capacity, I have had first-hand experience with terrorism investigations and prosecutions. As a result of that experience, I can tell you that the safety of our fellow citizens would be significantly enhanced if federal law provided for the presumptive pretrial detention of terrorists. Mr. Chairman, you and Senator Chambliss have introduced a bill to do just that. The Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003, S. 1606, is an important and much needed piece of legislation and the Department of Justice strongly urges the Congress to pass it as soon as possible.

Let me begin by explaining the nature of the problem that this bill is intended to fix. While it may seem intuitive that those charged with the most serious crimes, and who pose a flight risk or a danger to the community, should be detained before trial, under current law, that is not always the case. Although defendants in federal cases who are accused of certain crimes are presumptively denied pretrial release under 18 U.S.C. § 3142(e), the specific enumerated list of such crimes contained in that statute does not include most terrorism offenses. The consequences of this gap in the law were noted by President Bush who, in a September 10, 2003, speech at the FBI Academy, said:

Suspected terrorists could be released, free to leave the country, or worse, before the trial. This disparity in the law makes no sense. If dangerous drug dealers can be held without bail in this way, Congress should allow for the same treatment for accused terrorists.

Mr. Chairman, your bill would answer the President's call to action to close this loophole. The bill would amend 18 U.S.C. § 3142(e) to presumptively deny release to persons charged with an offense involved in or related to domestic or international terrorism (as defined in 18 U.S.C. § 2331), or with a federal crime of terrorism (as defined in 18 U.S.C. § 2332b(g)(5)). This change in the law would not result in the automatic detention of individuals charged with those offenses, but merely a rebuttable presumption in favor of detention, a presumption that could be overcome with evidence from the accused that favors release. Adding all terrorism offenses to the list of crimes for which there is a presumption in favor of detention is warranted because of the unparalleled magnitude of the potential danger posed to our fellow citizens by acts of terrorism. These acts, moreover, are many times committed by individuals who are part of larger groups - many with international connections - that are often in a position to help their members flee or go into hiding if released before trial.

It is important to emphasize that this proposed legislation does not represent a solution in search of a problem. This problem is a very real one and, unless fixed, the threat posed by this problem will remain clear and present. I want to share with the Subcommittee one real-life example of how the current statutory scheme can impede terrorism investigations and prosecutions and endanger the community, and why a legislative solution is necessary. In a recent terrorism case from my district involving several defendants, collectively known as the "Lackawanna Six," the government sought an order for pre-trial detention for each of the defendants. The defendants, of course, opposed our motion. Because Section 3142 does not presently include a presumption for pre-trial detention in terrorism cases, a nearly three-week hearing on the issue of detention followed. In the course of that hearing, we were forced to disclose a substantial amount of our evidence against the defendants. In fact, the Magistrate Judge presiding over the hearing went so far as to consider a request by the defense to require us to put an FBI agent on the stand so that he could be cross-examined by defense counsel. Fortunately, the Magistrate Judge denied this request by the defense, thus avoiding a "mini-trial" which would have put the government at a significant tactical disadvantage due to what would have been the premature disclosure of even more of our trial evidence. Moreover, without the presumption of detention in this case, the Magistrate Judge did authorize the release of one of the defendants. Although that defendant failed to post bail and therefore was not released, it was later revealed that this defendant had been the least candid of the six and had, in fact, lied to the FBI about the fact that he had met with Usama Bin Laden in Afghanistan. All six of these defendants pled guilty to providing material support to al Qaeda. They were sentenced to prison terms ranging from seven to ten years.

If the law had contained a presumption in favor of pre-trial detention applicable to the charges in the "Lackawanna Six" case, it is unlikely that the government would have been required to prematurely disclose so much evidence, and it is virtually certain that the hearing would not have lasted almost three weeks. However, let me remind you that even with a presumption of detention in this case, defense counsel would have had an opportunity to argue and present evidence against detention.

In addition to tactical concerns, the absence of presumptive detention could permit terrorist suspects to go free altogether without facing justice. In one case, for instance, a Hezbollah supporter was charged with providing material support to a terrorist organization. He fled the country after being released on bail. After living overseas as a fugitive for six years, he surrendered to the FBI, and is now in U.S. custody.

These examples illustrate the dangerous loophole that exists in current law. Clearly, we are not talking about a purely theoretical problem that may or may not come up in the future; we are talking about real obstacles the government has faced in prosecuting the war on terrorism. Mr. Chairman, the passage of your bill would go a long way toward ensuring that such situations cannot occur again.

Thank you again for allowing me the opportunity to present my perspective as a prosecutor in the field on this important issue. I look forward to answering any questions you may have.