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ABUSE OF THE MATERIAL WITNESS: SUSPECTS DETAINED AS WITNESSES IN VIOLATION OF THE FOURTH AMENDMENT

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"We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America." - U.S. Attorney General John Ashcroft, October 25, 2001[1]

INTRODUCTION

Following the September 11 attacks on the World Trade Center and the Pentagon, the Department of Justice was forced to immediately implement new procedures that would help law enforcement officials prevent and obstruct future terrorist attacks that appeared to be imminent.[2] The Department of Justice vowed to use every available law to combat the threat that this new kind of enemy now posed to the United States.[3] The exigency to obstruct future attacks led to the reevaluation and reinterpretation of existing laws so the Department of Justice could more effectively combat the individuals and organizations that had just destroyed thousands of American lives.[4]

The Department of Justice (DOJ) used the federal material witness statute[5] to detain individuals that the DOJ suspected were involved in terrorist activities or may have had information related to the September 11 attacks.[6] In most instances the evidence was extremely weak against

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[1] John Ashcroft, U.S. Att'y Gen., Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] 18 U.S.C. § 3144 (2006).

[6] American Civil Liberties Union, Myths and Realities About the Patriot Act, http://action.aclu.org/reformthepatriotact/facts.html#critics (last visited Oct. 20, 2009).

these individuals, such as a landlord's suspicion of his tenant that was of Arab descent.[7]

The DOJ believed that they were acting within the boundaries of the law when they detained suspects as federal material witnesses in order to further investigate the individual.[8] The Government would piece together any evidence they could uncover in order to bring criminal charges against the detained "witness", which would secure the further detention of the person.[9] Detainees were treated like convicted criminals rather than witnesses detained to secure their appearance and testimony at a criminal proceeding.[10]

In this essay I argue that the Department of Justice, which vowed to protect life and enhance security for America by "acting within the law and under the Constitution", acted unconstitutionally by using the material witness statute as a tool to investigate and preventively detain suspected terrorists in the aftermath of the September 11 attacks.[11] Part I of this essay addresses the new threat facing the Department of Justice following the unprecedented attacks of September 11 and the comments that executive branch officials made following the attacks that evidence the fundamental shift that took place within the Department of Justice after 9/11. Part II of this essay will provide a discussion of the background of the material witness statute prior to September 11 and then go on to discuss the use of the statute in the aftermath of September 11. In Part III of this essay, I will discuss the abuse and unconstitutionality of material witness detentions, such as the arrest and detention of Osama Awadallah, as applied by the DOJ following September 11. In Part IV I will explore possible solutions to balance the new threat that global terrorism presents to law enforcement with the guaranteed constitutional protections of individual liberty.

(I) A NEW KIND OF THREAT

On September 11, 2001 four airplanes that were controlled by al-Qaeda hijackers were used to attack the World Trade Center and the Pentagon resulting in the deaths of all 246 passengers.[12] Approximately 3,000 people were killed in the attacks on the World Trade Center and the Pentagon.[13] The Federal Bureau of Investigation (FBI) rapidly began to investigate the attacks.[14] Through "PENTTBOM", the name given to the investigation, the FBI sought to identify the hijackers and to uncover evidence of anyone that may have aided the hijackers in the planning or the implementation of the September 11 attacks.[15]

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[7] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, 16 (June 2003), http://www.usdoj.gov/oig/special/0306/chapter2.htm [hereinafter *OFFICE OF THE INSPECTOR GEN.*].

[8] *See* HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 (2005), *available at* http://www.hrw.org/reports/2005/us0605/index.htm (click "Misuse of the Material Witness Law to Hold Suspects as Witnesses").

[9] *Id.*

[10] *Id.*

[11] Ashcroft, *supra* note 1.

[12] OFFICE OF THE INSPECTOR GEN., *supra* note 7, at 1.

[13] *Id.*

[14] *Id.*

[15] *Id.*

The shock and scale of the September 11 attacks fostered an urgent demand to find and to hold the individuals that were responsible for the attacks accountable.[16] Osama bin Laden and al-Qaeda were being discussed on national news coverage as the possible masterminds behind the attacks just hours after the two hijacked planes plunged into the World Trade Center. Most Americans were learning about radical Islamists for the first time while "experts" on Islamic Law were discussing the foundations and history of Qur'anic interpretations that lead to the September 11 attacks.[17] Al-Qaeda had inflicted a devastating blow to the American psyche that had catapulted Osama bin Laden from the CIA analyst's desk to the front pages of our newspapers while also guaranteeing an instantaneous presence in the lives of all Americans for the immediate future. Those responsible for the attacks had redefined the scale and scope of the threat that international terrorism posed to the United States as well as to the global community.[18]

Al-Qaeda was a different kind of enemy and the Department of Justice shifted from tracking down individuals suspected of past crimes or those involved in ongoing crimes to the daunting task of preventing future terrorist attacks.[19] In the chaotic period following the attacks the atmosphere within the Department of Justice was "one of tremendous intensity as the Department was required immediately to alter its central mission to the prevention of further acts of terrorism."[20] Deputy Attorney General Larry Thompson stated that "[t]he circumstances required the Department to respond, in a crisis atmosphere, to hundreds of novel issues in an "effort to protect the American people from further acts of terrorism."[21]

