

ANTI-HOAX TERRORISM ACT OF 2001

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BEFORE THE
SUBCOMMITTEE ON CRIME
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
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ANTI-HOAX TERRORISM ACT OF 2001

WEDNESDAY, NOVEMBER 7, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:05 p.m., in Room 2237, Rayburn House Office Building, Hon. Lamar S. Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Crime will come to order. I am going to first recognize Members for their opening statements, after which I will introduce the witnesses and proceed with the hearing. I will start off by recognizing myself.

Today's hearing is on H.R. 3209, the Anti-Hoax Terrorism Act of 2001.

Mr. SMITH. The purpose of this legislation is to address the serious problem of hoaxes related to terrorist threats. Our two witnesses will testify about the description and panic, even terror, these hoaxes cause. Under current law it is a felony to perpetrate a hoax such as falsely saying there is a bomb on an airline. It is also a felony to communicate or send communications threatening personal injury to another.

However, the current measures relating to anthrax, for example, don't always involve specific threats and therefore are not necessarily covered by current law; current law goals that address a hoax relating to biological or nuclear dangers where there is no specific threats.

If someone places white paper—if someone places white powder on a computer, for example, with a note that says, this is anthrax, or sends white powder through the mail, such conduct may cause panic, but now violates no Federal law, and no Federal law is violated when the Government spends time and money and effort responding to such hoaxes. But the public safety is threatened when resources are diverted to investigating legitimate threats.

This legislation makes it a felony to perpetrate a hoax related to biological, chemical and nuclear attacks. If a hoax causes a hospital to be evacuated, people could die. If a hoax causes a business to close, people could lose their jobs. And if a hoax occupies law enforcement officials, the public is denied protection from other crimes.

These hoaxes threaten public safety and health, overburden law enforcement officials and emergency workers and chip away at the Nation's morale.

America is engaged in a war on terrorism. Those who prey on fear should be held responsible for their actions. If attention is the goal of the perpetrator of hoaxes, then they should be rewarded with a swift punishment. There is a great need for legislation to address these crimes, and I hope that our witnesses will describe the extent of the problem and make suggestions as to how we can improve the legislation being considered.

That concludes my opening statement. I will now recognize the gentleman from Virginia, Mr. Scott, for his opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you in cosponsoring the Anti-Hoax Terrorism Act of 2001 and also thank you for convening this hearing on the bill in this climate of heightened alertness and attention necessitated by the events of September 11th, and in this climate of heightened alertness created by September 11 local emergency response and first responder operations are already over-strained. And we have seen this with the state of the U.S. Capitol, where our Capitol Police are working shifts that sometimes get to 72 hours a week.

In recent meetings with a group of officials representing such operations in my district, I was told of numerous resources being expended to investigate suspected anthrax and other biological scares.

Norfolk, Virginia, with a population of about 200,000, estimated that it spent over \$70,000 tracking down dozens of scares, all of which fortunately proved to be false alarms. Those weren't intentional, they weren't intentional. Some they found powder, and it needed to be investigated. There were legitimate inquiries which were tracked by law enforcement, medical and other appropriate personnel before committing the investigatory resources but with the limited resources available in most localities to conduct such investigations, even when they are based on legitimate reasons for concern, the last thing we need is to waste such valuable time and resources on pranks or hoaxes.

It is my understanding that there are holes in our current ability at the Federal level to prosecute terrorist hoaxes. I do not know what the situation is with State laws, but we should certainly have the ability to go after such cases at the Federal level where States are not able to prosecute.

However, in providing for closure of loopholes in the law to allow the prosecution of hoaxes, to prevent and fully address them, we don't want to create life sentences for crimes with a 5-year maximum penalty. I am concerned, for example, that requiring judges to mandate reimbursement costs expended by emergency or investigatory parties without discretion to look at an individual's circumstance and impacts could result in much harsher sentences than the crimes called for.

That is why I propose amendments to provide for discretion in the assessing of those fines. I have questions about how the provisions will fit into the general scheme of criminal law, which I hope will be addressed during the testimony.

For example, I am not sure how the provisions of fines, restitution, reimbursement, and civil liability in addition to imprisonment will interrelate in the enforcement of the bill.

Will a need for a separate jury trial, for example, be necessary to determine whether or not the reimbursement is appropriate and, if so, how much?

So I look forward to the testimony and working with you, Mr. Chairman, as we develop a bill that addresses the concerns we are trying to cover and avoids those we are trying to avoid. Thank you.

Mr. SMITH. Thank you, Mr. Scott. The gentleman from Wisconsin, Mr. Green, is recognized.

Mr. GREEN. Thank you, Mr. Chairman. Just briefly. I can't think of a proposal that is more time sensitive and more necessary than what we have before us here today. As most of us are probably aware, the United Kingdom has actually taken similar action, passed similar legislation some weeks back. I think we should follow their lead and move as quickly as we can. I think it would be another way of providing some reassurance to the members of the public and also send a very strong message about how serious we view these threats.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Green. Mr. Coble.

Mr. COBLE. Mr. Chairman, I have no prepared statement. I will be very brief. Initially, I want to join you and Mr. Scott and Chairman Sensenbrenner as cosponsors of this bill. I think it is a good bill and I hope it does well in the legislative process.

The hypothetical you just gave, Mr. Chairman, about disseminating harmless white powder, an alleged anthrax, that would have been—5 months ago I think most any of us would have laughed it away as a good joke. Since September 11th it is not a joke at all, since those messengers of evil have seen fit to come calling for our country. I hope that hysteria is not sweeping the countryside, but I think it is probably only natural to become certainly anxious. It is not hysteria, but high anxiety surrounding our lives today.

And this is a good piece of legislation, Mr. Chairman. I am just—and perhaps our witnesses may address this. And maybe yours and Mr. Scott's and Chairman Sensenbrenner's bill does, but I am interested in knowing what persons who carry out these hoaxes cause, and if they can ultimately be identified whether they should be held responsible for any cost that is forthcoming in conducting the investigation.

I know that the Coast Guard from time to time is the beneficiary or recipient of hoax calls, you know, false distress calls, and the Coast Guard goes out to effect a rescue, there is no one to be rescued because it is a hoax. I think if you can identify people that did it they ought to be held responsible fiscally and otherwise, and perhaps you could address that in your testimony as well.

And that is all I have to say in opening statement. Thank you and Mr. Scott for having called this hearing.

Mr. SMITH. The gentleman from Massachusetts, Mr. Delahunt, is recognized for his opening statement.

Mr. DELAHUNT. Thank you, Mr. Chairman. I too don't have an opening statement, but I would just simply make the observation that given what occurred in terms of September 11th, it has created a devastating psychological and emotional scar etched into the American psyche, and I think that when we discuss the term "ter-

rorism,” the concept of the sense of fear as well as actual physical injury or loss of life is a component of the efforts by those who perpetrated these kind of acts, that in many respects link it just as wrong as a loss of life.

So I think we are here in a very timely way. I am interested in listening to the testimony of the witnesses, and I join with the Chair and the Ranking Member in supporting the principles embodied in this particular legislation.

Mr. SMITH. The gentleman from Virginia, Mr. Goodlatte, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman. I wanted to thank you for bringing this legislation forward. I think it is very timely, very appropriate. In fact, I would ask that my name be added as a cosponsor of the legislation.

I agree very much with the remarks of the gentleman from North Carolina. There is in addition to the insipid nature of those hoaxes, in addition to the terror that they themselves bestow on people who are exposed to them, they are also a major major detraction, of our law enforcement, our emergency rescue and health care personnel in the country, from dealing with the legitimate concerns—the legitimate problems that we are confronted with at this time.

And so I would strongly urge the adoption of legislation that will make it very very clear that there is a heavy, heavy consequence to perpetrate hoaxes like these that have the danger of causing panic and misallocating resources that could be devoted to fighting the true challenges that we face in this country.

Mr. SMITH. Thank you, Mr. Goodlatte. The gentleman from Florida, Mr. Keller, is recognized.

Mr. KELLER. Thank you, Mr. Chairman. I would also like to add my congratulations to you for bringing out this important issue and this legislation and for conducting this hearing. And along with Mr. Goodlatte, and Mr. Coble you can add my name as a cosponsor.

One of my concerns that I hope that we can address in the hearing, in looking at the legislation, is it talks about the recovery of expenses by any person who has been the victim of some sort of hoax, and I just am concerned that, for example, the young lady working as a secretary got a powdery substance on a letter and a very threatening statement that she has been exposed to anthrax and will die, that her expense may be very minimal, she may have to go to a doctor, get a test and miss some work, and you may be talking about a few hundred dollars.

But the emotional distress for that could be quite significant. I hope that we can just clarify that even though we are acting responsibly with respect to this legislation, it is much needed, that we are not in any way preempting any State law claims that that victim may have, such as an intentional infliction of emotional distress claim.

So hopefully we can address that, but I congratulate you on an excellent piece of legislation.

Mr. SMITH. Thank you, Mr. Keller. I will now introduce our two witnesses. They are Mr. James Jarboe, Section Chief, Counterterrorism Division, Domestic Terrorism, Federal Bureau of Investigation, and Mr. James Reynolds, Chief, Terrorism, and Violent Crime Section, Criminal Division, U.S. Department of Justice.

We welcome you both for your expertise and also for your personal knowledge of the problems at hand. And let me say also so that the Members also know and the wider audience will know that you all are involved on a daily basis with the investigations of the hoaxes that we are here to try to prevent.

And so we appreciate your taking the time away from these investigations. We won't keep you too long, but on the other hand your testimony is vital to our ability to produce a piece of legislation that is going to be workable and is going to try to accomplish the goals that we all want to accomplish.

So I thank you for being here. Mr. Jarboe, we will begin with you.

**STATEMENT OF JAMES F. JARBOE, SECTION CHIEF,
COUNTERTERRORISM DIVISION, DOMESTIC TERRORISM,
FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT
OF JUSTICE**

Mr. JARBOE. Thank you for inviting me to testify today. I have submitted a written statement and request that it be made part of the record.

Mr. SMITH. Without objection, both of your opening statements will be made part of the report.

Mr. JARBOE. The question has arisen whether the response to a hoax is the same as a response to an actual event. It is, and there is no way for law enforcement, emergency first responders to understand whether they have a real event or a hoax event until they arrive on scene, do the investigation and do the chemical or the biological analysis to determine whether they have a real threat of anthrax, which we have seen recently, or a hoax.

In responding there is an inherent danger to first responders. Usually they come under red light or blue light and there is a risk they are in danger of having accidents with the civilians on the street who may not see them responding. So the civilians are put, and first responders are put at risk, and also, perhaps more importantly, ties up available resources responding to a hoax that could be better spent responding to a material emergency incident where some individual is truly in distress.

As far as the recipients of hoax letters or hoax threats, the same anxiety, the same fear as if the threat were real; it is quite similar to what a bank teller would undergo as far as stress if they found out days later that the weapon that was put into their face and the money taken, it was actually an empty weapon or a toy weapon. The trauma, the fear, the after trauma is identical.

