MATERIAL WITNESS DETENTION IN A POST-9/11 WORLD: MISSION CREEP OR FRESH START?

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INTRODUCTION

Suppose you are a high-ranking official in the United States Department of Justice ("DOJ"). Your quiet world was shattered yesterday, like that of all Americans, by news that terrorists had succeeded in dropping a weapon of mass destruction ("WMD") on a major city on the east coast of the United States. Only the failure of the device to operate correctly prevented death on a catastrophic scale. It is still unknown who is responsible for the attack, how many people were involved, or if there are more WMDs. All that is known at this time is that the civilian aircraft that dropped the device was shot down by Air Force fighters, and the three men in it—now deceased—were Egyptian and Saudi Arabian nationals with connections to al Qaeda.

This afternoon, word reaches you that the FBI has detained an individual named Hasan Abdallah.[1] Abdallah is an Egyptian citizen present in the United States on a student visa whose family still resides in Egypt. Abdallah checked into a hotel across the street from the terrorists' WMD target two weeks ago. Yesterday afternoon, a hotel security guard, who was helping conduct an inventory of the closed hotel, told FBI agents that he had found three items locked in the safe provided for valuables in the room occupied by Abdallah: Abdallah's passport, a Koran, and a hand-held "transceiver" that can be used for air-to-ground communication. Unsubstantiated intelligence reports indicate that the pilot of the airplane received assistance from someone near the target building. When Abdallah returned to the hotel this morning to recover his belongings, he was questioned by FBI agents. He admitted that he had served in the Egyptian Air Corps and was familiar with the type of transceiver found, but he denied that the device found in

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[1] The facts in this scenario are based on the case of Abdallah Higazy, who was detained in the wake of the 9/11 attacks. *See* Higazy v. Templeton, 505 F.3d 161, 164-65 (2d Cir. 2007); *In re* Application of U.S. for Material Witness Warrant, 214 F. Supp. 2d 356, 358 (S.D.N.Y. 2002); HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 24 (2005) [hereinafter WITNESS TO ABUSE], *available at* http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf.

the safe was his. The FBI Director wants guidance from the DOJ as to what to do with Hasan Abdallah.

Your direct supervisor, the Attorney General of the United States, has asked for your opinion of the situation. You think through the possibilities. There does not appear to be probable cause to charge Abdallah with a crime relating to the attack. You have probable cause to believe that he rented a room near the scene of the attack, he possessed a radio that could have been used to communicate with the airplane, he knew how to use the device, and there is some evidence that someone may have aided the terrorists from the ground. There is nothing else, however, to indicate that Abdallah was a conspirator (all other potential investigatory options, such as an expedited check for fingerprints on the radio, have been attempted but have yielded no additional evidence against Abdallah), and this quantum of evidence is in all likelihood not enough to constitute probable cause to believe that Abdallah conspired in the terrorist act.[2] Thus, Abdallah would appear to be due for release. However, would it be irresponsible to advise the Attorney General—a cabinet-level official responsible for protecting the country from such attacks—to release Abdallah under these circumstances without any further attempt to determine whether Abdallah knows something about the plot or the possibility of further attacks? What if Abdallah, with a student visa and no family connections in the United States, decides to leave the country?

You know that a grand jury is investigating the attack. Would it be legal to detain Abdallah as a "material witness" to the crime so the grand jury and prosecutors can question him about the radio and any knowledge of the attack?[3] If such a detention is legal, how long can it last and what other limits are there on it? Suppose you learn that Abdallah has knowledge of visa fraud committed by another individual being investigated by the grand jury. Would it be legal to detain him as a material witness in this separate criminal investigation in order to give prosecutors and investigators more time to determine what involvement or knowledge he might have of the WMD attack?[4] The Attorney General also wants to know what the DOJ's policy should be going forward as to individuals suspected of involvement in the plot or possessing other terrorist connections. Should it be DOJ policy to attempt to detain such individuals if they meet the requirements of the material witness statute? What if they have committed otherwise minor immi-

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[2] *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91 (1964) (explaining that probable cause is satisfied when a judge determines that the facts and circumstances within the knowledge of the officers "were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense").

[3] For a discussion of the federal material witness statute, see *infra* Part I.

[4] This part of the scenario is based on the case of Abdullah al-Kidd. *See* al-Kidd v. Ashcroft, 580 F.3d 949, 952 (9th Cir. 2009) (detaining plaintiff as material witness in case against another individual for visa fraud and making false statements), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

gration or criminal violations? What are the legal implications of having a policy that calls for aggressive use of the material witness statute and minor criminal or immigration charges to detain persons suspected of being terrorists?

This Article explores the questions raised by this scenario, focusing in particular on the role that the federal material witness statute played after the 9/11 attacks and may play again if similar events occur. Part I chronicles the history of the material witness statute. Part II discusses the post-9/11 use of the statute as one of the DOJ's primary "tools" for detaining terrorist suspects. Part III explores the constitutionality of the material witness statute, first addressing whether detention under the statute itself is legal under the Fourth Amendment, then addressing the question of whether pretextual use of the material witness statute—that is, detention in which the real motivation is something other than ensuring a witness is available for trial—is constitutional. Finally, Part IV looks to the future in an attempt to determine what the United States should do to be prepared for scenarios like the one posed above. Specifically, should there be changes to the federal material witness statute or changes in the way it is used? Alternatively, should the United States consider developing some type of investigative detention law to alleviate the need to make pretextual use of statutes like the one regarding material witnesses? What might such a detention law look like if it were to remain consistent with the Constitution?

I. HISTORY OF THE FEDERAL MATERIAL WITNESS STATUTE

It might surprise some to learn that the federal material witness statute, described as both "the most potent weapon in the U.S. counterterrorism arsenal"[5] and the statute that "may have produced the most civil-liberties abuses of any post-9/11 policy,"[6] is, unlike controversial counter-terrorism laws like the USA PATRIOT Act,[7] not of recent origin. Rather, it is part of what Benjamin Wittes calls "the law of September 10"—that is, law that existed prior to September 11, 2001, but which was used with particular vigor in the wake of the 9/11 attacks.[8] In fact, the origins of the law relating to the ability to detain material witnesses date back centuries prior to September 11, 2001.