(A) *Use Every Available Law Enforcement Tool to Incapacitate*

The Department of Justice determined that the scale of the destruction on September 11 required an immediate and radical shift in focus so the United States could effectively combat the increased threat to U.S. interests that al-Qaeda now represented. In a memo laying out the Department of Justice's Anti-Terrorism Plan, Attorney General John Ashcroft stated that "[t]he guiding principle of this enforcement plan is the prevention of future terrorism . . . This plan focuses on preventing terrorism by arresting and detaining violators who have been identified as persons who participate in, or lend support to, terrorist activities."[22] Ashcroft went on to open the door for U.S. Attorneys to creatively reinterpret and apply existing law, such as the material witness statute, by directing "[f]ederal law enforcement agencies and the United States Attorneys' Office [to] *use every available law enforcement tool to incapacitate* these individuals and their organizations."[23]

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[16] Press Release, American Forces Press Service, Bush: No Distinction Between Attackers and Those Who Harbor Them (Sept. 11, 2001), *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=44910.
[17] *See* September 11 Television Archive (ABC, BBC, CBS, CNN, FOX, and NBC television broadcasts Sept. 11-13, 2001), http://www.archive.org/details/sept_11_tv_archive.
[18] CIA: NATIONAL STRATEGY FOR COMBATING TERRORISM (Feb. 2003).
[19] OFFICE OF THE INSPECTOR GEN., *supra* note 7.
[20] Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Glenn A. Fine, Inspector General, on the Office of the Inspector General Review of September 11 Detainees (Apr. 4, 2003), *available at* http://www.usdoj.gov/oig/special/0306/appK.htm.
[21] *Id.*
[22] Memorandum from John Ashcroft, U.S. Att'y Gen., to all U.S. Att'ys on the Dep't of Justice Anti-Terrorism Plan (Sept. 17, 2001), *available at* http://www.scribd.com/doc/17819245/T5-B61-AG-AntiTerrorism-Plan-Fdr-91701-Ashcroft-Memo-AntiTerrorism-Plan-206.
[23] *Id.* (emphasis added).

On October 25, 2001, Ashcroft further enunciated the DOJ's aggressive policy shift to prevent and combat terrorism while speaking at the United States Mayor's Conference. In his remarks, Ashcroft began to detail how the DOJ would use existing laws to prevent and obstruct future attacks by stating, "[l]et the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible."[24] Ashcroft then echoed the directive that he gave to the U.S. Attorney just one month earlier stating, "[w]e will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America."[25] Ashcroft then summed up this striking new policy in the following remarks:

> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street. If suspects are found not to have links to terrorism or not to have violated the law, they are released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.[26]

A few days later, at a press conference on October 31, Ashcroft expressly evidenced his intent for the DOJ to detain material witnesses in an effort to prevent and disrupt terrorist attacks when he stated that "[a]ggressive detention of lawbreakers and *material witnesses* is vital to preventing, disrupting, or delaying new attacks. It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism."[27]

Several other U.S. government officials have expressly acknowledged that the material witness statute has been used to detain suspects rather than witnesses. Alberto Gonzales, acting as White House Counsel, appeared to have believed that federal government officials were acting within the law when they regularly detained *suspects* in the war on terror as material witnesses.[28] In February 2004, while addressing the American Bar Association Standing Committee on Law and National Security, Gonzales stated that:

> In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for criminal prosecution, detention as a material witness, and detention as an enemy combatant.[29]

FBI Director Robert Mueller confirmed that his agency used the material witness statute to detain suspects in the PENTTBOM investigation when he stated that "a number of suspects were detained

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[24] Ashcroft, *supra* note 1.
[25] *Id.*
[26] *Id.*
[27] John Ashcroft, U.S. Att'y Gen., Outlines Foreign Terrorist Tracking Task Force (Oct. 31, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.
[28] *See* HUMAN RIGHTS WATCH, *supra* note 8.
[29] Alberto R. Gonzales, White House Counsel, Remarks to American Bar Association Standing Committee on Law and National Security 13 (Feb. 24, 2004), *available at* http://www.fas.org/irp/news/2004/02/gonzales.pdf.

on federal, state, or local charges; on immigration violations; or on material witness warrants."[30] Michael Chertoff, then acting as Assistant Attorney General, explicitly admitted that the DOJ was detaining suspects under the material witness statute as a means to preventively detain the suspect as well as to investigate the suspect. Chertoff is quoted in the Washington Post saying "[i]t's an important investigative tool in the war on terrorism…you get not only testimony – you get fingerprints, you get hair samples – so there's all kinds of evidence you can get from a witness."[31]

It is unambiguously clear that the Department of Justice specifically intended to detain individuals who were deemed to be suspects in the September 11 investigations as material witnesses in order to further investigate those individuals. The DOJ's reinterpretation and subsequent application of the material witness statute following September 11 is an impermissible expansion of the scope of the material witness statute.