Given the idea of what we are facing, the numbers have blossomed. Recently in 1999 we had 26 weapons of mass destruction cases. These included all of the categories of chemical, biological, radiological and nuclear threats. In 2000 that number was 257.

In 2001, so far we have opened 395 WMD cases, of which 305 were anthrax related. With the exception of a handful, all of those have been since mid-September. Also since mid-September, we responded physically to over 7,000 anthrax-related incidents nationwide.

Responses to all WMD matters have increased over 900, and telephonic responses have been over 29,000. That is just a basic over-

view of the numbers that we are dealing with. The only live anthrax threats that we have had that have turned out to be real anthrax we are all aware were in Miami, New York, and Washington, D.C. Everything else has been a hoax or someone who thought that they might have some anthrax and asked for a response.

And with that I would close, Mr. Chairman, and thank you for your time, and I would be happy to answer any questions.

[The prepared statement of Mr. Jarboe follows:]

PREPARED STATEMENT OF JAMES F. JARBOE

Good morning Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the law enforcement response to bioterrorism.

The Bioterrorism threat has risen to a new level. The Federal Government, in partnership with State and local law enforcement agencies, has always taken the threat concerning intentional release of a biological agent seriously. However, neither the Federal Government nor State and local responders have been required to utilize their assets to coordinate a response to an actual release of anthrax. The intentional introduction of bacillus anthracis into the infrastructure of American lives has resulted in significant panic and alarm concerning our health and safety. Today, I would like to comment on the manner in which the law enforcement community responds to a suspected act of terrorism involving biological agents, and reinforce the cooperative effort that is in place between the federal government and the myriad of first responders who provide guidance, assistance and expertise.

The response to a potential bioterrorist threat can be broken down into two different scenarios: overt and covert releases. The distinction between the two involves the manner in which the biological threat agent is introduced into the community and the nature of the response. Regardless of whether a biological release is overt or covert, the primary mission of law enforcement and the public health community is saving lives.

An overt scenario involves the announced release of an agent, often with some type of articulated threat. An example of this would be the receipt of a letter containing a powder and a note indicating that the recipient has been exposed to anthrax. This type of situation would prompt an immediate law enforcement response, to include local police, fire and emergency medical service (EMS) personnel. Each FBI field office is staffed with a Weapons of Mass Destruction (WMD) Coordinator whose responsibilities include liaison with first responders in the community. Due to this established relationship with first responders, the local FBI WMD Coordinator would be notified and dispatched to the scene. The FBI investigates these articulated threats involving a biological agent. The response protocol would involve securing the crime scene and initiating the FBI's interagency threat assessment process. The FBI's Counterterrorism Division at FBI Headquarters, coordinates this threat assessment which determines the credibility of the threat received, the immediate concerns involving health and safety of the responding personnel, and the requisite level of response warranted by the federal government. The FBI obtains detailed information from the on-scene personnel and input from the necessary federal agencies with responsibility in the particular incident. In a biological event, representatives from Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (DHHS), United States Department of Agriculture (USDA) and Food and Drug Administration (FDA) are the key agencies called upon to assist FBI personnel in assessing the particular threat. Based upon the assessment, a determination is made as to the level of response necessary to adequately address the particular threat, which could range from a full federal response if the threat is deemed credible, to collection of the material in an effort to rule out the presence of any biological material if the threat is deemed not credible.

The method of collecting suspect material is established by protocols set forth by the FBI's Hazardous Material Response Unit (HMRU). These protocols, recognized and followed by state and local Hazmat teams, are necessary to ensure that sufficient evidentiary samples are collected, screened and over-packed according to scientific safety guidelines for transportation to the appropriate testing facility. Over 85 State Health Laboratories perform this analysis on behalf of CDC and belong to a coordinated collection of facilities known as the Laboratory Response Network (LRN). Once the testing has been completed, results are provided to the FBI for dissemination in the appropriate manner. The results of the analysis are then disseminated to the exposed person or persons, local first responders and to the local public

health department. Additionally, results will be forwarded to the Centers for Disease Control and Prevention (CDC) in Atlanta, GA.

A covert release of a biological agent invokes a different type of response, driven by the public health community. By its nature, a covert introduction is not accompanied by any articulated or known threat. The presence of the disease is discovered through the presentation of unusual signs and/or symptoms in individuals reporting to local hospitals or physician clinics. In this situation, there is initially no crime scene for law enforcement personnel to respond. The criminal act may not be revealed until days have elapsed, following the agent identification and preliminary results obtained from the epidemiological inquiry conducted by the public health sector. Contrary to an overt act where law enforcement makes the necessary notification to public health, in a covert release, notification to law enforcement is made by the public health sector. The early notification of law enforcement in this process encourages the sharing of information between criminal and epidemiological investigators. Once an indication of a criminal act utilizing a biological agent is suspected, the FBI assumes primary authority in conducting the criminal investigation, while public health maintains responsibility for the health and welfare of the citizens. At the local level, involving the FBI WMD Coordinator and the State or local public health department, and at the national level between FBI Headquarters and the CDC, an effective coordination has been accomplished to address the requisite roles and responsibilities of each agency.

The response to an actual threat or one that is later determined to be not credible, or a hoax, is indistinguishable. This includes deployment of a Hazmat team, thorough examination of the potentially contaminated area (including situations where a telephonic reporting is received) and the disruption of the normal operations of the affected entity. Additionally, the individuals potentially exposed to the WMD may experience extreme anxiety/fear due to the reported release. Potential victims may have to be decontaminated or transported to a medical facility. *The first responders must treat each incident as a real event until scientific analysis proves that the material is not a biological agent.* To both the responding entities and the potentially exposed victims, the presence of a powder threatening the presence of "anthrax" is not a hoax, or something to be taken lightly. The individuals perpetrating such an activity must be held accountable for their actions.

In 1999, the FBI testified before the House Energy and Commerce Subcommittee on Oversight and Investigations, discussing the need for improved Federal statutes which address the threatened use and possession of biological agents. During this testimony, it was reported that in 1998, the FBI opened 181 cases related to WMD events, of which 112 were biological in nature. The number of cases has increased since then, with 267 in 1999, and 257 in 2000. (threatened biological releases accounted for 187 and 115 respectively.)

Prior to the events of September 11, 2001 the number of cases initiated for 2001 was 100, of which 67 were biological, and a large percentage of these cases involved the threatened release of anthrax, necessitating a law enforcement response. However, the combined terrorist attacks on the World Trade Center and Pentagon, the subsequent publicity afforded to a handful of anthrax threats, and the tragic death of four persons, have resulted in a dramatic increase in calls for help from the public. Since mid-September, the FBI has responded to over 7,000 suspicious anthrax letters, 950 incidents involving other WMD matters, and an estimated 29,000 telephone calls from the public about suspicious packages. In that same time frame, the FBI has initiated 305 new anthrax related investigations which exceeds and virtually doubles the normal annual average of all WMD cases. Resources available by law enforcement in responding to the alleged threats and public health laboratories in testing suspicious material for the presence of biological agents are limited.

Mr. SMITH. Thank you.

**STATEMENT OF JAMES REYNOLDS, TERRORISM AND VIOLENT
CRIME SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF
JUSTICE**

Mr. REYNOLDS. Mr. Chairman, thank you. I appreciate the opportunity of being here today, and I commend the Committee on moving forward with this legislation. I think it is tremendously important legislation, important legislation not because I or any other Federal prosecutor looks forward to prosecuting a hoax case, we don't. But based on what Mr. Jarboe has just described to you, the

number of hoax incidents we have right now, I think it is clear that we need legislation and we need at least at the outset a small number of prosecutions for people who have dealt with it, and from that the hope would be and the expectation would be that we create the deterrent impact that will make regular utilization of the hoax statute unnecessary.

As I look at the issue, and as I listen to the opening remarks this morning, one of the things I am gratified about is to hear the focus on the victim, because very often as we discuss hoax legislation I don't hear anything about the victim. I hear about the rights of the person that perpetrated the hoax, but not the trauma to the victim. When we are talking about a biological hoax, there is particularly great trauma to the victim. In fact, it is hard to think of a context in which it is greater, because the individual has no way of knowing when they are the subject of a hoax whether their health and indeed their life has been put at risk.

And in many of these instances, it is not—we are not in a position to resolve whether or not that health or life risk is in fact one that exists, or not, until laboratory analysis. That laboratory analysis frequently takes many days, can sometimes take a week. During that period of time the victim is left to linger, left to reach a decision as to whether they want to undergo medical treatment or risk not undergoing medical treatment. So in a very real sense, this is a crime that has a victim.

The other aspect of this, of course, is the utilization of law enforcement resources. They have finite resources. We have experienced unprecedented atrocities on September 11th. They have been followed by real anthrax incidents. Law enforcement resources ought to be devoted to those incidents, and to catching the perpetrators and punishing the perpetrators and not hoax incidents.

There are hoax statutes that are in existence in the Federal Code, but they do not relate to chemical, nuclear, biological or radiological hoaxes. Rather they relate to other areas, so they are not usable in this area. We do then, as we try to deal with hoaxes, have to look to other statutes that we may be able to apply. Most commonly we would look to threat statutes, but it is not a good fit. It is an attempt to put, in essence, a square peg in a round hole. It leaves in doubt our ability to bring the prosecution, and if we bring it, it makes it an unusually difficult prosecution and the outcome in greater doubt than we should be merited by the facts of the case.

Now, let me say this about hoax cases again, to get back to an initial point. We are not looking forward to prosecuting a bunch of hoax cases. We want hoax legislation that will be fair to defendants. We are not looking to prosecute anyone who did something because of inadvertence or who mistakenly reported an event thinking that their facts were genuinely correct facts. Clearly, the legislation should write out those situations and we believe the key points of doing that is that the Government will have the burden of showing that the defendant knew that the statement the defendant was making was in fact a false statement, was not an accurate statement; and, secondly, that the statement be one that conveys information that under the circumstances is reasonably—can reasonably be expected to be believed.

So I think there are key elements that we can make a statute that not only will allow us to deter those types of events, but also a statute that is fair to the defendant.

Mr. Chairman, again we appreciate your calling this hearing, and have viewed your legislation as certainly an important step in addressing this problem. We look forward to working with you, Members of the Subcommittee and the staff to arrive at an appropriate item of legislation. Thank you.

[The prepared statement of Mr. Reynolds follows:]

PREPARED STATEMENT OF JAMES S. REYNOLDS

Mr. Chairman and Members of the Subcommittee, my name is James S. Reynolds. I am Chief of the Terrorism and Violent Crime Section of the Criminal Division, U.S. Department of Justice. I appreciate the opportunity to appear before you today to discuss the problem of persons who perpetrate hoaxes relating to weapons of mass destruction.

Recently, the United States and its citizens have been the subject of anthrax disseminations that have resulted in deaths and illnesses, and the interruption of government processes. Following the public disclosure of these tragic criminal acts, there has been a dramatic increase in incidents in which individuals convey information, knowing it to be false, concerning the presence of anthrax or other weapons of mass destruction. Such information has been conveyed in a variety of ways, including orally, in writing, and by deliberate acts (such as sending through the mail).