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[5] DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION 50 (2009).

[6] Michael Isikoff, *A Sharp New Look at 'Material Witness' Arrests*, NEWSWEEK, July 4, 2005, at 6, 6.

[7] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

[8] BENJAMIN WITTES, LAW AND THE LONG WAR 23 (2008).

The principle that certain witnesses have material testimony—and as a result, a duty to testify—has its roots in the 1500s in the common law courts of England.[9] As Lord Bacon declared, "[a]ll subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[10] Because of this duty, witnesses with material knowledge could be detained to ensure their availability to testify at trial.[11]

In the United States, the first Judiciary Act of 1789[12] authorized courts to detain material witnesses.[13] Statutory authority to detain material witnesses has continued to the present day, although it has taken various forms and has not been without some confusion. Federal statutes provided the authority until 1948, at which time they were repealed in a general revision of Title 18 of the United States Code.[14] By that time, Rule 46(b) of the Federal Rules of Criminal Procedure, which had been adopted in 1946, governed the detention of material witnesses.[15]

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[9] *See generally* Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 487 (2002). The duty was imposed in criminal cases by the Second Act of Philip and Mary in 1555, which enabled the Crown to bind over witnesses (defendants did not gain the ability to compel witnesses until the late 1600's), and in civil cases in 1562 by the Statute of Elizabeth. *Id.* at 487-88. Equity courts had recognized a testimonial duty by the invention of the subpoena writ more than a century earlier. *Id.*

[10] Blair v. United States, 250 U.S. 273, 279-80 (1919) (quoting Countess of Shrewsbury's Case, 2 How. St. Tr. 769, 778 (1612)) (internal quotation marks omitted).

[11] Bacon v. United States, 449 F.2d 933, 938-39 (9th Cir. 1971) ("[Power to detain material witnesses] is consonant with the long established rule of English Law, in effect when the United States became a nation."). There is some debate as to whether the authority to detain could be exercised prior to the witness's failure to comply with an order to testify. *See* Joseph G. Cook, *The Detention of Material Witnesses and the Fourth Amendment*, 76 MISS. L.J. 585, 606 n.122 (2006). What is not disputed, however, is that common law courts had the power to detain material witnesses.

[12] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[13] §§ 30, 33, 1 Stat. at 89, 91; Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1222 n.23 (2002). The Act provided: "[C]opies of the process [against the person accused] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment." *Id.* (alterations in original) (quoting § 33, 1 Stat. at 91) (internal quotation marks omitted).

[14] Studnicki & Apol, *supra* note 9, at 490-92; *see also* 28 U.S.C. §§ 657, 659 (1940) (repealed 1948); Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 72, 73-74.

[15] Until 1972, the Rule provided:

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

Studnicki & Apol, *supra* note 9, at 491 (quoting FED. R. CRIM. P. 46(b) (1946) (amended 1966)). Neither Rule 46(b) nor a later federal statute, 18 U.S.C. § 3149, passed as part of the Bail Reform Act of 1966, had language authorizing the arrest of material witnesses. *Id.* at 491-92. The authority to arrest

Federal material witness law assumed its current form with the passage of the Bail Reform Act of 1984.[16] The primary provision pertaining to material witnesses is Title 18, section 3144, of the United State Code, which 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.[17]

Broadly speaking, the statute permits the arrest of a person whose testimony is needed in a criminal proceeding and who is likely to flee.[18] Several other important points emerge from the statutory language. First, invocation of the procedure necessary to arrest a material witness is not limited to requests by the government. The required affidavit need only be filed by "a party."[19] Although the vast majority of material witness detentions are initiated by the government, the procedure is also available to criminal defendants.[20]

A second notable aspect of the statute is what happens to a witness who is arrested. The statute provides that the witness is to be treated in accordance with the provisions of § 3142—the section detailing procedures used for persons charged with crimes. According to § 3142, pretrial defendants (and, presumably, detained witnesses) generally are to be released on personal recognizance (essentially a promise to appear) or upon execution of an unsecured appearance bond.[21] However, in the case of a defendant, if the judge determines that such release will either not reasonably assure the defendant's appearance or endanger the safety of another person or the community as a whole, the judge may impose additional conditions or may even detain the defendant if no condition or combination of conditions will

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was read into both provisions, however, as implied by language that gave the court power to impose bail and set conditions of release if the witness "has been detained for an unreasonable length of time." *Bacon*, 449 F.2d at 937-38; *see also* Studnicki & Apol, *supra* note 9, at 491-92.

16 Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150, 3062 (2006).

17 18 U.S.C. § 3144. In addition to the federal statute, almost every state also has a comparable witness detention statute. *Bacon*, 449 F.2d at 939; Cook, *supra* note 11, at 586 n.4.

18 18 U.S.C. § 3144.

19 *Id.*

20 Aguilar-Ayala v. Ruiz, 973 F.2d 411, 419 (5th Cir. 1992) ("Either party, upon the requisite showing, can effectuate the detention of a material witness pending trial."); United States v. Mercedes, 164 F. Supp. 2d 248, 249 (D.P.R. 2001) (involving nineteen material witnesses detained on defendant's request).

21 18 U.S.C. § 3142(b).

assure appearance or safety.[22] In the case of a witness, however, danger to other persons or the community is not a valid consideration.[23] A witness, after all, is not charged with a crime, and the only proper consideration should be what is necessary to assure appearance at trial to provide the material testimony that the witness possesses.