(II) BACKGROUND OF 18 U.S.C. § 3144

(A) *History of 18 U.S.C. § 3144*

The authority to detain suspects in the war on terror as material witnesses, for preventive or investigatory purposes, can be tenuously[32] traced back to the First Judiciary Act of 1789.[33] The Act granted the authority to require a recognizance, in a criminal proceeding, which would secure the witnesses' appearance at the trial; and allowed for the imprisonment of any witness who failed to appear as promised.[34] It is important to understand that imprisonment was permissible only if the witness had sworn to appear and then failed to do so. The First Judiciary Act did not allow for the imprisonment of a witness at the courts discretion, "[i]t [provided] only that a witness's refusal to recognize his obligation to appear could be punished. Such a refusal was deemed a contempt of court because the common law imposed on every individual a duty to testify in court."[35]

Since the passage of the First Judiciary Act of 1789 until 1948, witnesses could be detained pursuant to statutory authority. However, in 1948 Congress repealed 28 U.S.C. §§ 657 and 659, statutory provisions that granted authority to detain material witnesses, thus leaving "no formal authority to arrest material witnesses because the newly enacted Federal Rules of Criminal Procedure did not explicitly mention such arrests."[36] After 1948, "[t]he authority to arrest [and detain] material witnesses was thought to arise by implication from the Federal Rules of Criminal Procedure."[37]

In 1966, Congress enacted the Bail Reform Act that was interpreted to have granted the authority to allow for the detention of a material witness in any criminal proceeding.[38] As with the

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[30] HUMAN RIGHTS WATCH, *supra* note 8, at 18 (*citing* Robert S. Mueller, III, Dir., Fed. Bureau of Investigation, Speech at Commonwealth Club of California (Apr. 19, 2002).
[31] Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo*, WASH. POST, Nov. 24, 2002, at A1, A12.
[32] *See* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 708 (2005) (arguing that the authority to detain individuals where there is no probable cause to believe they have committed a crime, such as detention as a material witness, was not authorized by the First Judiciary Act of 1789).
[33] Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 73.
[34] *Id.* at § 33; s*ee* Stacey M. Studnicki, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483 (2002).
[35] Bascuas, *supra* note 32, at 708.
[36] Studnicki, *supra* note 34, at 491.
[37] *Id.* at 491-92; *see also* Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).
[38] Act of June 22, 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 216, codified at 18 U.S.C. § 3149 (repealed 1984); *see* Roberto

Federal Rules of Criminal Procedure, this grant of authority was inferred because "[t]he Bail Reform Act of 1966 did not specifically authorize the arrest of witnesses; rather, it provided for their release."[39] This was corrected in 1984 when Congress revised the Bail Reform Act and expressly provided for the arrest and detention of a material witness if it was impracticable to secure their appearance at trial.[40]

(B) *The Current Material Witness Statute*: 18 U.S.C. § 3144

The most recent statutory provision granting authority to detain material witnesses in federal proceedings is codified at 18 U.S.C. § 3144.[41] The statute was meant to target individuals who a party believed had testimony that was material to the case at issue and would likely not appear if subpoenaed at the criminal proceeding.[42] In order for a judicial officer to order the arrest of a witness, 18 U.S.C. § 3144 requires the party seeking the detention of the witness to show that the testimony of the person is material to the criminal proceeding and "that it 'may become impracticable' to secure the presence of the person by subpoena."[43] If an application for a material witness warrant establishes probable cause to believe that the materiality and impracticability elements are met then a warrant may be issued and the witness can be arrested without ever having been served a subpoena or having failed to appear at a proceeding.[44] After an arrest has occurred under section 3144, the witness is to be treated consistent with a criminal defendant awaiting trial.[45]

As an alternative to the detention or release of a material witness on bail, the federal material witness statute provides for a deposition alternative. Section 3144 provides that "[n]o material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice."[46] The witness must file a written petition requesting that he be released or deposed[47] and then show that the deposition is an adequate substitute to the live testimony and further detention is not necessary to prevent a failure of justice.[48]

(C) *Use of the Material Witness Statute Prior to September 11*

Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY'S L. J. 401, 408 (2003).

[39] Studnicki, *supra* note 34, at 492.

[40] *Id.* at 492-93.

[41] Section 3144 provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. § 3144 (2006).

[42] Bascuas, *supra* note 32, at 683.

[43] *Id.*

[44] 18 U.S.C. § 3144 (2006).

[45] *Id.*; *see* 18 U.S.C. § 3142 (2006) (detailing the procedures and guidelines for the release or detention of a defendant pending trial).

[46] 18 U.S.C. § 3144.

[47] Studnicki, *supra* note 34, at 503.

[48] *Id.*

Prior to the September 11 attacks, "the government generally used the material witness law to arrest individuals who had witnessed a crime and who had a legal reason or had made clear to the government that he or she would not comply with a subpoena to testify at a criminal trial."[49] "The vast majority of persons arrested as material witnesses were non-U.S. citizens arrested by the former Immigration and Naturalization Service (INS). In 2000…94 percent of the 4,168 federal material witness arrests were made by the INS."[50] The primary scenario involved an immigrant who was smuggled into the country and then detained as a material witness in order to secure their testimony in the prosecution of their alleged smuggler before the witness could leave the country.[51] Courts have previously required the government to meet a high threshold of proof that the witness was extremely unlikely to appear if subpoenaed, such as "a witness moving without leaving a forwarding address, a witness not appearing when requested or subpoenaed to appear, or the inability to serve a subpoena upon a witness."[52] This high threshold would soon hit the floor after the September 11 attacks as the judiciary gave extreme deference to the Executive under the exigency of national security.