Such hoaxes pose a clear and present danger to the ability of public safety and law enforcement authorities to respond promptly and effectively to actual terrorist events, including biological terrorist events. We should not tolerate the expenditure of scarce resources caused by the current epidemic of hoaxes. Simply put, all the resources that law enforcement can bring to bear to address the unprecedented terrorist atrocities of September 11th and the criminal dissemination of anthrax should be focused on addressing those crimes, without being diluted by responding to possible additional crimes that prove to be hoaxes.

Such hoaxes exact an incalculable toll on innocent people who are needlessly placed in fear that their health, and possibly their lives, have been jeopardized. The imposition of such fear on innocent individuals through the conveyance of information, knowing it to be false, is unjustifiable in any context. However, the current wave of biological weapons hoaxes is particularly outrageous. The extended period of time that is often necessary to determine through laboratory analysis that the incident was a hoax compounds the trauma to the innocent victims.

Currently, federal law does not explicitly address hoaxes relating to biological, chemical, nuclear or radiological weapons of mass destruction. As a result, it is necessary for federal investigators and prosecutors to seek to address such hoaxes in the context of statutes that are not well designed for this purpose. For example, in some instances threat statutes have been used. However, the use of such statutes renders the prosecutions unnecessarily difficult and leaves the outcome unreasonably in doubt.

Although hoax statutes have not been enacted for the knowing communication of false information relating to biological, chemical, nuclear, or radiological weapons of mass destruction, hoax statutes are not unique in the Federal Criminal Code. A variety of hoax statutes already exists (e.g., relating to the communication of false information in the context of aircraft, motor vehicles, railroads, and shipping, 18 U.S.C. §35; explosives, 18 U.S.C. §844(e); and tainting of consumer products, 18 U.S.C. §1365(c)).

While these and other hoax statutes are meritorious legislative enactments, they exist in contexts that do not involve the magnitude of consequences that arise from biological hoaxes. The communication of information, knowing it to be false, relating to the existence of a biological weapon can have no conceivable justification. It is an act that should be labeled legislatively to be *per se* malicious and made subject to severe penalties.¹

To be effective in deterring hoaxes, legislation should address the knowing communication of false information by whatever means used. It should not matter whether the perpetrator conveys his false information orally (e.g., by a phone call),

¹In that connection, Mr. Chairman, we note that you, Ranking Member Scott, and others have introduced H.R. 3209, the "Anti-Hoax Terrorism Act of 2001." We are reviewing that legislation now and hope to provide you with detailed views on it in due course.

in writing (*e.g.*, by letter), or through action (*e.g.*, sending white powder through the mail, communicating in context the false message that the powder is anthrax). Furthermore, given the tremendous expenses that can be incurred by government agencies in responding to these hoaxes, consideration should be given to requiring convicted defendants to reimburse the government for the expenses relating to both the public safety and investigative responses to the hoax.

It should be stressed that hoax legislation must be formulated so as not to penalize persons who innocently, but mistakenly, report the existence or use of a biological weapon or a weapon of mass destruction. We believe that this can be achieved by including as an element of the offense that the prosecution prove that the defendant knew the information he conveyed to be false. Because biological, chemical, nuclear and radiological hoaxes are by their very nature extremely serious matters, we do not believe that the prosecution should be required to establish that the defendant acted with malicious intent. While that may be an appropriate element relating to hoaxes perpetrated in some other contexts, in this context it is appropriate to conclude in enacting the legislation that hoaxes of this nature are *per se* malicious.

Mr. Chairman, that concludes my prepared remarks. I will be happy to respond to any questions that you or other Members of the Subcommittee may have at this time.

Mr. SMITH. Thank you. Mr. Reynolds, I have a couple of questions I would like to address to both of you all. But first of all, I think maybe an obvious point. That is that a hoax can create panic. It can cause financial loss, and it can bring scarce law enforcement resources and can, in effect, have the same impact as a real threat or a legitimate threat. And, I think that is one reason why we need to have the stiff penalties, which is why we have the penalties in this particular piece of legislation that we are considering today.

But what I would like to ask you all specifically is in regard to both the criminal and the civil penalties and ask you all if you think they are adequate, if you think they are too strong or too light, particularly with regard to the criminal penalties as far as the fines and the prison sentences, in regard to the civil penalties, particularly with regard to reimbursement.

We have had some comments that perhaps reimbursement is too harsh of a penalty, when you consider that the cost may be hundreds of thousands of dollars we are imposing upon an individual. Do you agree with that, considering the severity of the fines and the severity of the consequences of the hoaxes?

But I would like you all to respond to the penalties that we have in the bill and whether you think those are adequate. Mr. Reynolds, let me ask you to respond first.

Mr. REYNOLDS. Well, I think as far as the potential criminal penalty, a 5-year provision would appear to be, I think, consistent with other hoax legislation and adequate, would give a court adequate latitude in sentencing and would in turn allow the creation of the deterrent impact.

Federal law already has laws relating to restitution as relates to injury suffered by the victim, that restitution where a crime is a violent crime is a mandatory assessment by the court.

And of course a biological hoax is one that impacts the victim as though it were a violent crime. It only turns out not to be a violent crime when it is learned to be a hoax.

Similarly, the reimbursement provision is not a common one in Federal law, but it is one that does exist in some other contexts, and one that we think is appropriate in this area.

Mr. SMITH. Thank you, Mr. Reynolds. Mr. Jarboe.

Mr. JARBOE. I would agree with Mr. Reynolds on the offense. It is consistent with others in the same vein.

As far as the reimbursement, it could be argued that these law enforcement officers, the fire department, has units that are on duty 24 hours a day and they have to be there and be paid no matter what. That is correct. However, when they respond, there is an inherent cost that goes with that. The reimbursement for that is appropriate, and the fact if they don't get reimbursed, it reduces the money that is available to use for legitimate law enforcement needs at the end of the fiscal year. Each community is very similar, and that if they don't have the money, they reduce services. So therefore, we would allow these hoax threats to cause a response that would reduce the ability for law enforcement, first responders, fire departments to respond to legitimate needs in the year. That is not right, and I think the reimbursement is correct.

Mr. SMITH. So the penalty fits the crime, Mr. Reynolds.

And furthermore, I think you made the point in your testimony that in fact the hoax is just as much as the real thing, can jeopardize lives and threaten people's safety and therefore we have to take these claims seriously.

Let me ask you all another question. And if you will, take the time to elaborate specifically. The question is in what ways would you suggest that we improve this legislation as it is now written? Mr. Reynolds.

Mr. REYNOLDS. The central concern I have about the bill as currently drafted is the (a)(1) provision where the prosecution would need to prove that the defendant engaged in conduct knowing that the conduct is likely to impart a false impression that activity is taking place that will violate section 175, 229, in essence the weapons of mass destruction statute?

The concern with that is that it puts us in the position of trying to establish a defendant's knowledge of the law as part of our prosecution. As it is commonly said, ignorance of the law is not a defense, and in this area we ought not give a hoaxer the defense of saying, well, he didn't realize that what they described was in fact conduct that would be violative of particular statutes.

So that provision, that knowledge provision is one that I would suggest to you would make the statute difficult to apply.

Mr. SMITH. What specific language would you recommend instead?

Mr. REYNOLDS. My preference would be to have the statute indicate that the defendant's act is an act that was taken—there is not—let me come back to specific language and suggest to you that the best context in which to do that may be with staff together.

But we certainly don't want to react to inadvertence or mistake. So a knowing communication of information, it is not uttered in one's sleep. It is a knowing communication of information with knowledge that the information is false and under circumstances where it is reasonable to expect that the information will be taken as serious information strikes us to be the core elements of the statute.

Mr. SMITH. Mr. Reynolds, that is very helpful. Mr. Jarboe. Do you want to respond very briefly to the question?

Mr. JARBOE. Yes, sir. The part that Mr. Reynolds brought up about knowing, from an investigator's perspective, that is one of the more difficult aspects to prove. You can prove what was done, how it was done. Getting in someone's mind, what they knew, what their thinking process was when they perpetrated a crime is very difficult. Unless they discuss it with someone and that be documented and corroborated, then you can't take that element into a trial. That is very difficult.

Mr. SMITH. Thank you. The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Reynolds, it came up that the Attorney General is aware of charges of somebody pulling a hoax, a public statement, that some people have been charged with hoaxes like this. Are you familiar with that case?

Mr. REYNOLDS. I don't know which case he is referring to. But we have undertaken the prosecution of some hoax cases where we felt we could fit them within a threat statute.

Mr. SCOTT. Okay. What does this bill—what do you want covered in this bill that you do not already have covered under the law?

Mr. REYNOLDS. Threat statutes relate to an apparent intention by the perpetrator to carry out an activity in the future. I am going to do something if you don't do something. That really doesn't fit the hoax situation where a person goes ahead and conveys information that something has already happened. "Smile, you have been exposed to anthrax." So the application of the threat statutes to the hoax situation is in any event difficult and in many events impossible.

Mr. SCOTT. Okay. The bill—you mentioned (a)(1) as language being somewhat problematic. What about (a)(2)? The bill goes on to say that you have to knowingly, know the conduct is likely to impart the false impression and that causes an emergency or investigative response.

What do you think of (a)(2) requiring a governmental response?

Mr. REYNOLDS. Well, first of all—and let me make clear my reading of (a)(2) is that it is not a knowledge requirement by the defendant. So the defendant doesn't need to know that there will be an emergency or investigative response. If we need to prove that, I again would have the same problem with that element as relates to proving that there was an emergency or investigative response. I don't think—it is certainly not an insurmountable difficulty for us.

I question whether it is a necessary part of this legislation. I think Mr. Jarboe's testimony or other witnesses that you may have would make it clear that invariably in all cases there is an emergency or investigative response.

That being the case, I would hope that findings by the Committee would be sufficient, as opposed to putting the Government to the test in each case to bring in a law enforcement official or HAZMAT official to testify. We can meet that burden, but whether it is utilizing the time of the witnesses that we have to bring in to testify is questionable.

Mr. SCOTT. Did I understand your testimony to suggest that we ought to have language in here that would have, I guess, essentially a good faith exception so that somebody in good faith making

a report, having found salt at a table, for example, calling in, would not be charged with a criminal violation if it turned out to be salt that somebody should have known was salt?

Mr. REYNOLDS. Certainly legislation should be drafted in a way that it does not bring in a good faith act by a well-intending citizen. The way I would suggest that we would do that would be that the Government would bear the burden of showing that the defendant knew that the information he or she was conveying was false.

Mr. SCOTT. Now, under the reimbursement section where the court shall order reimbursement, what is the precedence for the court ordering reimbursement of investigative fees and expenses?