The Supreme Court has noted that § 3142 provides a number of significant procedural safeguards.[24] The arrested person has a right to counsel and to have an attorney appointed if he cannot afford one.[25] In order to detain an arrestee, a court must hold a hearing "immediately upon the person's first appearance before the judicial officer."[26] At this hearing, the arrestee has the right to testify, present witnesses, proffer evidence, and cross-examine witnesses.[27] The judge is not given unbridled discretion in making the detention determination, but must consider only the factors that Congress deemed relevant.[28] If the judge finds that detention is required, she must state her findings of fact in writing and support her conclusion with "clear and convincing evidence."[29] In the event that detention is ordered, the arrestee is entitled to expedited appellate review of the order.[30] Moreover, Rule 46 of the Federal Rules of Criminal Procedure requires the detaining judge to eliminate unnecessary detention by "supervis[ing] the detention within the district of . . . any persons held as material witnesses."[31] To aid the court in this requirement, the government "must report biweekly to the

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22 *Id.* § 3142(b)-(c), (e).

23 *See* United States v. Awadallah, 349 F.3d 42, 63 n.15 (2d Cir. 2003) (explaining that consideration of safety of any other person and the community is inappropriate in the material witness context); S. REP. NO. 98-225, at 28 n.90 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 ("Of course a material witness is not to be detained on the basis of dangerousness.").

24 United States v. Salerno, 481 U.S. 739, 742 (1987); *see also* 18 U.S.C. § 3142(f)(2)(B). *Salerno* involved a constitutional challenge to the provision in the Bail Reform Act of 1984 allowing pretrial detention of defendants based on danger to other persons or the community. 481 U.S. at 741. The Supreme Court upheld the Act. *Id.*

25 *Salerno*, 481 U.S. at 742; *see also* 18 U.S.C. §§ 3006A(a)(1)(G), 3142(f)(2)(B).

26 18 U.S.C. § 3142(f)(2)(B). This statutory provision allows for a short continuance (not to exceed five days on the government's motion). *Id.*

27 18 U.S.C. § 3142(f)(2)(B); *Salerno*, 481 U.S. at 742.

28 18 U.S.C. § 3142(g); *Salerno*, 481 U.S. at 742. Of the four factors listed in the statute, one clearly does not apply to witnesses. *See* 18 U.S.C. § 3142(g)(4) (addressing "the nature and seriousness of the danger to any person or the community that would be posed by the person's release"); *see also supra* note 23 and accompanying text. Two other factors also appear to be relevant only to individuals charged with crimes. 18 U.S.C. § 3142(g)(1)-(2) (addressing "the nature and circumstances of the offense charged" and "the weight of the evidence against the person"). Thus, only one of the listed factors is relevant to the decision to detain a material witness: "the history and characteristics of the person." *Id.* § 3142(g)(3); *see also Awadallah*, 349 F.3d at 63 n.15 (explaining that the magistrate properly considered only the witness's character and history).

29 *Salerno*, 481 U.S. at 742 (quoting 18 U.S.C. § 3142(f)(2)(B)).

30 18 U.S.C. § 3145(b)-(c); *Salerno*, 481 U.S. at 743.

31 FED. R. CRIM. P. 46(h)(1).

court, listing each material witness held in custody for more than 10 days" and stating why each witness should not be released.[32]

Finally, one notable aspect of the statute is that it provides a detained witness with an additional procedural safeguard that a criminal defendant detained under § 3142 does not possess—"a mechanism for securing his own release."[33] The penultimate sentence of § 3144 provides that a witness cannot be detained if the witness's testimony "can adequately be secured by deposition" and "if further detention is not necessary to prevent a failure of justice."[34] Additionally, Rule 15(a)(2) of the Federal Rules of Criminal Procedure provides that:

> [a] witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript."[35]

The Fifth Circuit Court of Appeals has held that the conjunctive effect of § 3144 and Rule 15(a)(2) is that a detained witness who files a written motion requesting deposition and showing that the witness's "testimony can adequately be secured by deposition, and that further detention is not necessary to prevent a failure of justice" *must* be deposed and released.[36] Such a motion can be denied only if "the deposition would not serve as an adequate substitute for the witness'[s] live testimony," resulting in a failure of justice.[37]

Historically, federal witnesses have most often been detained to testify in the prosecution of immigration offenses.[38] In the majority of these cases,

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32 *Id.* at 46(h)(2).

33 Aguilar-Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992).

34 18 U.S.C. § 3144.

35 FED. R. CRIM. P. 15(a)(2).

36 *Aguilar-Ayala*, 973 F.2d at 413 (quoting 18 U.S.C. § 3144) (internal quotation marks omitted); *see also* Torres-Ruiz v. U.S. Dist. Court for S. Dist. of Cal., 120 F.3d 933, 935 (9th Cir. 1997); United States v. Nai, 949 F. Supp. 42, 44 (D. Mass. 1996); United States v. Huang, 827 F. Supp. 945, 948 (S.D.N.Y. 1993).

37 *Aguilar-Ayala*, 973 F.2d at 413. In order to constitute an adequate substitute for live testimony, the deposition must be admissible notwithstanding any objection under the Federal Rules of Evidence or the Confrontation Clause. *Id.*

38 *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL 33077, ARREST AND DETENTION OF MATERIAL WITNESSES: FEDERAL LAW IN BRIEF AND SECTION 12 OF THE USA PATRIOT AND TERRORISM PREVENTION REAUTHORIZATION ACT (H.R. 3199) 3 n.11 (2005) (stating that the Administrative Office of the United States Courts records indicate that—both before and after September 11, 2001—"an overwhelming majority of the material witness hearings conducted by United States magistrate judges occur[red] in judicial districts bordering Mexico"). In 2000, the former Immigration and Naturalization Service made ninety-four percent of the material witness arrests. WITNESS TO ABUSE, *supra* note 1, at 14. In 2001, INS was responsible for more than ninety percent of material witness arrests. Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES,

the detained witnesses were foreign nationals whose testimony was needed against those charged with illegally smuggling them into the United States.[39] Even prior to 9/11, however, the statute was used at times to detain persons suspected not merely of being witnesses to crimes, but of being involved as participants. For instance, Terry Nichols, who was later charged and convicted in the bombing of the Murrah Federal Building in Oklahoma City in 1995, was initially arrested not as a suspect, but as a material witness to the crime.[40]

II. POST-9/11 USE OF THE MATERIAL WITNESS STATUTE

The events of September 11, 2001, brought a number of changes to law enforcement in the United States. One of the most significant changes was the degree to which the focus of federal law enforcement shifted from the investigation and prosecution of terrorists to a single-minded emphasis on the prevention of future terrorist acts. Less than a week after the 9/11 attacks, Attorney General John Ashcroft directed all United States Attorneys to prevent future terrorism by using "every available law enforcement tool" to arrest and detain terrorists and their supporters.[41] The DOJ's "single objective" was to "prevent terrorist attacks by taking suspected terrorists off the street."[42] The following discussion describes the legal tools available to the DOJ to accomplish this objective, notes other relevant policies developed during this time, and recounts some of the actual practices of the material witness statute.