(D) *Use of the Material Witness Statute Following September 11*

Following the September 11 attacks the government has evaded meaningful judicial oversight and has used the material witness statute to detain and investigate possible terrorist suspects. The post-9/11 individuals who have been detained as federal material witnesses were primarily held to secure testimony in grand jury proceedings, where the government "has exceedingly broad powers of investigation" to direct and control whether future criminal charges will be filed against an individual.[53] These grand jury investigations were convened in the Second and Fourth Federal Circuits where judges allowed great deference to the government's claims that the material witnesses posed a threat to national security and therefore their detention was justified.[54]

Information surrounding the post-9/11 arrests of persons as material witnesses is difficult to uncover because the Department of Justice was successful in obtaining court orders that sealed all court documents.[55] Research by Human Rights Watch and the American Civil Liberties Union (HRW/ACLU) reveals, "the government has [as of 2005] arrested at least seventy material witnesses in connection with its post-September 11 counter-terrorism investigation."[56] All seventy of these individuals were male and all but one of them was Muslim.[57] The limited details of the seventy individuals and their cases suggest that they became suspect because they lived, worked, and prayed or may have had some limited contact with the September 11 hijackers.[58] Others raised suspicion for a "variety of reasons [such as] taking flight lessons, tips from neighbors, having news material on terrorist suspects, or even having a name similar to a suspect."[59]

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[49] Anjana Malhotra, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims without Charges*, 2004 ACLU INTERNATIONAL CIVIL LIBERTIES REPORT 2 (2004).
[50] HUMAN RIGHTS WATCH, *supra* note 8, at 14.
[51] *Id.*
[52] Studnicki, *supra* note 34, at 499.
[53] Malhotra, *supra* note 49 (citing *Bacon*, 499 F.2d at 943).
[54] *See id.*
[55] HUMAN RIGHTS WATCH, *supra* note 8, at 15.
[56] *Id.* at 16.
[57] *Id.*
[58] *Id.* at 17.
[59] *Id.*

Abdallah Higazy, one of the individuals detained as a material witness, was an Egyptian graduate student studying at Brooklyn Polytechnic on a grant from the U.S. government.[60] On September 11 he was staying at a hotel located near the World Trade Center while waiting for permanent housing and attending his school's orientation program.[61] A security guard at the hotel falsely claimed to have found a pilot's air-land radio in Higazy's room safe and, based on reports received by the DOJ that the hijackers had been assisted by individuals in buildings close to the World Trade Center; Higazy was suspected of being a "terrorist conspirator" and arrested as a material witness.[62] The true owner, who was an airline pilot, later claimed the radio and "after detaining Higazy in solitary confinement for more than a month; obtaining a coerced, false confession from him in an interrogation without counsel; and criminally charging him with making false statements to the FBI, the government released Higazy…thirty-four days after his arrest."[63]

The Case of Osama Awadallah

The case concerning the arrest and detention of Osama Awadallah as a material witness in the September 11 grand jury investigation is the only instance where the federal judiciary has addressed "the scope of the federal material witness statute and the government's powers of arrest and detention thereunder."[64] Osama Awadallah, a twenty-year-old student, who worked and resided in San Diego, California, came under suspicion within weeks following September 11.[65] The government discovered a car registered to Nawaf al-Hazmi, one of the hijackers on American Airlines Flight 77 that crashed into the Pentagon, at Dulles Airport and conducted a search that yielded "documents relating to Khalid al-Mindhar [also a hijacker on Flight 77], and a piece of paper on which 'OSAMA 589-5316' was written.[66] Investigation revealed that 619-589-5316 [was]" a prior telephone number of Awadallah.[67] However, Awadallah had not used this number for 17 months.[68] Awadallah was promptly approached by FBI agents, interrogated at his home, and was later taken to an FBI office where he could not leave.[69] A search of a car belonging to Awadallah "uncovered videotapes entitled 'Martyrs of Bosnia,' 'Bosnia 1993,' and 'The Koran v. the Bible, Which Is God's Word?'" while a search of his apartment "yielded computer-generated photographs of Usama Bin Laden."[70] Awadallah was told that the FBI would not be finished until he passed a polygraph test so he voluntarily returned to the office the next day.[71] Awadallah was arrested several hours after his

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[60] *Id.* at 24.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] United States v. Awadallah, 349 F.3d 42, 44 (2d Cir. 2003); *see also* United States v. Awadallah, 202 F. Supp. 2d 17 (S.D.N.Y. 2002), United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), United States v. Awadallah, 202 F. Supp. 2d 82 (S.D.N.Y. 2002), United States v. Awadallah, 401 F. Supp. 2d 308 (S.D.N.Y. 2005).
[65] Robert Boyle, *The Material Witness Statute Post September 11: Why it Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 13, 13-14 (2004).
[66] Indictment of Osama Awadallah at ¶ 5, United States v. Awadallah, 202 F. Supp. 2d 17 (S.D.N.Y. 2002) (No. 01 Crim. 1026) [hereinafter Indictment of Osama Awadallah], *available at* http://news.findlaw.com/hdocs/docs/terrorism/usawdllh103101ind.pdf.
[67] *Id.*
[68] Boyle, *supra* note 65, at 14.
[69] *Id.*
[70] Indictment of Osama Awadallah, *supra* note 66, at ¶ 6.
[71] Boyle, *supra* note 65, at 14.