Mr. REYNOLDS. There are a limited number of statutes that I am aware of that do order reimbursement. And that is over and above the whole area of restitution that exists under Federal law. One of the statutes that has a somewhat analogous provision is the narcotics statute, 21 U.S.C. 853(Q)(2). That requires that the court—says that the court shall order the defendant to reimburse the United States, the State and local government, relating to the costs incurred by the United States, State or local governments, in the cleanup associated with the manufacture of certain narcotics.

Mr. SCOTT. If it is ordered under that section, that would be a criminal fine for which you would pay it under pains of imprisonment?

Mr. REYNOLDS. No. Again I would be happy to have a supplemental—

Mr. SCOTT. Because you have a civil provision. If you get a judgment under that civil judgement, it can be enforced. Criminal judgments, you go to jail if you don't pay it?

Mr. REYNOLDS. No.

Mr. SCOTT. Which is a little different?

Mr. REYNOLDS. It is very different, and let me answer that. I feel confident that the statute I read to you is a civil judgment, but we would be happy to submit something in the way of supplemental answers to quiet any doubt on that issue.

[The information referred to follows in the Appendix]

Mr. SCOTT. If it is a criminal fine for which you would go to jail if you don't pay it, should not the court have some discretion on the amount of fine that he is going to impose under the criminal statute?

Mr. REYNOLDS. Well, let me say this. We are under a constitutional dictate of the Supreme Court relating to jailing people who can't pay a fine.

So you have an issue of whether the individual has the funds to pay and chooses not to, in which case incarceration is a potential, versus a situation where the person can't pay. But I don't think that the criminal penalty analogy you are making, I don't think is one that applies here. I believe this is civil, would be collectible as a civil judgment.

Mr. SCOTT. Just for clarification, are you saying the bill, on the fine, would be enforcing this as a civil judgment and not as a criminal fine?

Mr. REYNOLDS. Let me look at the—this version of the bill. There certainly could be a criminal penalty, a criminal fine under the ex-

isting 18 U.S.C. that exists, and that is a criminal—that is a criminal fine that exists.

The reimbursement order would, in my judgment, be a civil penalty provision or a civil judgment. It would have to be enforced through civil as opposed to criminal penalty. Again, I must confess to not be an expert on the penalty aspect of law. We would be happy to submit something and indeed if anything I have said here is not completely accurate, we would submit something.

Mr. SCOTT. Thank you. If you could submit that and indicate whether or not—I assume bankruptcy would not discharge that kind of fine as being an intentional act, if you could consider that issue too.

Mr. REYNOLDS. Thank you, Mr. Scott.

Mr. SMITH. Let me recognize three Members who joined us since the questioning. Mr. Chabot from Ohio, Mr. Barr, and the gentleman from California, Mr. Schiff. We will now go to Mr. Green, the gentleman from Wisconsin, for his questions.

Mr. GREEN. Thank you, Mr. Chairman. I want to go back to provisions that were pointed out by Mr. Scott, but take my question perhaps in a different direction. On the (a)(2) page of the legislation, it says it is a conjunctive, the second part. It is, must have caused an emergency response by governmental agencies to that activity.

Is that necessary, in your opinion? In other words, should we attempt to punish behavior that takes place that satisfies provision 1 even if it doesn't rise to the level of provision 2?

Mr. REYNOLDS. Yeah. Our judgment would be yes.

Mr. GREEN. Okay. Would it make sense to—in provision 2, to say in that clause, either an emergency response by governmental agencies, that activity, or a subsequent investigatory response?

In other words, it may not be something that immediately causes fire and rescue to come racing to the scene because it is recognized as a hoax properly, but is serious enough where law enforcement decides that it subsequently needs to be investigated. Would that, do you think, be a useful modification?

Mr. REYNOLDS. Well, I would read the wording as it exists now to reach what you suggest. It is that causes an emergency or investigative response by governmental agencies. Emergency response obviously has the sense it is an immediate response. But there is no suggestion that I read, and we would certainly argue to a court that the investigative response need not be an immediate response, but that being the issue, do we need this provision in there? And I think our view is that you do not need the provision in there, and that while the Government will be able to prosecute, will be able to establish that element, it will necessitate our bringing a HAZMAT employee or an FBI agent or investigator to the courtroom to testify, when the fact of it is, as a matter of findings, we can determine that there is such a response that occurs.

Mr. GREEN. Okay, thank you. My second question really I guess is a question for our legislative counsel.

We recognize in your testimony that one of the greatest costs of those hoaxes is the utilization of resource responses, resources that are already in finite supply, precious short supply. Should we be looking at—I guess the question is, would there be liability under

this legislation to a third party who may be injured because of a lack of availability of such emergency resource? In other words, there is a hoax and you got the HAZMAT team, and you have got the fire and rescue crew down at the post office because of this hoax and, lo and behold, two miles away there is a serious fire. Would there be liability by the accused to a third party who may be injured?

The COUNSEL. I would say, yes, sir. If you will look at (b), the civil action section, it says, a civil action to any party incurring expenses incident to the investigation of the conduct. So it should be covered. I can check with leg counsel to make sure.

Mr. GREEN. Great, because I think that is important. Thank you.

Mr. SMITH. Thank you, Mr. Green. I would like to recognize the gentlelady from Texas, Ms. Jackson Lee, and also recognize her for the purposes of asking questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I would like to ask that my entire statement for the record be submitted. I ask unanimous consent.

Mr. SMITH. Without objection.

Ms. JACKSON LEE. Let me thank the Chairman and the Ranking Member for holding this hearing and focusing on the new attitude and the new need that we are facing after September 11th.

Certainly, I think that hoaxes are something that we as a country that believes in freedom of expression have tolerated as a part of our lifestyle and have typically acknowledged that it be the bad judgment. Unfortunately, we now face times that cause us to consider these in a totally different manner.

Mr. Chairman, if I might just cite for the record a series of incidents that may have already been commented on that warrant, I think, the hearing that we are having today, such as the out-of-work Norfolk, California man who phoned in four bomb threats to a Long Beach building in 2 weeks; additionally, the situation in Los Angeles where three suspicious anonymous letters were sent to the IRS that had to be tested for hazardous materials by crews who ultimately determined that the substance was harmless.

In my own City of Houston, in the last 2 weeks we had a very intense mayoral campaign, and two of the mayoral candidates received substances at their homes addressed to their spouses. So there comes a point where we do have to address these incidents as more than hoaxes.

Therefore, I would also like to note for the record that many of our abortion clinics have likewise over the years received a number of threats dealing with anthrax.

In fact, I will read the first sentence of the report that talks about this situation. Letters threatening anthrax poisoning were first used to terrorize and disrupt reproductive health care clinics beginning in October 1998, just days after the murder of abortion doctor, Barnett Slepian. Though we are not here to give any particular opinions about any particular groups or efforts, I believe this document is important to submit into the record. It is labeled the Family Abortion Federation Professional Association of Abortion Providers Throughout the United States.

I would like to put this into the record.

Mr. SMITH. Without objection.

Ms. JACKSON LEE. We do have to accept the challenge of the attitudes of Americans that hoaxes can now go without full recrimination.

But I would like to raise a question in my support of this legislation to help provide a sense of balance and also seek some answers about how we do balance the normal attitudes of Americans who have typically been used to a good laugh, a good joke, a practical joker, and how do we balance that with getting to the individuals with true criminal intent.

Let me again refer my question to Mr. Reynolds, if I could, on the question of intent, whether or not you are suggesting that the question of intent be left to the—or the seriousness be left to the determination of the prosecutor. Should we not be more detailed in the legislation?

Secondarily, let me also speak to the question of minors. I see no exception to minors, particularly in their comprehension of the wide impact of their acts, meaning that they may be subject to civil liabilities, or of course criminal liabilities, and let me add to that, many local jurisdictions are now writing legislation where they are holding parents responsible for the acts of minors, and I don't see that in this legislation. But of course there might be that possibility if the person is a minor. I would like to have your reflection on that and whether or not—and how we can make sure this legislation is narrowly tailored so that there is the kind of intent that we are seeking to eliminate or the actions thereof, and not to turn ourselves into a nation intimidated by the terrible acts of September 11th.

Mr. Reynolds and Mr. Jarboe.

Mr. REYNOLDS. Let me address first the juvenile prosecution issue. We are not in a position under existing law to prosecute a juvenile as an adult unless the offense that the juvenile committed is one of the delineated offenses under the juvenile statute or, alternatively, it constitutes a crime of violence.

A hoax activity would not constitute a crime of violence under the Federal definition 18 U.S.C. section 16, and therefore there would be no potential of prosecuting a juvenile as an adult. Now, there is the potential of prosecuting a juvenile as a juvenile in a juvenile delinquency proceeding, but only if we certify that, the appropriate department official certifies that the State jurisdiction cannot or will not deal with the offense.

As a practical matter, there are very few Federal juvenile delinquency proceedings that are pursued, and the vast bulk of that limited number are offenses that take place on exclusive Federal territory where there is just simply no opportunity for a State or local prosecution.

So I think from the standpoint of juvenile prosecutions, it is an issue that is—upon reflection, should not be a matter of concern.

As related to making sure that we don't bring people into this statute who take action by inadvertence, a normal general criminal intent requirement that exists for any statute would require that the defendant was aware of his act and did not act through ignorance, mistake or accident. So we are not into a situation where this is an accidental act.

Secondly, as we have reflected before, the Government would have the burden of showing that the defendant knew that the information that he or she provided was in fact false and, lastly, that information would have to rise to a serious—a level where we could meet the standard before a jury that it was something that could reasonably be expected to be believed.

Ms. JACKSON LEE. Mr. Jarboe?

Mr. JARBOE. I have nothing further to add to that.

Ms. JACKSON LEE. Mr. Chairman, let me thank you very much for your indulgence. I would like to engage you on the refinement of those issues that I am concerned about with respect to minors.

Mr. SMITH. We will be glad to discuss that with you after this hearing. We will now move to Mr. Coble for his questions.

Mr. COBLE. Glad to have you all with us. Regarding the reimbursement question you raised, I notice that the bill does authorize the court to order convicted defendants to pay reimbursement.

Mr. REYNOLDS. Yes.

Mr. COBLE. The Anti-Hoax Terrorism bill would make it a felony to commit a hoax, chemical, biological and nuclear attack. Now, I am told that some in the Senate, the other body, have suggested such hoaxes do not rise above the level of a misdemeanor.

Well, let me ask you all a two-part question. Do you think the criminal penalty should be a felony or misdemeanor and why, A? And, B, are the other hoax crimes in the Criminal Code that are felonies subject to a fine? And I think the answer to me is in the affirmative, but I will let you all respond to that.

Mr. REYNOLDS. The answer to B is in the affirmative. As relates to your first question, the hoax provisions in existing law are felony provisions, and indeed on the mention that was made about the false information of a bomb location that was mentioned earlier, the explosive statute is one where we have not only a threat provision, but we also have a false information provision, and in that context, interestingly enough, the calling in of the bomb hoax would be subject to a 10-year penalty.

Mr. COBLE. 10-year penalty?

Mr. REYNOLDS. 10-year felony.