A. *Three Tools Available to Incapacitate Potential Terrorists*

As to the tactics to be employed to prevent terrorist attacks, the Attorney General and other high-ranking DOJ officials drew analogies to those

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Aug. 19, 2004, http://www.nytimes.com/2004/08/19/us/threats-responses-detainees-for-post-9-11-material-witness-it-terror-different.html.

39 WITNESS TO ABUSE, *supra* note 1, at 14.

40 *In re* Material Witness Warrant Nichols, 77 F.3d 1277, 1278 (10th Cir. 1996).

41 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 12 (2003) [hereinafter OIG REPORT] (quoting Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Anti-Terrorism Plan 1 (Sept. 17, 2001), *available at* http://www.scribd.com/doc/17819245/T5-B61-AG-AntiTerrorism-Plan-Fdr-91701-Ashcroft-Memo-AntiTerrorism-Plan-206) (internal quotation marks omitted), *available at* http://www.justice.gov/oig/ special/0306/full.pdf.

42 *Id.* at 12-13 (quoting John Ashcroft, Att'y Gen., U.S. Dep't of Justice, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm) (internal quotation marks omitted).

used by previous generations of federal crime fighters. According to Assistant Attorney General Viet Dinh: "Robert F. Kennedy's Justice Department, it was said, would arrest a mobster for spitting on the sidewalk, and Elliott Ness brought down Al Capone for tax evasion. We have sought to apply this approach to the war on terror. Any infraction, however minor, will be prosecuted against suspected terrorists."[43]

As it developed in the aftermath of 9/11, the DOJ's strategy to prevent future attacks by incapacitating potential terrorists inside the United States involved three primary "tools."[44] In the case of persons not present legally in the United States, the primary device was detention on immigration charges.[45] Immigration detentions constituted far and away the largest category of post-9/11 detainees. Over seven hundred aliens were detained after the 9/11 attacks for immigration law violations such as entering the country

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[43] Viet Dinh, Assistant Att'y Gen., U.S. Dep't of Justice, Ordered Liberty in the Age of International Terrorism 8 (June 7, 2002), *available at* http://www.bancroftassociates.net/docLeventhalTalk7-7-02.pdf. The Attorney General also drew inspiration from the past:

> Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the republic. . . .
> . . . .
> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.
> Let 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. 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.
> 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.

Ashcroft, *supra* note 42.

[44] OIG REPORT, *supra* note 41, at 38-39; *see also* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 921 (D.C. Cir. 2003) (identifying three categories of detainees: those detained on immigration charges, those with criminal charges, and those arrested on material witness warrants); Dinh, *supra* note 43, at 8 ("[E]ach and every person detained arising from our investigation into 9/11 has been detained with an individualized predicate—a criminal charge, an immigration violation, or a judicially issued material witness warrant."). In the case of suspected terrorists seized outside of the United States, a fourth option was commonly used: detention as an enemy combatant. However, detention under the law of war was used for only two individuals apprehended in the United States, Jose Padilla and Ali Saleh Kahlah al-Marri. Letter from Eric Holder, Att'y Gen., U.S. Dep't of Justice, to Senator Mitch McConnell, U.S. Senate 3 (Feb. 3, 2010), *available at* http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf. In both cases, the individuals were initially held as material witnesses and in both cases, each detainee's later transfer to law of war custody raised "serious statutory and constitutional questions." *Id.*

[45] OIG REPORT, *supra* note 41, at 39.

illegally and overstaying visas.[46] According to the DOJ's Inspector General, although nearly all of these individuals had in fact committed immigration violations, it is unlikely that they would have been arrested but for the 9/11 investigation.[47]

In the case of suspects legally present in the United States, two incapacitation "tools" were available: arrest and detention based on criminal charges or charges pursuant to a material witness warrant.[48] Criminal detainees, although a much smaller number than immigration detainees, appear to constitute the second largest group. According to the Court of Appeals for the District of Columbia, as of 2003, "134 individuals [had] been detained on federal criminal charges in the post-September 11 investigation."[49] The number of persons arrested and detained as material witnesses is more difficult to ascertain, but this group appears to be the smallest of the three. Material witness proceedings and records were sealed at the government's request, and the government did not initially reveal how many persons were detained on material witness warrants.[50] The government has subsequently admitted to holding forty to fifty material witnesses.[51] According to research by Human Rights Watch and the American Civil Liberties Union, however, at least seventy individuals—all male and all but one Muslim—were detained as material witnesses after 9/11.[52]

B. *Related Detention Policies*

In addition to the policy to arrest on any supportable basis, another component of the DOJ's strategy was implementation of a "hold until cleared" policy. This unwritten but widely understood directive required that law enforcement officials seek to hold all 9/11 detainees without bond

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46 *Id.* at 2, 5 (concluding that 762 aliens were detained in 9/11 investigation); *see also Ctr. for Nat'l Sec. Studies*, 331 F.3d at 921 ("Over 700 individuals were detained on INS charges."). Some estimates put the number of immigration detainees much higher. David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1753 (2004) ("As of January 2004, the government had detained more than 5000 foreign nationals through its antiterrorism efforts.").

47 OIG REPORT, *supra* note 41, at 5, 41.

48 *Id.* at 39.

49 *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 921.

50 *Id.*; *see also* WITNESS TO ABUSE, *supra* note 1, at 3.