detention pursuant to a material witness warrant.[72] The government alleged that Awadallah's testimony was material to the grand jury investigation in the Southern District of New York because it would help ascertain whether he knew al-Hazmi and al-Mindhar, and as a result, it was material to uncover details of their relationship to learn of any other associates the two hijackers may have had.[73]

From the time Osama Awadallah was arrested on September 23, 2001 until he appeared before a grand jury on October 10, he was ushered through the federal prison system and treated as if he was a convicted federal prisoner.[74] Throughout his detention as a material witness, Awadallah was classified as a high-security inmate which required guards to strip-search him each time he left his cell.[75] The government moved Awadallah from San Diego to Oklahoma City, and finally on October 1, to the New York Metropolitan Correctional Center (MCC) where he was treated cruely.[76] Awadallah's family did not have any information as to his whereabouts during this time following his arrest.[77]

While in custody at the New York MCC, Awadallah accumulated several unexplained bruises. Awadallah was placed in a cold cell and kicked and thrown into a chair by a guard.[78] This "same guard jammed his face into an elevator wall, made his handcuffs extremely tight, stepped on the chain linking his ankles, and pulled his hair to move his face in front of an American flag."[79]

The government held Awadallah as a material witness until he was brought before the grand jury and as a result the government later charged him with knowingly making a false material declaration before the grand jury.[80] Awadallah testified before the grand jury on October 10, twenty days after his arrest.[81] The charges arose from testimony that he did not know that one of the hijackers was named Khalid and for testimony that he did not write the word "Khalid" in a notebook.[82] On December 13, 2001, Awadallah was released from prison on bail after spending eighty-three days in detention.[83]

The *United States v. Awadallah* litigation arose in the Southern District of New York. Awadallah sought dismissal of the indictment and the suppression of all evidence and all statements made by him to the government between September 20, 2001, and October 3, 2001.[84] The district court held that the material witness statute could not be used as authority to detain individuals in order to secure testimony before a grand jury because section 3144 "only allows the detention of material witnesses in the pretrial . . . context."[85] Judge Shira Scheindlin reasoned that since the grand

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[72] *Id.*
[73] Indictment of Osama Awadallah, *supra* note 66, at ¶ 7(a)-(c).
[74] *Id.* at ¶ 8-9.
[75] Bascuas, *supra* note 32, at 721.
[76] Boyle, *supra* note 65, at 15.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Awadallah*, 202 F. Supp. 2d 55, 58-59 (S.D.N.Y. 2002).
[81] *Awadallah*, 349 F.3d at 48.
[82] *Awadallah*, 202 F. Supp. 2d 55, 59 (S.D.N.Y. 2002).
[83] *Id.*
[84] Notice of Motion on behalf of Osama Awadallah at ¶ 1-8, *Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (No. 01 Crim. 1026 (SAS)).
[85] *Awadallah*, 202 F. Supp. 2d 55, 65, 71 (S.D.N.Y. 2002).

jury exists as an investigative body and there are no criminal charges until the grand jury has completed its function; the grand jury is not a "criminal proceeding" within the meaning of section 3144.[86] The District Court suppressed the grand jury testimony and dismissed the indictment against Awadallah.[87]

The United States appealed and the Second Circuit Court of Appeals reversed the decision of the District Court and reinstated the indictment against Awadallah.[88] The court, relying on *Bacon v. United States*,[89] held that the term "criminal proceeding" located in section 3144 encompassed grand jury investigations and therefore the government was authorized to detain Awadallah as a material witness in the grand jury investigation of the September 11 attacks.[90]

The court also held that the material witness warrant issued by Judge Mukasey in the Southern District of New York was valid because the government had established probable cause to believe both the materiality and impracticability elements of 18 U.S.C. § 3144 were satisfied.[91] Based on the piece of paper found by the FBI in Nawaf al-Hazmi's car, which had a phone number and the name "OSAMA" written on it; the court found that the government had adequately established that Awadallah's testimony was material to the grand jury investigation.[92] The court also found there was probable cause to believe that it would be impracticable to secure Awadallah's presence at the grand jury proceeding by subpoena.[93] This finding was based on Awadallah's failure to come forward after the September 11 attacks and share information he may have had concerning al-Hazmi and al-Mindhar "whose names and faces had been widely publicized across the country."[94]

(III) ABUSE OF THE MATERIAL WITNESS LAW

(A) *Flawed Reliance on* Bacon v. United States

There are several issues concerning the scope of the material witness statute, as used by the DOJ following the September 11 attacks, such as the lack of probable cause and its applicability to grand jury investigations. Some argue that the detention of material witnesses without a provision of bail lacks any legal foundation. Ricardo Bascuas[95] sets forth a convincing argument that the arrests and detentions of material witnesses in connection with the September 11 grand jury investigations were the "very arrests that the Fourth Amendment[96] [was] meant to bar"[97] and the

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[86] *Id.* at 74-75.
[87] *Id.* at 82.
[88] *Awadallah*, 349 F.3d at 44-45.
[89] *Bacon*, 449 F.2d 933 (permitting for the detention of material witnesses in grand jury investigations).
[90] *Awadallah*, 349 F.3d at 50-51.
[91] *Id.* at 69-70.
[92] *Id.*
[93] *Id.* at 70.
[94] *Id.*
[95] *See* Bascuas, *supra* note 32.
[96] The Fourth Amendment provides:

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
[97] Bascuas, *supra* note 32, at 736.

notion that these detentions are "constitutional is based on a combination of flawed historical analysis and flawed legal reasoning."[98]

Bascuas argues that the flawed reasoning of the Ninth Circuit case *Bacon v. United States*[99] is the basis of the belief that "incarcerating 'material witnesses' has been deemed constitutional since the eighteenth century."[100] In *Bacon*, the petitioner was arrested as a material witness to secure testimony in a grand jury proceeding in Seattle, Washington.[101] Bascuas recounts the relevant facts:

> A judge ordered Ms. Bacon imprisoned unless she posted bail of $100,000, which she was unable to do. Ms. Bacon petitioned for a writ of habeas corpus on the ground that her detention was illegal. Following a removal hearing, the district court for the District of Columbia dismissed her petition. After being flown across the country in custody, Ms. Bacon refiled her petition at the federal courthouse in Seattle. She argued that the government had no power to assure her appearance before the grand jury by detaining her before she had been served a subpoena and disobeyed it.[102]

The court granted Bacon's petition finding that the government did not sufficiently establish that it would be impracticable to secure Bacon's testimony at the grand jury investigation by a subpoena.[103] However, the court rejected Bacon's argument that the government has no authority to arrest and detain an individual as a material witness unless the individual had been subpoenaed and had subsequently disobeyed that subpoena.[104]

Bascuas argues that reliance on *Bacon* is flawed because the Ninth Circuit's "belief that the First Judiciary Act[105] (the Act) authorized the detention of material witnesses cannot be reconciled with the firmly established Fourth Amendment doctrine that every significant detention must be supported by probable cause to believe that the detainee was involved in the commission of a crime."[106] The *Bacon* court found no distinction in the Act between defendants and witnesses, which supported their belief that the Founding Fathers had authorized the detention of innocent persons.[107] Bascuas argues that the *Bacon* court misinterpreted the Act because they did not recognize the distinction between offenders and witnesses; "Only 'offenders' could be 'arrested, and imprisoned or bailed"[108] while "'[w]itnesses,' unlike 'offenders,' were not subject to arrest, imprisonment, or bail under the First Judiciary Act. Rather, the statute authorized only the taking of 'recognizances' of them."[109] A witness could only be detained if they had voluntarily refused to testify.[110] The *Bacon* court did not recognize this distinction and interpreted the Act as treating

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[98] *Id.* at 681.
[99] *Bacon*, 449 F.2d 933.
[100] Bascuas, *supra* note 32, at 681.
[101] *Id.* at 704.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 73.
[106] Bascuas, *supra* note 32, at 706.
[107] *Id.* at 707.
[108] *Id.* (citing Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91).
[109] *Id.*
[110] *Id.*

witnesses similar to offenders or defendants who could be arrested and imprisoned or bailed.[111] Based on this misinterpretation the court wrongly "believed that the power to imprison innocent witnesses dated to the time of the Founding Fathers."[112]

The *Bacon* court, relying on the finding that a court could order the arrest and detention of a witness since the First Judiciary Act, created a new "probable cause" to fit the determination of whether a witness may be detained.[113] Bascuas describes the courts' reconciliation of their own misconstruction of the Founding Fathers intent with the Fourth Amendment:

> Though it acknowledged that the Constitution requires that "probable cause" be established for every arrest, the Bacon court could not apply the usual probable cause standard because Ms. Bacon had not committed any crime. The solution was to gut "probable cause" of its age-old substantive meaning by linguistic sleight of hand and convert it into a mere standard of proof…Rather than examining whether the statutory provisions authorizing the detention of "material witnesses" could be reconciled with the Fourth Amendment, the Bacon court reconciled the Constitution with this supposedly time-honored practice.[114]

Bascuas argues that the only definition of "probable cause" is "cause to believe the individual to be seized is involved in the commission of a crime"[115] and had this definition been applied by the *Bacon* court, "the practice of detaining witnesses could not have survived constitutional analysis.[116]

Applying Bascuas' approach to the case of Osama Awadallah it appears that his arrest and detention cannot be reconciled with the protections of the Fourth Amendment. At the time of his arrest, the only information the FBI had gathered on Awadallah was a piece of paper with his first name and telephone number written on it,[117] which had been out of use for 17 months; and three videotapes recovered from the search of his car.[118] The government did not have sufficient evidence to establish cause to believe that Awadallah was involved in the commission of a crime. At best the government, at the time of Awadallah's arrest as a material witness, could tenuously establish that he had limited contact with two known hijackers and nothing more. Therefore, accepting Bascuas's argument that the *Bacon* court fundamentally misinterpreted the First Judiciary Act and failed to properly analyze the constitutionality of the detention of an innocent person as a witness, then Awadallah's arrest and detention were unconstitutional under the Fourth Amendment.