Mr. COBLE. Mr. Jarboe.

Mr. JARBOE. Yes, sir. I would concur. I believe it should stay in the felony arena. The threat of an anthrax or any other biological nuclear attack that would injure someone or kill them, which has been the cases that we have before us, is no different than threatening someone with another type of weapon, handgun, threaten to kill. A letter with alleged anthrax which we have seen has been fatal to a number of our fellow citizens is a threat to kill. To me that is a felony.

Mr. COBLE. I concur with that. Those who argue that the penalty should be a misdemeanor I think question whether anyone is actually harmed. Well, as you all pointed out earlier, I mean harm can extend beyond physical harm, trauma for example. Do you all want to elaborate on that?

Mr. REYNOLDS. If I could, the emotional trauma that someone endures after they have been threatened is long term. Each individual person is different in their reaction. Some individuals are able to come to terms with it and go on about their life in a very

quick manner. Others take forever, if ever, to recover from the traumatic stress of being threatened or being perceived as a victim. So it is not—

Mr. COBLE. That is harm nonetheless?

Mr. JARBOE. Absolutely. Harm is in the mind of the receiver. And those individuals having dealt with in the field and dealt with acts, talking with the victims, we have very traumatized people in this country because someone sent them a joke, a hoax. It is not a joke. It is a serious matter. And again these can be long term. They can be short term, and it is still trauma.

Mr. COBLE. I thank you. I know how you dislike the scene of illuminating red lights. So I will yield back my time.

Mr. SMITH. Thank you.

Mr. SMITH. The gentleman from Massachusetts, Mr. Delahunt, is recognized for his questions.

Mr. DELAHUNT. Yes. In response to my friend, the Chairman of the Subcommittee on Intellectual Property, and a vast array of other portfolios—I mean, I think the comparison is the common law definition of assault, which doesn't even involve the need for a physical touching but clearly incorporates the sense of fear; and I think that clearly we will accept that the Federal Government needs to fill the gaps.

Mr. COBLE. Will the gentleman yield just a moment—

Mr. DELAHUNT. Sure.

Mr. COBLE [continuing]. And I will say that the gentleman from Massachusetts is a valued Member of that Subcommittee.

Mr. DELAHUNT. Well, I thank you. I will take every compliment I can get, Mr. Chairman.

I take it you don't have any estimate of the cost to the Federal Government of the hoaxes that you have investigated to date. I just presume it is too early.

Mr. JARBOE. That is right. Because we have to go back and determine the number of agent hours that were engaged in responding and come up with the cost.

Mr. DELAHUNT. You know, as I indicated in my opening remarks, I support the principles. I suggest, Mr. Reynolds, as I have heard from Members here, I think there is some drafting issues and some clarification that is needed. But also suggest that that conjunctive and paragraph (a) subsection (1) might very well implicate a knowledge requirement in subsection (2). But I will leave that to Leg. Counsel, also.

And I hear you talk about not wanting to prosecute a lot of these cases. I understand that. Let me just say I do have some serious reservations—I know what you are trying to accomplish—about whether this particular effort will serve as a deterrent. I hope so. But I don't think we should kid ourselves and kid the American people. The likelihood of that happening, I think, is not very probable. But I think it is incumbent on us to make the effort.

I will tell you what I am concerned about, Mr. Jarboe, is the coordination between the FBI and State and local agencies. I recently read a column by Mr. Novak where Mayor Giuliani castigated the Bureau for lack of coordination, withholding of information among the FBI and Federal and State agencies. I hope this is not happening.

Mr. JARBOE. It should not happen. We have a program with weapons of mass destruction coordinators in all of our field offices, and their primary purpose is to go out and deal with State and local first responders to insure that the coordination is there and that—

Mr. DELAHUNT. And the information is being shared.

Mr. JARBOE. Absolutely. That is the primary requirement.

Mr. DELAHUNT. Okay. Because, again, in his column not only did he speak and quote the Mayor, but he referred to a number of prominent chiefs of police from all over the Nation that have that common lament that they felt that they were not receiving the kind of cooperation from the Bureau that they thought was necessary.

Mr. JARBOE. Sir, I think some of those comments have come from the warnings—the generic warnings that have been put out that there is a threat, nonspecific, for a certain period of time; and, unfortunately, that is all the information that we had available. We would love to be able to tell a chief or a sheriff that you have a threat at this location at this time. The information is not there. And we had to balance it. If we know there is a potential threat, do we make it a comment and take criticism for not being more specific when we don't have more specifics, or do we hold it and then try to vet it out until we have it and then perhaps an even worse situation, something would happen? So it is a—

Mr. DELAHUNT. Well, I hope that you are accurate in your representation. I am sure your intention is to be accurate. But it is a matter of concern clearly in terms of local and State law enforcement.

In terms of that, maybe I would address this to Mr. Reynolds. In these cases, is there a policy to defer to State prosecution of these cases if they have adequate substantive law?

Mr. REYNOLDS. There is not a policy per se. We certainly have, under the principles of Federal prosecution, a general policy across the board on all offenses that where there is a—

Mr. DELAHUNT. Concurrent jurisdiction.

Mr. REYNOLDS [continuing]. Potential remedy short of Federal prosecution then certainly that should be considered. And if that remedy is sufficient there certainly should not be Federal prosecution.

Mr. DELAHUNT. It would be my hope that there would be deference to the State and local law enforcement prosecutors because I think that these kind of cases are better suited to those agencies, particularly, as you pointed out and I think appropriately so, as far as the minority of the minors are concerned. That is why the States process 99.9 percent of juvenile cases.

I thank you.

Mr. SMITH. Thank you, Mr. Delahunt.

The gentleman from Ohio, Mr. Chabot, is recognized for his questions.

Mr. CHABOT. Thank you, Mr. Chairman. Thank you for holding this hearing.

You know, at a time like this when our country has pulled together almost uniformly in response to the events of September 11, it is too bad that a hearing like this is even necessary, that there are some sick, some disturbed people among our citizenry who

would subject their fellow citizens to the trauma and disruption and false runs that our emergency personnel have to go to and, as was mentioned earlier, other emergencies where people really ought to be responding to them, they may be off responding to one of these hoaxes. So it is unfortunate, but I guess it is something that we as a society just have to deal with because there are folks out there that do apparently get some sort of pleasure out of these types of hoaxes.

Mr. Jarboe, in your testimony, you stated that I believe since mid-September the FBI has responded to over 7,000 suspicious anthrax letters and 950 incidents involving other weapons or mass destruction types of things, and an estimated 29,000 telephone calls from the public about suspicious packages. How many of the investigations proved to be hoaxes or incidents that—where people conveyed information that they knew to be false?

Mr. JARBOE. In almost every case it is false. I believe last year we had, if memory serves me correctly, five or six actual incidents of biological chemical releases; and these were nothing on the large-scale, serious side. We had one where a pipe bomb was filled with pesticide and thrown into the residence of a spouse, one where a gas, chlorine gas, was instituted into a house in an attempt to kill two individuals. Nothing large scale. The numbers of actual incidents that have with them the actual agent that is being talked about is extremely small. So, in essence, almost all of them are hoaxes.

Mr. CHABOT. I thank you for your response.

We also had an incident in my district in Cincinnati where an employee basically put a substance on his boss's desk and is being prosecuted under local law. Obviously, that is one of the things that we will be struggling with, is the need to have additional Federal legislation versus existing State and local laws which may already be on the books; and that is something that we obviously do have to deal with.

I also had one other—the other question that I was wondering but basically Mr. Delahunt had talked about. I was wondering what cost estimates are of this, but my guess is it is quite substantial, particularly when you consider that sometimes businesses may literally have hundreds of employees and everybody's out for a number of days and the emergency personnel time involved. So it is certainly an expensive problem.

I thank the Chairman for looking into this and holding this hearing; and I—as Mr. Coble did, I will yield back the balance of my time as well.

Mr. SMITH. Thank you, Mr. Chabot.

The gentleman from California, Mr. Schiff, is recognized for his questions.

Mr. SCHIFF. Thank you, Mr. Chairman.

I would like to begin by asking for unanimous consent that my remarks in their entirety be added to the record.

Mr. SCHIFF. I want to thank you, Mr. Chairman, and the Ranking Member for bringing the bill before us today and for the opportunity to speak on this subject.

Our communities are struggling every day to meet the needs of our citizens and prepare for all kinds of potential terrorist attacks.

They are working around the clock to develop and strengthen protocols to deal swiftly and safely in this new emerging environment, and we are doing this all with limited resources.

Every time a threat is identified, authorities spring into action, donating protective gear, bolstering hospital staffing, coordinating local, State and Federal efforts, and calling additional law enforcement to respond. But every time it turns out that a suspected threat is a hoax it not only costs us money but enormous time, energy and unnecessary anxiety.

In Los Angeles, a man who phoned in an anthrax threat because he wanted to avoid appearing in bankruptcy court that day, that succeeded in shutting down the courthouse and costing taxpayers \$600,000. This is a tremendous and unconscionable waste of resources, and I really want to compliment the Chair for his efforts to combat this problem.

I wanted to raise a couple of questions, though, with respect to some of the testimony today and maybe get your further feedback on it.

When I first looked at the language of the section, it seemed a little bit awkward to me, although the more I looked at it the more I recognized the merit in how it was drafted. Focusing in particular on section (a)(1), knowing the conduct is likely to impart the false impression that activity that occurred under these other sections, I think we should resist the suggestion I thought, Mr. Reynolds, that you were making that we either recharacterize that or include in the requirement that the information communicated is false.

Because I think there are many circumstances where the information communicated is actually accurate, such as someone who mails a Government office an envelope with talcum powder in it and a note that says, anthrax is deadly. You don't want to get it. That note, in fact, is very true. But the impression nonetheless is given that they are being exposed to anthrax. So I think we want to resist the temptation to require that falsity in terms of what is said be an element.

That is why I think the language that is currently in the bill that says that it is likely to give the false impression that certain activity is taking place may be a better way to go after that. If you could comment on that.

But let me make a couple of other points, too.

I share your inclination that the second section (a)(2) may be unnecessary. I would think, at a minimum, that if we wanted to keep clause 2 we would want to amend it to say that is likely to cause an emergency response, not that we actually require an emergency response, since there may be circumstances where, for whatever reason, the threat is immediately discredited for reasons having nothing to do with the intent of the person who made the hoax but for reasons that the Government has information already to know that it is likely to be a hoax. So I would think that we would either do well to remove that second element or qualify it by saying that it is likely to cause emergency response.

Finally, I think you were right that you would probably prevail in court if we argued that emergency response includes investigative response. But there is no reason, since we are drafting the bill now, not to foresee that the issue that will be raised and have to

be litigated. I think there may be an impression that the court may have that emergency response is a term of art. That refers to emergency responders such as a HAZMAT team rather than investigative authority. And it may be worthwhile either to define emergency response or just simply add, as you might have suggested, that we add investigative and emergency or investigative response.

Mr. SCOTT. Will the gentleman yield?