51 JAMES BECKMAN, COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM 33 (Tom Payne & Tom Lansford eds., 2007); *see also* WITNESS TO ABUSE, *supra* note 1, at 15 (stating that the DOJ told Congress "that as of January 2003 it had detained fewer than fifty" individuals on material witness warrants).

52 WITNESS TO ABUSE, *supra* note 1, at 1. Assuming that the Human Rights Watch/ACLU number is roughly correct, post-9/11 material witness detainees were about half as numerous as criminal detainees and less than ten percent the size of the group detained on immigration charges. Also, the 9/11 material witness detainees would constitute less than two percent of the total of approximately 4,000 material witness warrants issued on average each year. DOYLE, *supra* note 38, at 3 n.10.

until the FBI could affirmatively ensure that an individual detainee was not a threat.[53] The reason for the policy, as explained by the Deputy Attorney General, was that the threat after 9/11 required a different approach "to aggressively protect public safety, within the bounds of the law, by disrupting and preventing further incidents."[54] There was a recognition at the highest levels that "if we turn one person loose we shouldn't have, there could be catastrophic consequences."[55] At the same time, however, there was also an understanding of the problems inherent in such a process. Officials recognized that this was "unchartered territory" in a legal sense and that the strategy to hold until cleared "had risks."[56] Moreover, there was a realization that practical problems existed with a clearance process that required the FBI (and the detainee) to "prov[e] a negative"—that is, that the detainee was not a threat.[57]

Preventive detention is "deprivation of liberty that is based on a prediction of harmful conduct and that is not time-limited by culpability or other considerations (such as a pending trial)."[58] Given that the underlying (and stated) rationale for the "arrest on any supportable basis" and "hold until cleared" policies was the prevention of future terrorist attacks, it seems apparent that after 9/11, the United States was employing at least a limited form of preventive detention. The limits on this particular form of preventive detention were twofold. First, there had to be a basis for the arrest in either a criminal or an immigration violation or in an assertion—deemed plausible by a federal judge—that the requirements of the material witness statute had been met. Second, the detention was at least theoretically time-limited in that the detainee would be released when it could be shown that he was not a threat. In the context of material witness detentions, Mary Jo White—United States Attorney for the Southern District of New York until 2002 and one of the architects of the post-9/11 strategy to use the material witness statute to detain terrorist suspects—conceded that such detentions were essentially a form of preventive detention but asserted that they were permissible because they were "preventive detention . . . with safeguards."[59]

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53 OIG REPORT, *supra* note 41, at 37-39. The OIG REPORT specifically addressed those held on immigration charges, but the "hold until cleared" policy extended to material witness detentions as well. 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, 692 (2005).

54 OIG REPORT, *supra* note 41, at 40.

55 *Id.* at 39 (internal quotation marks omitted).

56 *Id.* at 38 (internal quotation marks omitted). For instance, administration officials clearly anticipated legal challenges to the policy in the form of habeas corpus petitions by detained individuals. *Id.*

57 *Id.* at 40 (internal quotation marks omitted).

58 Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 2 (2003).

59 Liptak, *supra* note 38 (internal quotation marks omitted). Ms. White stated: "It was really my idea to use the material witness warrant statute in appropriate cases to detain for reasonable periods of time people who might not appear for a grand jury with information related to the 9/11 attacks." *Id.* (internal quotation marks omitted). She went on to observe: "Does [material witness detention] really

As previously noted, the material witness warrant and detention process has a number of procedural safeguards.[60] Thus, one of the critical questions in assessing the legitimacy of material witness detentions in the wake of 9/11 is whether these statutory safeguards worked as designed to protect the rights of those detained.

C. *Actual Practices and Use of the Material Witness Statute*

Michael Mukasey, who as a federal judge signed a number of material witness arrest warrants and later served as United States Attorney General, asserts that the statutory safeguards were followed and the witnesses' rights protected.[61] According to Mukasey, each material witness arrested "was brought immediately before a federal judge where he was assigned counsel, had a bail hearing, and was permitted to challenge the basis for his detention, just as a criminal defendant would be."[62] The government, Mukasey says, then had only a "limited time" to release the witness (after either obtaining his cooperation or determining that detention was a mistake), place him before the grand jury, or charge him with a crime.[63] The United States Court of Appeals for the District of Columbia also expressed confidence in the conduct of material witness proceedings at the district court level, finding that deference was appropriate to the government's assertion that the material witnesses were connected with terrorism because "all material witness detainees have been held on warrants issued by a federal judge . . . [and] have been found by a federal judge to have relevant knowledge about the terrorism investigation."[64]

Research conducted by Human Rights Watch and the American Civil Liberties Union, however, paints a different picture. According to a report issued by Human Rights Watch in 2005, attorneys "who had material witness clients both before and after September 11 were stunned by the transformation in the law's use in the counterterrorism context," with safeguards required by the material witness statute not followed in many cases.[65] More than two dozen of the seventy witnesses located by the report's authors

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sort out to being in one sense preventive detention? Yes, it does, but with safeguards." *Id.* (internal quotation marks omitted).

60 *See supra* notes 24-37 and accompanying text.

61 Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, http://www.opinionjournal.com/extra/?id=110010505. Judge Mukasey signed the material witness arrest warrants for Jose Padilla. *Id.*; *see also* United States v. Awadallah, 349 F.3d 42, 47 (2d Cir. 2003).

62 Mukasey, *supra* note 61.

63 *Id.* DOJ officials also defended the process, arguing that there was compliance with the necessary safeguards. *See* Isikoff, *supra* note 6 ("[E]very material witness arrest warrant must be based on 'probable cause' and approved by a federal judge.").

64 Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 931 (D.C. Cir. 2003).

