

Testimony of  
**The Honorable Rachel Brand**

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Hearing before the United States Senate Judiciary Committee,  
Subcommittee on Terrorism, Technology and Homeland Security:  
"Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists"

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Chairman Kyl, Ranking Member Feinstein, and Members of the Subcommittee:  
Thank you for giving me the opportunity to testify at this important hearing. The Department of Justice appreciates your leadership in preserving and promoting the government's ability to prosecute the war on terror. The proposals we will discuss today - administrative subpoenas and the presumptive pretrial detention of terrorist suspects - would provide law enforcement with important new counter-terrorism tools that could make a critical difference in certain cases. My testimony today will focus on the potential usefulness of administrative subpoenas in terrorism investigations. My fellow witness, Michael Battle, the United States Attorney for the Western District of New York, will testify about the need for presumptive pretrial detention of terrorist suspects.

In combating terrorism, prevention is key. The entire Department of Justice has shifted its focus to a proactive approach to terrorism, reflecting the reality that it is not good enough to wait to prosecute terrorist crimes after they occur. For the law-enforcement officers responsible for staying a step ahead of the terrorists in these investigations, time is critical. Even a brief delay in an investigation could be disastrous. Therefore, these officers need tools that allow them to obtain information and act as quickly as possible. Administrative subpoenas are one tool that will enable investigators to avoid costly delays.

An administrative subpoena is an order from a government official to a third party, instructing the recipient to produce certain information. Because the subpoena is issued directly by an agency official, it can be issued as quickly as the development of an investigation requires. Administrative subpoenas are a well-established investigative tool, currently available in a wide range of civil and criminal investigations. A 2002 study by the Office of Legal Policy identified approximately 335 administrative subpoena authorities existing in current law. See Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities at 5 (May 13, 2002) (available at <http://www.usdoj.gov/olp/intro.pdf>). These authorities allow the use of administrative subpoenas in investigations of a wide variety of federal offenses, such as health-care fraud, see 18 U.S.C. § 3486(a)(1)(A)(i)(I); sexual abuse of children, see *id.* §

3486(a)(1)(A)(i)(II); threats against the President and others under Secret Service protection, see *id.*; and false claims against the United States, see 31 U.S.C. § 3733.

Administrative subpoenas are not, however, currently available to the FBI for use in terrorism investigations. This disparity in the law is illogical, especially considering the particular need for quick action in terrorism investigations and the potentially catastrophic consequences of a terrorist attack. As President Bush stated in his September 10, 2003 address to the FBI Academy at Quantico, Virginia: "[I]ncredibly enough, in terrorism cases, where speed is often of the essence, officials lack the authority to use administrative subpoenas. If we can use these subpoenas to catch crooked doctors, the Congress should allow law enforcement officials to use them in catching terrorists."

The legislation introduced by Chairman Kyl would fix this anomaly in the law and level the playing field between terrorism investigations and other criminal investigations by giving the FBI authority to use administrative subpoenas in investigations of federal crimes of terrorism. Although grand jury subpoenas are a sufficient tool in many investigations, there are circumstances in which an administrative subpoena would save precious minutes or hours in a terrorism investigation. For example, the ability to use an administrative subpoena will eliminate delays caused by factors such as the unavailability of an Assistant United States Attorney to immediately issue a grand-jury subpoena, especially in rural areas; the time it takes to contact an Assistant United States Attorney in the context of a time-sensitive investigation; the lack of a grand jury sitting at the moment the documents are needed (under federal law, the "return date" for a grand-jury subpoena must be on a day the grand jury is sitting); or the absence of an empaneled grand jury in the judicial district where the investigation is taking place, a rare circumstance that would prevent a grand-jury subpoena from being issued at all.

To appreciate the potential importance of an administrative subpoena in a terrorism case, consider the following hypothetical example. On Friday afternoon, counter-terrorism investigators learn that members of an al Qaeda cell have purchased bomb-making materials from a chemical company. They want to obtain records relating to the purchase that may reveal what chemicals the terrorists bought, as well as delivery records that might reveal the terrorists' location. Investigators reach a prosecutor, who issues a grand jury subpoena for those records. But because the grand jury is not scheduled to meet again until Monday morning and the recipient of a grand jury subpoena is not required to produce the records until the next time the grand jury meets, investigators may not be able to obtain the information for three days - during which time the al Qaeda cell may have executed its plan. If investigators had the authority to issue an administrative subpoena, they could obtain the records immediately and neutralize the cell.

In addition to providing an important new law enforcement authority, Chairman Kyl's bill contains important protections against over-reaching. It would not give the Justice Department unilateral authority to compel production of documents relevant to a terrorism investigation. If a recipient refused to comply with a subpoena, the Justice Department would be required to ask a court to enforce it. And the recipient would retain the ability, as with other types of subpoenas, to ask a court to quash the subpoena.

Because the bill would apply only to terrorism investigations, in which confidentiality is often critical to the success of the investigation, it would prohibit a recipient of a subpoena from disclosing the subpoena in cases in which the Attorney General certified that disclosure would endanger the national security. A knowing violation of such a non-disclosure requirement would be punishable by up to a year of imprisonment, and the offense would carry a penalty of up to

five years of imprisonment if the unlawful disclosure were committed with the intent to obstruct the investigation.

However, the bill would impose several safeguards on the use of the nondisclosure provision.

The requirement would last only until the Attorney General determined that the nondisclosure requirement was no longer justified by a danger to the national security, and the recipient of the subpoena would be notified that the obligation had expired. In addition, notwithstanding the nondisclosure requirement, the recipient would be allowed to discuss the subpoena with his or her attorney. The recipient could challenge the nondisclosure obligation in federal court, and the court could set it aside if doing so would not endanger the national security.

The bill also would immunize against civil liability individuals who comply with an administrative subpoena - just as existing administrative-subpoena authorities do. See, e.g., 18 U.S.C. § 3486(d). Administrative subpoenas thus protect third parties who have information relevant to a terrorism investigation and would be willing to provide it to investigators but for a fear of incurring civil liability for disclosure.

In short, this bill would advance law enforcement's proactive approach to preventing terrorism by giving officers the tools they need to conduct time-sensitive investigations without unnecessary delay, all while providing appropriate safeguards.

Again, I thank you, Mr. Chairman, for inviting me to testify. I look forward to answering your questions and those from other members of the Subcommittee.