Mr. SCHIFF. Yes.

Mr. SCOTT. We are proposing an amendment in the nature of a substitute, and I think you are reading the original bill. The suggested language in the amendment in the nature of a substitute is it causes an emergency or investigative response, and I think that would cover the point you are making.

Mr. SCHIFF. It would. I guess the only addition then would be the potential change of that is likely to cause that response.

Mr. SCOTT. Thank you.

Mr. SCHIFF. Thank you though for pointing that out.

If I could get your comment on those points.

But, also, I wanted to see if you had examined—we cross-referenced additional sections. You are likely to get the false impression that activities take place that violates these other sections. Have you had a chance to look at those other sections to determine whether they are sufficiently drafted as is to cover the situation?

In my look at those other sections, they discuss basically weaponizing chemical or biological agents, using them as a biological weapon, chemical weapon. Would that necessarily cover situations that we have described where an employee sends talcum powder to the employer or to a Government office, viewing it from their point of view as a peaceful protest but not a weapon? Are you confident that those sections do not limit our ability to proceed against hoaxes?

Mr. REYNOLDS. I have some reservation about the inclusion of 2332(A), which is the weapons of mass—generic weapons of mass destruction statute. As relates to 175, 229 and 831, we are satisfied with their inclusion. You may have looked at a version of 175 prior to the enactment of the recent legislation on October 26, which changed somewhat that legislation. So weaponization is no longer an element of that offense in the way in which it was previously.

So we are—to answer that question specifically, we are satisfied with the inclusion, at least the first three statutes.

As relates to your question on causes an emergency or investigative response, let me be clear. We think it is unnecessary and ought not be in the statute. You got testimony here from Mr. Jarboe that in virtually all instances there is an emergency or investigative response. And it strikes us that we ought not have to prove it. We can prove it, but it is yet another example of a person who does the hoax and part of the cost of their hoax is we have to bring out a HAZMAT employee or an FBI agent to testify as to the emergency or investigative response. It seems like an unnecessary element.

As relates further to my comment on that, I was commenting now this is moving out of the issue of whether investigative response falls within emergency. The comment I had said earlier,

when I wasn't having the problem, was on the amended version that says emergency or investigative response.

Then, lastly, let me just say that the concern in subparagraph (a)(1) focuses first and foremost on the existing requirement that we show that the defendant knew that his conduct was likely to impart a false impression. We believe that that, absent a change, would severely undercut the effect of legislation.

Mr. SCHIFF. Mr. Chairman, may I be permitted another 60 seconds?

Mr. SMITH. The gentleman is recognized for an additional minute.

Mr. SCHIFF. I am sorry.

Mr. SMITH. The gentleman is recognized for an additional minute.

Mr. SCHIFF. Thank you, Mr. Chairman.

I guess I mean there has to be a mens rea requirement. Otherwise, we would have strict liability and people could be found to have created a hoax without intending to. And I guess my question is, if we can't say that they have imparted false information because that unduly narrows the applicability of the law, how do you provide more mens rea without saying that they were at least knowingly engaged in activity that is wrongful? I mean, the fact that you send an envelope that has powder in it that creates an emergency response but you didn't even know there was powder in the envelope because it inadvertently fell into it. Now I realize the prosecution has the authority not to bring the case. But we are after drafting statutes that don't provide for that opportunity, even if it is unlikely to be employed. So how do we—

Mr. REYNOLDS. Well, first of all—and your point is well taken. Obviously, we have no desire to prosecute people who have acted through inadvertence. It would be unfair. That is not what we are about. General criminal intent would require, even without a word of intent within the statute, that the defendant had acted with an awareness of their act and that they did not act through ignorance, mistake or accident.

Additionally, although it is a matter of drafting, we are happy to meet with staff to do, the modification of the word communicate or convey, by the word knowingly, again, gets in—the person knew that—knew the quality of their act. So that is one form of mens rea. That is the general criminal intent of men rea. Beyond that, the knowledge of the inaccuracy of the information conveyed is a further safeguard.

Mr. SCHIFF. Well, are you suggesting that knowing be placed in subsection (a) so it would read, whoever knowingly engages in the conduct, would make it more of a general intent provision, where it is now you think you know it is a specific intent?

Mr. REYNOLDS. Let me say this. We would certainly prefer to work with legislative counsel or with the Committee staff to come up with wording. Our preference would be to change the statute to make it simpler, indicating whoever knowingly communicates information—I am sorry—whoever knowingly communicates false information under circumstances where it is reasonably to be expected that the information will be believed is guilty of a crime here.

Mr. SCHIFF. I will yield back to the Chairman. I thank you. But I still think the problem with that is, if you require knowing communication of false information, then when you have knowing communication information that is true, anthrax kills, it would not be punishable under the statute.

Mr. REYNOLDS. But what would be the false information is that—the use of the word communicates or conveys does not require that the communication of conveyances—this is a matter of simple definition—be a written communication or an oral communication. So the inclusion of the white powder in the envelope we believe would be sufficient to allow us to pursue a prosecution, at least in the context of the current law. It might not 5 years ago, and hopefully it will not 5 years from now.

But, right now, we have—if there is an intentional act of putting powder—and this is a difference between a trace of something that got in accidentally and something where it can't be inadvertent. There is powder in the envelope. We believe you prosecute that case, notwithstanding the fact that the writing may be correct writing.

Mr. SMITH. Thank you, Mr. Schiff.

The gentleman from Florida, Mr. Keller, is recognized for his questions.

Mr. KELLER. Thank you, Mr. Chairman.

Mr. Reynolds, let me direct my questions to you. I have some concerns about the mens rea provisions and the adequacy of the civil remedies. Let me just give you a fact pattern, and I will tell you what my concerns are.

Let's say that a businessman goes out for a three-martini lunch and after he has a few too many comes up with this cruel hoax, and they are going to put baking soda powder in an envelope with a very vicious letter and send it to a secretary who is particularly gullible. They do it, and she opens it up, and she freaks out and cries, and everybody in the office knows about it. Just as they are about to call in the police an hour later he discloses to her that, hey, call it off; this is just a hoax. Now, under that particular fact pattern—I am no Johnny Cochran here, but I see the statute being defeated pretty easily by a criminal defense attorney, and I want to walk through this in hopes that we can fix it.

First, as you pointed out, under section (a)(1) the defendant says, hey, I didn't know I had violated section 175, 229, 831 or 2332. I am a businessman. I never heard of the statute, so how can I violate them? That is one problem, right?

Mr. REYNOLDS. But, again, this statute I think as far as use is largely dead on arrival if we leave (a)(1) the way it is.

Mr. KELLER. But that is one problem.

The second problem is, because it was called off before the emergency response people were called to the scene, it doesn't apply. That is the second problem that has to be fixed, (a)(2), right?

Mr. REYNOLDS. Again, our preference would be that (a)(2) not be there.

Mr. KELLER. I am agreeing with you. I am just pointing out these are things we have got to fix and this is why.

The third thing is, well, I had so many drinks, you know, I know I was reckless and disregarded the consequences of my actions, but

I certainly didn't intend to cause all this trauma. It could be a defense.

I am wondering if there should be some sort of reckless disregard standard rather than a flat out knew I would—.

Mr. REYNOLDS. That is really not part of the Government's proof in a general intent statute. As long as the person is, under the law, deemed to know the natural and probable consequences then the fact that, well, I didn't intend isn't sufficient. I mean, you know, the hypothetical situation you give—I know we have to be careful just because it is a businessman in a coat and tie and a three-martini lunch doesn't make the quality of their act different from some guy in a blue shirt somewhere who sends in the powder. So—.

Mr. KELLER. Well, the reckless standard, that is easier for a prosecutor than an intent standard, isn't it?

Mr. REYNOLDS. Again, the general criminal intent standard is that you did not do your act by inadvertence. You did it. You—it was not mistake. The words you uttered, you weren't talking in your sleep. It is a standard that we can meet. I don't—I mean, we need to keep this statute simple. This is a problem that is in some ways a simple problem except that it has been now compounded thousands and thousands of times over. And we believe that with the statute that is a relatively straightforward statute, general criminal intent statute but one that is fair to defendants, we could deal with the problem.

Mr. KELLER. Of the defenses that I raised, the first two are legitimate concerns we have to take into consideration. The third one is not a problem, in your view.

Mr. REYNOLDS. I don't see it as a problem.

Mr. KELLER. You would agree with that.

Mr. REYNOLDS. Yes.

Mr. KELLER. Now on the adequacy of the civil remedies, I see under the 881(b) that all that secretary would get would be expenses incident to the investigation of conduct. I am wondering if it would be a little clearer if we also put in the statute that this section does not preempt any State law claims that that person may have because she would be able to bring a claim for something such as in tort law in Florida, intentional infliction of emotional distress. And I am concerned by not putting that language in there that we are not preempting that and an attorney could say, well, that tort claim isn't available because the Federal Government has acted here with the statute and there is no remedy for those type of compensatory damages.

Mr. REYNOLDS. That is an issue that I really had not focused on. I don't anticipate there would be any objection from the Department of Justice to the inclusion of the provision that it doesn't preempt State or local remedies.

Mr. KELLER. You mentioned restitution is something that is available and not changed under this particular statute. Under that scenario, would the judge be able to order that businessman, the defendant, to make restitution to the secretary for not only her expenses but any sort of mental or emotional distress she suffered as a result of that?

Mr. REYNOLDS. The answer, I believe, is correct. But we will be happy to supplement. It was Congressman Scott's question on the details of restitution and civil reimbursement.

Mr. SCOTT. Well, you said the answer was correct. What was the answer?

Mr. KELLER. I asked if restitution could include compensatory damages such as mental and emotional distress, and he said the answer is yes.

Mr. SCOTT. Under the bill or the way we want to amend it.

Mr. REYNOLDS. Under existing restitution law. That has nothing to do with this bill.

Mr. KELLER. Mr. Chairman, I would yield back.

Mr. SMITH. Okay. Thank you, Mr. Keller.

That concludes our hearing today. Let—

Oh, I am sorry, Mr. Barr. The gentleman from Georgia is recognized for a very generous 5 minutes.

Mr. BARR. Thank you, Mr. Chairman.

Whenever I am presented with a proposed addition to the criminal code, the first place I always go to is the criminal code to see if there is an absolute necessity for the legislation. And in just sort of looking through title 18 of the criminal code here, I am still not absolutely certain that if the Government really believes there is, as there seems to be, a problem with these sorts of hoaxes but could not reach them through existing statutes, particularly given the fact that this proposal purports to reach hoaxes in the context of activities that are clearly already within the Government's jurisdiction—biological weapons, chemical weapons, nuclear weapons and so forth—and one presumes that the cases that we are talking about here also use instrumentalities of the Government to communicate the hoax—the phone, other forms of electronic communication, mails, for example.

Given that, if you look or if one looks at section 1001, if one looks at chapter 63, the mail and wire fraud statutes, why would not the Government be able to structure a successful case under existing law using, for example, those statutes? Because the activity that would be the subject matter of the hoax would already be within the jurisdiction of the Government, so I would think that the fraud statutes in 1001 would already apply.