65 WITNESS TO ABUSE, *supra* note 1, at 20.

were not brought before a judge for a hearing at which they could contest their detention for three or more days,[66] ten never received a hearing at all,[67] and judges routinely failed to issue the required written statement explaining the reasons for detention.[68] Human Rights Watch alleges that "government agents have sometimes delayed for days in providing counsel" to witnesses who requested it or discouraged those detained from seeking the advice of counsel.[69] "One-third of the . . . witnesses . . . were incarcerated for at least two months," and one was held for more than a year.[70] Despite their designation as witnesses, at least thirty of the seventy never testified before a court or grand jury.[71] Moreover, the technique of deposing and releasing the witnesses—ostensibly the preferred method under the statute—was consistently opposed by the DOJ and apparently not used in any of the cases.[72] According to Human Rights Watch, forty-two of the witnesses eventually were released without any charge, and the government apologized to at least thirteen of those detained.[73] The report alleges that the DOJ deliberately used the material witness law for a purpose for which it was not intended—"to secure the indefinite incarceration of those it has wanted to investigate as possible terrorist suspects."[74] Before 9/11 "a witness [was] just a witness,"[75] but after, "[t]here is no longer a line . . . between being involved in a conspiracy or being a witness."[76]

One consistent theme in the Human Rights Watch report is that federal judges did not "honor[] the letter [or] spirit of the material witness rules."[77]

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66 *Id.* at 47-48. A continuance of up to three days at the government's request could have been allowed under the statute. 18 U.S.C. § 3142(f)(2)(B) (2006).

67 WITNESS TO ABUSE, *supra* note 1, at 48. The material witness statute provides that the judge "shall hold a hearing" before detaining an arrestee. 18 U.S.C. § 3142(f). The Human Rights Watch report cites one case in which a detainee was not taken before a judge or provided an attorney for fifty-seven days. WITNESS TO ABUSE, *supra* note 1, at 48.

68 WITNESS TO ABUSE, *supra* note 1, at 48. The statute provides that "[i]n a detention order issued under subsection (e) of this section, the judicial officer shall . . . include written findings of fact and a written statement of the reasons for the detention." 18 U.S.C. § 3142(i)(1); *see also* United States v. Salerno, 481 U.S. 739, 742 (1987) (explaining that a judge "must state his findings of fact in writing").

69 WITNESS TO ABUSE, *supra* note 1, at 56.

70 *Id*. at 3.

71 *Id*. at 2.

72 *Id*. at 79.

73 *Id.* at 5. As to the outcomes for the other witnesses, the report states that twenty were charged with non-terrorist-related crimes, seven were charged with providing material support to terrorist organizations, and two were subsequently designated as enemy combatants. *Id.* Twenty-four of the individuals were deported. *Id.*

74 *Id*. at 1.

75 WITNESS TO ABUSE, *supra* note 1, at 20 (quoting Telephone Interview with Eric Sears, Att'y for Mohamad Elzahabi (Aug. 24, 2004)) (internal quotation marks omitted).

76 *Id*. at 54 (quoting Interview with Gerald Kleinschmidt, Att'y for Anwar al-Mirabi) (internal quotation marks omitted).

77 *Id.* at 2. The report asserts that the DOJ did not honor the rules either. *Id.*

According to the report, no case was found in which a court denied a government application for a material witness warrant[78] or disputed "the government's assertion that it could not obtain the testimony of the witness[] through a subpoena."[79] Judges allowed an "astonishing" level of secrecy, generally granting government requests to close proceedings and to seal records pertaining to material witnesses.[80] In practice, according to the report, judicial involvement in the material witness process amounted to "no more than a formality."[81]

The truth about what happened to material witnesses in the wake of 9/11 appears to be somewhat more complicated than either defenders or critics of the process will admit. The secrecy in which the entire process was conducted makes it difficult to know the full truth,[82] but the fact that the government decided that it was necessary to apologize to many of those detained is in itself an indication that the process had significant flaws. A number of these problems appear to stem from the fact that most, if not all, of the material witnesses were detained in connection with grand jury proceedings.[83] As Human Rights Watch notes, the grand jury context makes it

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78 *Id.* at 45.

79 *Id.* at 68; *see also* Bascuas, *supra* note 53, at 689 ("While the details of many cases are still unknown because of DOJ's efforts, it appears that federal judges generally deferred to law enforcement agents' and prosecutors' requests in the September 11th investigation for 'material witness' detentions without bail.").

80 WITNESS TO ABUSE, *supra* note 1, at 62. Of the seventy witnesses located by HRW and the ACLU, no judicial records could be found for sixty-two of them. *See id.*

81 *Id.* at 47. At least one commentator has also criticized the judiciary for not fulfilling its assigned role:

> If the major objection to the post-September 11th "material witness" detentions is that the targets are not true material witnesses, then the problem must be that the Judiciary is not fulfilling its obligation to ensure the law is followed. As DOJ has repeatedly pointed out, a federal judge or magistrate judge has, by signing each warrant, represented that the statutory criteria are met in every case. While the circumstances of many of the "material witness" detentions undermine the image of careful and skeptical judicial oversight that the Department hopes to convey, the lack of such oversight can only be blamed on the Judiciary.

Bascuas, *supra* note 53, at 697-98.

82 As previously noted, this secrecy itself is the subject of objection by Human Rights Watch and is pointed to as evidence that judges did not do their job. *See* WITNESS TO ABUSE, *supra* note 1, *passim*. However, the Court of Appeals for the District of Columbia, which had access to much more information than is available to the general public, upheld the government's refusal to provide the names of 9/11 detainees, holding that "the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003).

83 Grand juries investigating the terrorist attacks were convened in two jurisdictions: the Southern District of New York and the Eastern District of Virginia. Bascuas, *supra* note 53, at 689. Thus, most material witness warrants and sealing orders were issued in these districts, and judges in other districts in which witnesses were found were limited to conducting removal hearings, during which the government merely had to prove the identity of the individuals arrested. *Id.*; *see also* FED. R. CRIM. P. 5(c)(3)(D).

extremely difficult for courts to conduct meaningful scrutiny because grand jury investigations are broad in scope and run largely by prosecutors operating under strict rules regarding secrecy.[84] While it appears that statutory safeguards were not followed in some instances, in other cases judges disagreed with the government's position and ruled against prosecutors.[85] As to the allegation that the line between witness and suspect has been blurred by post-9/11 policy, it is not at all clear that such a line ever existed or should exist. Indeed, there appears to be the potential for significant overlap between suspects and witnesses, as well as legitimate reasons why in a terrorism conspiracy investigation—particularly in the early stages—"an individual's proximity to a crime may make him both a legitimate witness and a legitimate suspect."[86] However, as to the overarching allegation underlying much of the Human Rights Watch report—that the DOJ used the material witness statute for the purpose of detaining those it suspected of terrorist connections—there appears to be no doubt. Indeed, it is clear that the DOJ regarded the statute as a valuable tool for just that purpose.