Even if one does not accept Bascuas' argument, the arrest and detention of Osama Awadallah can still be shown to be unconstitutional because it falls short of the new "probable cause" or "mere standard of proof" created in *Bacon*.[119] Under the *Bacon* standard, probable cause is

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[111] *Id.*
[112] *Id.* at 706.
[113] *Id.* at 716.
[114] *Id.*
[115] *Id.* at 717.
[116] *Id.* at 719.
[117] Indictment of Osama Awadallah, *supra* note 66, at ¶ 5.
[118] *Id.* at ¶ 6.
[119] Bascuas, *supra* note 32, at 716.

established "in the case of a material witness, when it is determined that the individual's testimony is material and that it is 'impracticable to secure [their] presence by subpoena.'"[120]

In the case of Awadallah, the materiality prong of the *Bacon* standard was sufficiently established. The Second Circuit Court of Appeals properly found, based on the slip of paper found in Nawaf al-Hazmi's car which bore the name "Osama" and a telephone number that could be linked to a prior residence of Awadallah near San Diego,[121] that there was "probable cause to believe that Awadallah's testimony was material to the grand jury investigat[ing the September 11 attacks.]"[122] The grand jury investigations were convened shortly after the attacks and little was known of the individuals who were responsible. This lack of knowledge made any information more likely to be material to the grand jury investigation. Therefore, as Justice Straub explains, "[e]ven if the most that Awadallah could tell the grand jury was that he did not know the suspected terrorists…that information would still be material because it would likely close off one avenue of the grand jury investigation . . ."[123]

However, the impracticability prong under the *Bacon* standard was not sufficiently satisfied, and as a result, the arrest and detention of Awadallah were unconstitutional under the Fourth Amendment.[124] The information the court was entitled to rely on in making this determination included the same information that was known when the materiality determination was made, including the slip of paper and the telephone number.[125] Facts sufficient to show that it may become impracticable to secure a witnesses' testimony by subpoena generally evidence that the witness is a flight risk because of family ties overseas, a prior refusal to appear or evidence of criminal culpability.[126] The Court of Appeals could not rely on or consider any facts showing that Awadallah was a flight risk. Rather, in finding that the impracticability prong was satisfied, the court relied on the scale of the September 11 attacks and the fact that Awadallah did not come forward to share information with authorities to establish that he was a flight risk.[127] Judge Straub, concurring, explains the problem with this reasoning:

> My colleagues erroneously draw from the slip of paper not merely the easy and obvious inference that the suspected hijackers knew (or knew of) Awadallah but that (i) the hijackers' possession of Awadallah's 18-month-old phone number meant that Awadallah knew them; *and* (ii) Awadallah was sufficiently familiar with the hijackers that he should have promptly sought out the FBI once the suspected hijackers' identities and pictures were published; *and* (iii) Awadallah's failure to come forward promptly and of his own volition establishes that he would likely flee if subpoenaed…[r]eliance on such a tenuous and speculative chain of inferences effectively dispenses with the impracticability requirement.[128]

Therefore, even though the materiality prong is satisfied under the *Bacon* standard, the impracticability prong is not sufficiently established because there are no facts that the court would

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[120] Studnicki, *supra* note 34, at 506, (citing *Bacon*, 449 F.2d at 943 (9th Cir. 1971)).
[121] *Awadallah*, 349 F.3d at 68.
[122] *Id.* at 70.
[123] *Id.* at 77, (Straub, J., concurring).
[124] Bascuas, *supra* note 32, at 716.
[125] *Awadallah*, 349 F.3d at 77.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 77-78.

be able to rely on to establish that "it may become impracticable to secure Awadallah's presence before the grand jury…by subpoena" and Awadallah's arrest and detention as a material witness was unconstitutional.[129]

The majority opinion in *United States v. Awadallah* is troubling because, not only does it rely on the *Bacon* misconception, but the Second Circuit Court of Appeals significantly lowered the "probable cause" or standard of proof created in *Bacon* in order for the government to arrest and detain a material witness. By finding that the impracticability prong was successfully established based on the fact that "in the wake of a mass atrocity and in the midst of an investigation that galvanized the nation, Awadallah did not step forward to share information he had about one or more of the hijackers, whose names and faces had been widely publicized across the country,"[130] the court has lowered the standard to such a degree that it cannot be reconciled with the Fourth Amendment. Judge Straub explains the ramifications of the majority's decision when he states, "[the majority's holding] seems to suggest that any individual with a documented connection to the suspected hijackers – including, e.g., anyone from a neighbor or colleague to a less familiar acquaintance at their mosque – could without any additional showing, have been arrested as a material witness if he failed (for whatever reason) to come forward in the days following the publication of the suspected hijackers' names and photographs."[131]

The extremely low standard to detain a material witness that now exists after *United States v. Awadallah*[132] has radically limited judicial oversight of material witness detentions and has opened the door for the Department of Justice to use the material witness statute as a way to circumvent the Fourth Amendment in order to detain and investigate a suspect until they can later clear him or file criminal charges. After the September 11 attacks judges have given great deference to the government's arguments that material witnesses need to be detained because of the looming threat of future attacks or national security concerns.[133]

The new standard created by the Second Circuit Court of Appeals not only makes the post-9/11 use of the material witness statute inconsistent with the Fourth Amendment but also dangerously concentrates power in the executive by authorizing judges to rely merely on the word of the government that an individual has information that is material and therefore should be detained.[134] This executive overreaching attacks our nation's notion of justice by granting the government the authority to detain individuals indefinitely without probable cause to believe that they have committed a crime.