Mr. REYNOLDS. There are—I mean, there have been cases that have been fashioned using 1001, using threat statutes, so we have had some success. But they are made more difficult by not being statutes that directly address the provision of false information.

Mr. BARR. Are there some situations that the Government is currently confronted with that could not be, similarly to those other cases, prosecuted under existing statutes? Is there something unique about the cases that the Government is currently facing?

Mr. REYNOLDS. We have looked at cases that appear to be difficult if not impossible to prosecute based upon existing threat law.

Mr. BARR. And what are those elements that make it, in view of the Department, impossible to prosecute under existing statutes? The reason I ask that is, if in fact there is a hole in the existing statutes, my preference would be to plug it up as narrowly as possible and not reach more broadly than is necessary.

Mr. REYNOLDS. The biological weapons statute, with the weapons of mass destruction statute and the other chemical and nuclear radiological statutes, deals with threats. It is very often difficult to put the communication of false information into the context of a threat. Threat law looks to—

Mr. BARR. Could the threat be—couldn't it be implied? Does it have to be an explicit threat?

Mr. REYNOLDS. It doesn't matter whether it is explicit or implied. The threat looks to the perpetrator's apparent intention to do something in the future. I will do something unless, or I am going to do something. Where here it is a provision of false information. It is not a suggestion that the perpetrator will do anything at all. It is, they communicate false information, and that is it.

Mr. BARR. But doesn't that put it within the ambit of these existing statutes, the communication of false or fraudulent information, which would be in the essence of a hoax, involving a matter within the jurisdiction of the Government and using an instrumentality within the Government's jurisdiction—interstate commerce, the mails and so forth?

Mr. REYNOLDS. Many of these hoaxes don't use an instrumentality of interstate commerce. For instance, if the mail is used, we have some potential, although again it is in the context of a threat. 876 is the mail threat statute which they have used in some of these cases.

But a number of these are cases of direct statements. Somebody in the context of an event makes a statement to a member of the security personnel that they saw something or they heard something which is made up out of a—that is not something that is accurately—

Mr. BARR. Well, wouldn't that be clearly reachable under 1001, if you make the false statement directly to a Federal law enforcement official, for example?

Mr. REYNOLDS. These aren't made to Federal law enforcement officials.

Mr. BARR. I am sorry—what?

Mr. REYNOLDS. These are not made to a Federal law enforcement official, though.

Mr. BARR. Well, then wouldn't they be reachable under State law? Because States do have, and I know Georgia does, and I think there was a reference earlier to other State statutes. Isn't that reachable and properly prosecutable by the State authority?

Mr. REYNOLDS. It depends on the State. It depends on the jurisdiction where it occurs. In some cases, it may be. In some cases, it may not.

Mr. BARR. Could I ask just one other quick question, Mr. Chairman?

Mr. SMITH. The gentleman is recognized for an additional minute.

Mr. BARR. Thank you. This proposal would amend chapter 41, which is—contains provisions of the criminal code on extortion and threats. Would it be more proper to put it in the malicious mischief section, chapter 65, which already contains very similar provisions providing false communication of information about tampering with

consumer products? Because it may not be in the context of an extortion.

Mr. REYNOLDS. Right. The prior version, I believe, did have it in a different chapter. I believe the most recent version switched chapters, and I am sure somebody will correct me if I am wrong here. But we certainly would be happy to work with Committee staff on what is the most logical place to put it if in fact legislation is to be enacted under the Federal Criminal Code.

Mr. BARR. Okay. Finally, if you all could—Mr. Chairman, if maybe you could join me in this request, I really would appreciate just a little more in-depth analysis of why the existing statutes would not be sufficient to cover the sort of fact patterns that we are seeing emerge now.

Mr. REYNOLDS. Again, the existing—

Mr. BARR. No, you don't have to do it today, but if you could just furnish that, a written analysis, I would appreciate that.

Mr. REYNOLDS. Sure. Sure.

Mr. BARR. Okay.

Mr. SMITH. Mr. Barr, does that conclude your questioning?

Mr. BARR. Yes, sir.

Mr. SMITH. Thank you.

Thank you all for being here. Let me thank our witnesses again for their expert testimony, for their good, constructive suggestions on how we might do the legislation for us. Gentlemen, we thank you for your personal involvement in all the investigations that are going on as well appreciate the good work you are doing.

The Subcommittee stands adjourned.

[Whereupon, at 3:32 p.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

SHEILA JACKSON LEE
18th DISTRICT, TEXAS

COMMITTEES
JUDICIARY
SUBCOMMITTEES
CRIME

Ranking Member
IMMIGRATION AND CLAIMS

SCIENCE
SUBCOMMITTEES
SPACE AND AERONAUTICS

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HOUSTON, TX 77008
17131 861-4070

STATEMENT

CONGRESSWOMAN SHEILA JACKSON LEE

HEARING IN

JUDICIARY SUBCOMMITTEE ON CRIME ON

H.R. 3209

"ANTI-HOAX TERRORISM ACT OF 2001"

November 7, 2001



I would like to thank Chairman Smith and Ranking Member Scott for convening this hearing on the "Anti-Hoax Terrorism Act of 2001." In light of the recent false alarms concerning anthrax and other terrorist acts, we must bring to justice anyone who communicates the false impression of an impending chemical, biological, nuclear, or weapons of mass destruction.

H.R. 3209 would create criminal and civil penalties for anyone who knowingly imparts false information that causes an emergency or investigative response by governmental agencies to that activity. The defendant shall be fined or imprisoned not more than five years, or both.

There are varying degrees of pranksters. The purpose of most common pranks is to embarrass, humiliate, frighten, or exploit without malicious intent. A teenager who sprinkles baby powder on a piece of mail before sending it out may just want to frighten the recipient, but not intend to wreak havoc among the general public or respective Federal agencies.

Around the country countless calls and threats warrant the speedy passage of HR 3209. An out-of-work Norwalk, California man phoned in four bomb threats to a Long Beach building in two weeks. Aboard a passenger jet bound for Chicago, a mentally unstable man rushed the cockpit. An ordinary pipe seen in a

Phoenix street brought out a weary bomb squad besieged by a 600% increase in scares in the weeks after Sept. 11.

Further, in Los Angeles three suspicious anonymous letters sent to the IRS were tested by hazardous-materials crews and determined the substance to be harmless. Locating the senders of anthrax-laden mail is a daunting task but once found, these individuals must be punished to the full extent.

This legislation should ensure that a prankster who executes such a hoax intends the hoax to result in severe consequences that requires a response from emergency personnel. Otherwise, the hoax was intended to be a common prank.

Retribution should reflect the magnitude of the crime. The courts should have the discretion to increase or decrease sentencing, and not limit imprisonment to five years.

Furthermore, children are always involved as copycat pranksters. As a strong advocate for preventative measures, I believe that public awareness should be raised that highlights for teenagers the consequences of their pranks.

While this legislation, as written, addresses the issue of terrorist pranks and hoaxes, I must reiterate some of my concerns. Most importantly, this bill should distinguish between common pranksters and pranksters intending to frighten the masses. Secondly, punishment for these crimes should reflect the gravity of the crime and the courts should have the discretion to do so. And last, but certainly not least, as a preemptive measure, children capable of pulling off a prank should be informed of the consequences of terrorist pranks.

Thank you, Mr. Chairman for this opportunity.

MATERIALS SUBMITTED FOR THE HEARING RECORD

Questions for the Record
Hearing on H.R. 3209, the "Anti-Hoax Terrorism Act of 2001"

Q. Does the reimbursement provision and/or the civil action contained in H.R. 3209, "the Anti-Hoax Terrorism Act of 2001," constitute a civil judgment, or are they part of the criminal sentence? Also, what would be the effect of a defendant's civil bankruptcy?

A. We think it clear from the text of the bill that the civil action authorized by proposed 18 U.S.C. §1037(b) would constitute a civil lawsuit separate from any criminal action. We also think that the wording of the reimbursement provision in proposed 18 U.S.C. §1037(c) clearly indicates that a §1037(c) reimbursement order would be part of the criminal sentence ("The court, in imposing a sentence on a [convicted] defendant . . . shall order the defendant to reimburse . . ."). At the same time, it is important to note that, after concerns were expressed by Congressman Scott, language was added to proposed section 1037(c) which clearly states that "[a]n order of reimbursement under this subsection shall, for the purposes of enforcement, be treated as a civil judgment."

Regarding bankruptcy, an order of restitution issued under Title 18, United States Code, is not dischargeable in bankruptcy pursuant to 11 U.S.C. §523(a)(13). However, we think it unlikely that a bankruptcy court would deem a civil judgment under proposed 18 U.S.C. §1037(b) to be an order of restitution. We are uncertain as to whether a bankruptcy court would deem a reimbursement order under proposed 18 U.S.C. § 1037 (c) to be an order of restitution.

Q. Would criminal restitution be available for emotional distress suffered by a victim of the offense created by the proposed statute?

A. The general federal restitution statutes (see 18 U.S.C. §3663 & 18 U.S.C. §3663A) provide for reimbursement of psychiatric and psychological care to a victim who suffers "bodily injury." That term is not defined in these restitution statutes, but it is reasonably clear that emotional distress, in and of itself, does not constitute "bodily injury." Cf. 18 U.S.C. §1365(g)(4) (defining "bodily injury" as a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body).

Q. Please provide supplemental analysis of why existing statutes are inadequate to prosecute hoax cases relating to weapons of mass destruction.

A. Hoaxes pertaining to weapons of mass destruction are not adequately covered under existing federal law.

The statutes that are most frequently used to prosecute such hoaxes are threat statutes. Thus, 18 U.S.C. §2332a criminalizes threats to use a weapon of mass destruction against any person within the United States if the results of such use would have affected interstate or foreign

commerce. Similarly, 18 U.S.C. §876 criminalizes using the mails to communicate a threat to injure the person of another, and 18 U.S.C. §875 criminalizes transmitting such a threat in interstate or foreign commerce.

Aside from their jurisdictional limitations, the basic problem with these statutes is that it is difficult to demonstrate that every knowingly false report pertaining to a weapon of mass destruction constitutes a threat (e.g., "I received a package containing a suspicious white powder"). The current epidemic of hoaxes includes some threats, but it also includes false reports that cannot easily be categorized as threats.

Other statutes do not fill these gaps. Section 1001 of Title 18, United States Code, prohibits making any materially false or fictitious statement within the jurisdiction of the executive, legislative, or judicial branch. But this would apply only when the hoax is communicated to federal officials; if the hoax is communicated to a private party and only forwarded to federal officials, it is unlikely that section 1001 would apply.

Similarly, statutes criminalizing mail and wire fraud are also unlikely to apply. The mail fraud statute, 18 U.S.C. §1341, is unlikely to apply because mailed hoax letters are unlikely to deprive someone of a property interest, nor do they (under 18 U.S.C. §1346) deprive people of the honest services of government officials. The wire fraud statute, 18 U.S.C. §1343, is unlikely to be applicable for similar reasons. Furthermore, these statutes also require a jurisdictional nexus to the use of the mails or wires, which is not desirable here because it fails to provide protection against other types of hoaxes that disrupt efforts to respond to actual attacks.