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84 WITNESS TO ABUSE, *supra* note 1, at 45-46; *see also* FED. R. CRIM. P. 6(e). A 2002 amendment to Rule 46(h) of the Federal Rules of Criminal Procedure, which requires a report by the government listing "each material witness held in custody . . . pending indictment," appears to clarify that detention to testify before the grand jury is proper. Heidee Stoller, Tahlia Townsend, Rashad Hussain & Marcia Yablon, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 203-04 (2004) (emphasis omitted) (quoting FED. R. CRIM. P. 46(h)(2)) (internal quotation marks omitted).

85 The Human Rights Watch report contains a number of examples of this. In the case of Mohamad Kamal Elzahabi, the district court judge informed the government that the judge would release Elzahabi if the government did not call him to testify before the grand jury. WITNESS TO ABUSE, *supra* note 1, at 35. In the case of Anwar al-Mirabi, the district court judge denied the government's request to seal the proceeding and records and held that al-Mirabi could not be detained because he was not a flight risk. *Id.* at 53. In the case of Osama Awadallah, the district court judge held that the government failed to establish that the witness would not comply with a subpoena to testify. *Id.* at 70. In the cases of Maher Mofeid Hawash and Abdallah Higazy, the judges denied the government's requests for secrecy. *Id.* at 66. Finally, in the case of Tajammul Bhatti, the judge released the witness on supervised release after six days. *Id.* at 23.

86 DOYLE, *supra* note 38, at 3; STIGALL, *supra* note 5, at 54 (noting that there is a "blurred distinction—or even logical overlap—between a suspected criminal and a suspected material witness"). In the context of material witness detentions, one commentator has called for "a vigorous assertion by a federal court declaring witness and defendant to be separate entities." Ronald L. Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America's Material Witness Laws*, 42 GA. L. REV. 941, 972 (2008). Perhaps due to years of watching the testimony of "cooperating witnesses," themselves generally potential (or actual) defendants, courts appear unwilling to make this declaration. At least some overlap is evident in the post-9/11 context as a number of those initially arrested as witnesses were later convicted of terrorism charges, including Jose Padilla, Ali Saleh Kahlah al-Marri, Zacarias Moussaoui, and Maher Hawash. STIGALL, *supra* note 5, at 72, 75-77; Bascuas, *supra* note 53, at 699-701.

III. MATERIAL WITNESSES AND THE FOURTH AMENDMENT

The hypothetical case of Hasan Abdallah that began this Article presents important constitutional issues that undoubtedly will arise in the event of a future terrorist attack in the United States. The Fourth Amendment, which governs the legality of arrests and seizures, provides the framework for analyzing the detention of individuals like the hypothetical Abdallah.[87] Specifically, material witness arrest and detention may present two Fourth Amendment issues. First, is such an arrest—conducted in accordance with a statute passed by the United States Congress—permissible under the Fourth Amendment at all, and if so, what are the limits? Second, assuming material witness detention itself is legal, does pretextual use of the statute—that is, detention in which the real motivation is something other than ensuring witness availability for trial—violate the Fourth Amendment?

A. *Analysis of the Material Witness Statute Under the Fourth Amendment*

Remarkably, despite the existence of a federal material witness statute for more than two hundred years,[88] the Supreme Court has never directly addressed whether material witness detention is permissible under the Fourth Amendment.[89] In 1973, the issue of material witness detention reached the Supreme Court in *Hurtado v. United States*,[90] a class action brought by illegal immigrants who had been detained as material witnesses.[91] The Court noted at the outset, though, that "petitioners do not at-

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87 The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, 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. The Fourth Amendment applies both to U.S. citizens and to aliens legally in United States, while it is an open question as to whether the Fourth Amendment applies to illegal aliens present in the United States. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 3.1(i), at 144 n.84 (5th ed. 2009); *see also* Orin S. Kerr, *The Modest Role of the Warrant Clause in National Security Investigations*, 88 TEX. L. REV. 1669, 1683 (2010) ("[I]t remains highly uncertain precisely how much voluntary contact with the United States a person who is not a citizen or permanent resident alien must have to get Fourth Amendment rights.").

88 *See supra* notes 12-17 and accompanying text.

89 Al-Kidd v. Ashcroft, 580 F.3d 949, 965 (9th Cir. 2009) ("The Supreme Court has never held that detention of innocent persons as material witnesses is permissible under the Fourth Amendment . . . ."), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98); *see also* Cook, *supra* note 11, at 587 n.9 ("Never, so far as I have been able to determine, has the question been asked, is the practice of detaining material witnesses per se unconstitutional."). The statute has, however, been held not to violate the Fifth and Thirteenth Amendments and the Privileges and Immunities Clause of the Fourteenth Amendment. *Al-Kidd*, 580 F.3d at 965 n.15.

90 410 U.S. 578 (1973).