(B) *Problems with Applicability to Grand Jury Investigations*

Since the September 11 attacks there has been much criticism of the finding that the federal material witness statute[135] is applicable to grand jury investigations. The district court in *Awadallah*[136]

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[129] *Id.* (discussing 18 U.S.C. § 3144 (2006)).
[130] *Id.* at 77.
[131] *Id.* at 79.
[132] *Awadallah*, 349 F.3d 42.
[133] *See Awadallah*, 349 F.3d 42 (determining that Awadallah was a flight risk based on his failure to come forward and share information in the weeks after the September 11 attacks).
[134] *See id.* (holding that FBI agent Ryan Plunkett's affidavit was sufficient to establish "probable cause" to believe that Awadallah had material information to the grand jury investigation of the September 11 attacks).
[135] 18 U.S.C. § 3144 (2006).

determined that the material witness statute did not authorize Awadallah's detention because 18 U.S.C. § 3144 does not apply to grand jury investigations, which the court considered not to be "criminal proceedings" within the meaning of the statute.[137] On appeal, the Second Circuit Court of Appeals reversed the lower court decision by finding that legislative history indicated "a settled view that a grand jury proceeding is a 'criminal proceeding' for purposes of the material witness statute."[138] As it currently stands, the material witness statute is applicable to arrest and detain individuals to secure testimony in connection with grand jury investigations. The arguments supporting both of these views focus on legislative intent gleaned from the enactment of prior legislation.[139] Based on the convincing arguments of Awadallah's counsel, Robert Boyle, and Judge Shira Scheindlin, who wrote the district court opinion in *Awadallah*,[140] it appears that grand jury investigations fall outside the scope of the material witness statute. However, since it appears that the arrest and detention of Osama Awadallah was unconstitutional under the Fourth Amendment I only briefly mention the issue of applicability to grand jury investigations to show the arguments others have made to establish that the Department of Justice has exceeded the scope of 18 U.S.C. § 3144 in its use following the September 11 attacks.[141]

(IV) REWORKING THE MATERIAL WITNESS STATUTE

Several checks could be put in place by Congressional action that would help to prevent the use of the statute as a tool to detain and investigate suspects where the government does not have enough evidence to criminally charge the individual. First, "courts can deal with the issue of excessive deference by making express findings that pay careful attention to each issue, particularly the impracticability of alternatives to detention."[142] The inquiry should focus on the "witness's ability to flee and his inclination to do so."[143] If this standard was applied in *Awadallah* the Court of Appeals would be required to provide express findings why Awadallah was a flight risk rather than relying on the combination of the scale of the destruction on September 11 and his failure to come forward and share information he may have had.

Congress could also enact legislation that placed time limits on the detention of a material witness. As 18 U.S.C. § 3144 is applied today a material witness may be detained indefinitely without probable cause to believe that the individual has committed a crime. A time limit would more effectively balance the individual's liberty interest with the governmental interest in accurate investigations.[144] Allowing indefinite detention of a material witness invites abuse of the statute as a means to effectuate the arrest and detention of suspects for investigative purposes.

There has been some discussion of creating special courts to deal with material witness detentions.[145] Peter Margulies argues that a special court "[c]ould consider more detailed

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[136] *Awadallah*, 202 F. Supp. 2d 55.
[137] *Id.* at 79.
[138] *Awadallah*, 349 F.3d at 55.
[139] *See* Boyle, *supra* note 65, at 30-34; *see also Awadallah*, 349 F.3d at 53-55.
[140] *Awadallah*, 202 F. Supp. 2d 55.
[141] *See* Boyle, *supra* note 65; Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002); *See* Iraola, *supra* note 38.
[142] Peter Margulies, *Detention of Material Witnesses, Exigency, and the Rule of Law*, 40 CRIM. LAW BULLETIN, Nov. 2004.
[143] *Id.* § III(A).
[144] *Id.*
[145] *Id.* § III(E).

information that would otherwise be confidential. Proceedings could be *ex parte*, or defense lawyers who passed a security clearance could be allowed to participate…[s]uch a court could breach the secrecy of the grand jury for the purpose of promoting accountability for material witness detentions."[146] While special courts present their own issues concerning secrecy and transparency it would be beneficial to at least debate their possible creation and mandate.

If the constitutionality of the federal material witness statute continues to be presumed then the foregoing possible remedies would put in place measures to check the current untethered executive branch authority to arrest and detain material witnesses.

(V) CONCLUSION

The detention of suspects as material witnesses in the September 11 grand jury investigations, exemplified by the case of Osama Awadallah, violate the Fourth Amendment because even if the material witness statute is constitutional, relying on *Bacon v. United States*; probable cause was not sufficiently established to arrest and detain Awadallah. The Department of Justice has succeeded in using the material witness law as a means to preventively detain and investigate suspected terrorists without probable cause by relying on extreme judicial deference to the executive on national security issues and the lowered "probable cause" standard announced by both the Ninth Circuit in *Bacon v. United States* and the Second Circuit Court of Appeals in *United States v. Awadallah*. The current state of federal material witness doctrine after the September 11 attacks poses a "potentially perpetual threat to the Fourth Amendment's most fundamental guarantee"[147] that no person may be detained without probable cause.

[146] *Id.*

[147] Bascuas, *supra* note 32, at 736.