Finally, given the overwhelming need for national uniformity and deterrence, we cannot rely on the vagaries of individual state laws and enforcement efforts. Hoaxes relating to weapons of mass destruction are a pressing national problem. In addition to the trauma that these hoaxes are inflicting on innocent victims, they are also impeding the efforts of law enforcement and public health authorities, including federal authorities, to meet their heightened responsibilities at this time of national crisis and actual bioterrorism attack. A federal response is appropriate.

Q. Are there any existing statutory provisions relating to mandatory reimbursement to the Government of its expenses incurred in responding to the offense?

A. We draw your attention to 21 U.S.C. §853(q), which requires a defendant convicted of that offense to reimburse the government concerned for costs incurred by that government for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant.



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In response to anthrax threats received at more than 80 clinics from late 1998 to 2000, we developed a brochure, *Anthrax: Bioterrorism Against Reproductive Health Care Clinics*. If you would be interested in receiving a copy of the publication or any additional information on domestic terrorism aimed at abortion providers, please contact the NAF Government Relations Office at (202)-667-5881 or nirvin@prochoice.org.

ANTHRAX

Bio-terrorism against Reproductive Health Care Clinics

Risks and Responses



(inside front cover)

The National Abortion Federation is the professional association of abortion providers throughout the United States and Canada. Our mission is to keep abortion safe, legal and accessible.

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The History of Anthrax use Against Reproductive Health Care Clinics

Letters threatening anthrax poisoning were first used to terrorize and disrupt reproductive health care clinics in October 1998, just days after the murder of abortion provider Dr. Barnett Slepian. At that time, about a dozen clinics across the country received letters that claimed to contain anthrax toxin. They threatened that clinic personnel exposed to the letters would die. Since then, additional anthrax threat letters have been received by clinics in February and June, 1999 and in January, 2000. As of December 2000, approximately 80 letters have been received by clinics across the United States.

A few of the threat letters were postmarked from Kentucky, but the rest have been sent from Ohio. The first batch of letters contained no return addresses, but after law enforcement agents advised clinic personnel around the country to avoid opening mail from anonymous senders, letters started arriving with phony return addresses that included fictitious medical supply companies, the department of taxation, and even other clinics.

While investigation has proven that none of the letters have actually contained anthrax toxin, virtually every case has resulted in frightening clinic staff and patients, disrupting services, and wasting valuable law enforcement resources.

What is Anthrax and How Do Humans Contract It?

Anthrax toxin is a bacterium found in the soil. Grazing animals such as sheep, goats, and cows typically contract anthrax from close contact with soil where live bacteria are thriving. While anthrax is commonly thought of as a veterinary disease, it can be transmitted to humans from infected animals or from other direct contact with sufficient quantities of the toxic spores of the bacterium.

In humans, there are three types of anthrax infection: cutaneous, gastrointestinal, and inhalation. Anthrax infection, regardless of the type, is not transmitted from human to human.

- *Cutaneous anthrax* – This is the most common cause of anthrax in humans. A person becomes infected with cutaneous anthrax by contact with an infected animal or contaminated animal product. Infection cannot occur unless anthrax spores come into contact with an open wound or broken skin. The symptom of infection is the appearance of a painless blister-like nodule or black-colored lesion. With treatment, the survival rate for people infected with cutaneous anthrax is over 99%.
- *Gastrointestinal anthrax* - This form of infection occurs from ingestion of anthrax toxin spores, which would typically occur from eating the undercooked meat of an infected animal. The symptoms of infection

include abdominal pain, vomiting and bloody diarrhea. This type of anthrax is fatal 50-60% of the time, even with treatment.

- *Inhalation anthrax* – This is the least common type of anthrax in humans, and results from directly inhaling significant quantities of anthrax spores. The onset of symptoms may occur anywhere from 2 to 20 days after inhalation. Initial symptoms are flu-like, with rapid deterioration as respiratory distress and shock develop. Even with treatment, fatality rates are over 80%.

Treatment for any type of anthrax infection involves the use of antibiotics such as Penicillin, Doxycycline or Ciprofloxacin. An anthrax vaccine that requires six initial doses and then annual boosters does exist, but it is used mainly for military personnel and medical researchers.

How To Prevent Potential Exposure to Anthrax

Exposing humans to anthrax spores through the mail in a package or envelope is a highly unlikely way of spreading the disease. Nevertheless, when a threat is received, caution must be exercised. The most effective way to guard against the risk of any potential anthrax exposure is to avoid opening the threat letter.

As soon as NAF is notified of the receipt of an anthrax threat letter, we send an alert to our members in an attempt to prevent other threat letters from being opened. Such an alert includes as much information about the envelope as we can determine, in order to help you identify suspicious mail delivered to your facility. When opening the mail, *always* look for any of the following suspicious signs on envelopes or packages:

- mail with no return address;
- mail with a return address from one place and a postmark from another;
- mail with a return address from a company you do not know and do not do business with;
- mail with a return address using generic terms (e.g. "Tax Office") instead of official organizational names;
- mail with excess postage;
- mail that has been addressed to a generic or incorrect title (e.g. "Manager" or "Doctor in Charge") without a name, or to an incorrect name;
- an address containing misspelled common names, titles, or places;
- mail with lumps, bumps, or protrusions, or any hint of a sandy or powdery enclosure;
- packages or envelopes with leaks, stains, protruding wires, or wrapped with string.

Mail with any of these characteristics should be considered suspicious and

potentially dangerous. If a return address is unfamiliar or suspicious, do not open the envelope or package until you have verified its origin and its legitimacy has been confirmed. **If you receive a letter that you believe may be an anthrax threat, do not open it. Notify law enforcement officials and NAF right away.**

Law Enforcement and Clinic Response to Anthrax Threats¹

Threats by Mail: If you open mail that purports to contain anthrax toxin, or that contains an unknown powdery substance, remember that there is a very low risk of disease. However, caution is still required. You should:

- remain calm;
- have people in the immediate area where the letter was opened move away;
- immediately close the envelope, place it in a plastic bag and do not touch it again (this prevents further spread of any spores and also preserves the evidence for law enforcement officials);
- wash your hands completely with soap and water;
- call 911, the police and/or the fire department and a hazardous materials team should respond;
- call your local FBI office to report the threat and let them know that the police have been called;
- notify your local and state health departments;
- notify NAF.
- *In the US only:* call the National Response Center at **1-800-424-8802** to report that there has been a threat with a biological agent; this will lead to a conference call with the FBI.
- *In the US only:* call the Centers for Disease Control Emergency Response Coordinating Group at **1-770-488-7100** for more assistance with potential exposure to anthrax.

Clinic staff should work with law enforcement officers who respond to the emergency, as well as with the professionals at the above phone numbers to assess the risk to the building occupants and others in the area. The local or state department of health and the Centers for Disease Control Emergency Response Coordinating Group can answer questions about victim care and treatment issues, and can resolve differences of opinion that may arise among emergency responders about how best to proceed.

If the threat came in the form of a letter, it is unnecessary to decontaminate

¹ The typical law enforcement response to anthrax threats provided here may vary slightly in Canada. Law enforcement response protocols have been developed for Hamilton, Ontario and could be used as a model for other areas. Please contact NAF for a copy of these protocols.

everyone in the building or the area. Anyone who touched the letter should simply wash their hands with soap and water. Bleach is neither necessary, nor recommended.

The FBI in the United States, or the police in Canada, should take the letter to test it for the presence of anthrax toxin. Results of these tests are usually available in 12 to 48 hours.

If the tests confirm that you have, in fact, been exposed to anthrax spores, you should see a doctor immediately for antibiotic treatment. Neither quarantine nor antibiotic treatment are indicated until anthrax exposure is confirmed. It is prudent, however, to keep emergency numbers nearby in case you develop a fever or other symptoms before the test results are known.

Threats of anthrax "bombs": Notification that anthrax has been introduced into the building, whether phoned in or delivered by some other route, are also likely to be hoaxes. However, because there is a potential for inhaling spores if such a biological "bomb" has been planted, the risk of disease is somewhat higher. You should take the following precautions:

- inactivate the ventilation system (heat, air conditioning, fans, etc.) for the office and/or the building to prevent spreading spores;
- call 911 and the other law enforcement and health agencies listed above;
- ensure that people inside the building move around as little as possible to minimize spore transport;
- secure the building so that no one leaves or enters until authorities arrive.

Authorities will evaluate whether decontamination is necessary for those people in the building. If so, they should simply go home and shower thoroughly with soap and water. Bleach is not necessary. Clothing should be placed in a bag and either discarded or laundered before being worn again.

It is important to maintain contact information for everyone who was potentially exposed so that they can be informed immediately when the anthrax test results are complete and the determination is made as to whether antibiotic treatment is indicated.

Notifying the Proper Authorities

In the United States

Threatening the use of a weapon of mass destruction, including a biological agent such as anthrax toxin, is a federal offense in the United States. As such, the FBI must be notified of any threat of this kind. You can contact your local FBI office directly or call the National Response Center at **1-800-424-8802**. They

will take a report and then forward you to the Chemical and Biological Defense Command Center of the U.S. Army, which will assist you in evaluating your risk. They will then coordinate their response with the national and local FBI offices.

The Centers for Disease Control Emergency Response Coordination Group can be reached at **1-770-488-7100**. They are experts in infectious disease and can also assist you with risk assessment.

In Canada

Sending an anthrax threat letter is not a federal crime in Canada and there are no central numbers to call. Local protocols will need to be developed in conjunction with the police/fire department and public health officials. A clinic that receives such a letter, or suspects that they have, should call 911.

Be Prepared

The more you and your staff know in advance about the risks and realities associated with anthrax toxin threats, the better prepared you will be to respond if you are ever targeted for this type of bio-terrorism. As with other potential clinic security issues, it may be helpful to establish a clinic response plan in advance so that everyone knows what their role is in the event of a threat. Contact your local law enforcement and health agencies to discuss your plan. Feel free to share the information in this pamphlet with them.

EMERGENCY TELEPHONE NUMBERS FOR BIOHAZARD EXPOSURE

Police Department: 911 or _____

Hazardous Materials Unit: _____

Fire Department: _____

Local FBI Office: _____

NAF Clinic Defense and Security Departments:

1-202-667-5881

or

1-888-370-7686, 24-hour pager for Sharon Lau and Chris Quinn

In the United States:

Centers for Disease Control Emergency Response Coordinating Group
1-770-488-7100

National Response Center
1-800-424-8802

(inside back cover)

Much of the medical information contained in this document was obtained from the Centers for Disease Control and Prevention, U.S. Department of Health and Human Services.

If you have any questions or need assistance, please contact NAF's Clinic Defense and Research Department or Security Department at 202/667-5881.