91 *Id.* at 579.

tack the constitutionality of incarcerating material witnesses, or the length of such incarceration in any particular case."[92] The Court—apparently to show why such an argument would not have been made—then cited two of its previous decisions, *Stein v. New York*[93] and *Barry v. United States ex rel. Cunningham*,[94] quoting from *Stein* that "[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."[95] As to the *Hurtado* plaintiffs' argument that they were entitled to additional compensation for their testimony, the Court held that there is no constitutional right to payment for a duty that is already owed and that the public owes a duty to provide evidence "no matter how financially burdensome it may be."[96]

One of the few federal appellate court opinions to directly address the interplay between the Fourth Amendment and the material witness statute—and the case most often cited as providing the proper standard to apply—is the Ninth Circuit's decision in *Bacon v. United States*.[97] Bacon was arrested in the District of Columbia pursuant to a material witness warrant issued in Seattle, Washington.[98] She alleged that arrest and detention of witnesses was "forbidden by the Constitution," but she did not specify the particular constitutional provision on which she was relying.[99] In analyzing her argument, the *Bacon* court initially purported not to rule on the constitutional issue, noting, however, the Supreme Court's statement in *Barry* that "[t]he constitutionality of this statute apparently has never been doubted."[100] The court then confusingly held that differences in wording between the material witness rule and the arrest and search warrant rules "do[] not provide a basis sufficient to insulate the procedure by which a material witness is taken into custody from the command of the Fourth Amendment. Thus, it follows that Bacon's arrest and detention must be based on probable cause."[101] According to the *Bacon* court, however, the "probable cause"

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92 *Id.* at 588. The *Hurtado* plaintiffs alleged that by paying them only one dollar per day of confinement, the government had violated their Fifth Amendment right to just compensation and due process. *Id.* at 579.

93 346 U.S. 156 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964).

94 279 U.S. 597 (1929).

95 *Hurtado*, 410 U.S. at 588 n.9 (second alteration in original) (quoting *Stein*, 346 U.S. at 184) (internal quotation marks omitted). In *Barry*, the Court addressed the Senate's power to compel the attendance of witnesses. After drawing an analogy to the federal material witness statute, the Court stated "[t]he constitutionality of [the material witness] statute apparently has never been doubted." *Barry*, 279 U.S. at 616-17. As neither *Stein* nor *Barry* involved the detention of a material witness, the quoted language in both cases is dicta.

96 *Hurtado*, 410 U.S. at 589.

97 449 F.2d 933 (9th Cir. 1971).

98 *Id.* at 934-35.

99 *Id.* at 941.

100 *Id.* (alteration in original) (quoting *Barry*, 279 U.S. at 617) (internal quotation marks omitted).

101 *Id.* at 942 (citation omitted). Although the court noted that the Supreme Court has allowed searches and seizures on "less than traditional probable cause" in certain cases, it held that probable

required for material witness arrest and detention is not the same as that required for arrest and detention generally because the material witness statute and rule "provide specific criteria for probable cause."[102] Accordingly, a judge may issue a warrant to arrest a material witness if there is "probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his presence by subpoena.'"[103] According to the court, "[t]hese requirements are reasonable, and if they are met, an arrest warrant may issue."[104]

Despite the somewhat confusing analysis of *Bacon*, the standard it established has become almost universally accepted as the proper one for material witness detention. Courts have generally relied on the *Bacon* "probable cause" standard without any discussion of its reasoning,[105] and commentators have noted its near-universal acceptance.[106] Moreover, in revising the material witness statute in 1984, Congress specifically cited *Bacon* as the "exclusive legal authority for the statute."[107] So entrenched is the *Bacon* standard that witnesses who challenge their detention generally do not even attempt to argue that the material witness statute itself violates the Fourth Amendment.[108] Even Human Rights Watch apparently accepts *Bacon*'s two-prong probable cause test. Its 2005 report on material witness detentions noted that among the few exceptions to the general rule requiring probable cause to believe that a person has committed a crime "is the fed-

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cause was the standard for material witness detention. *Id.* (citing Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Mun. Court, 387 U.S. 523 (1967)) ("Such an arrest as we have here, when based on a showing of less than probable cause, has no history of judicial or public acceptance.").

102 *Id.* at 943.

103 *Bacon*, 440 F.2d at 943 (quoting 18 U.S.C. § 3144 (2006)). These are the two elements required by statute. *See supra* note 17 and accompanying text.

104 *Bacon*, 440 F.2d at 943.

105 *See, e.g.*, United States v. Awadallah, 349 F.3d 42, 64 (2d. Cir. 2003); Arnsberg v. United States, 757 F.2d 971, 975 (9th Cir. 1985); *In re* De Jesus Berrios, 706 F.2d 355, 357 (1st Cir. 1983); United States v. Oliver, 683 F.2d 224, 230 (7th Cir. 1982); Bascuas, *supra* note 53, at 716 n.196.

106 Bascuas, *supra* note 53, at 696, 716 ("Nearly every federal court to consider the arrest of material witnesses before and after September 11th has uncritically adopted *Bacon*'s fundamentally flawed Fourth Amendment analysis."); *see also* Studnicki & Apol, *supra* note 9, at 496-97; Stoller et al., *supra* note 84, at 205-06.

107 Bascuas, *supra* note 53, at 703; *see also* S. REP. NO. 98-225, at 28-29 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211-12. Generally, when Congress enacts a statute that has been interpreted by the courts, it is "presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978). The inference of acceptance is even stronger where, as here, a relevant Congressional committee specifically cited the case. *See In re* Application of U.S. for Material Witness Warrant, 213 F. Supp. 2d 287, 297 (S.D.N.Y. 2002).

108 *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 579 (1973) (noting that plaintiffs "did not attack the validity or length of their incarceration"); al-Kidd v. Ashcroft, 580 F.3d 949, 966 (9th Cir. 2009) (noting that plaintiff "does not contend that § 3144 is facially unconstitutional"), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98); *Awadallah*, 349 F.3d at 48.

eral material witness law, which permits the government to hold temporarily a person whose testimony is needed for a criminal proceeding and who is likely to flee instead of testifying."[109] The report justified this exception as "a compromise between an individual's right to liberty and the administration of a fair and workable criminal justice system."[110]

The standard established by *Bacon* has not remained completely without criticism, however. Several commentators have pointed out that it deviates from the generally accepted test for probable cause in the arrest context, which requires a belief that the suspect has committed or is committing a crime.[111] Indeed, some critics have argued that the *only* basis on which probable cause can be premised is involvement in a crime.[112] *Bacon*, according to one commentator, committed "heresy" by converting probable cause in the material witness context into a "mere standard of proof."[113] Acknowledging the degree to which courts and other commentators disagree with him, however, that same commentator conceded that *Bacon*'s "heretical feat of legerdemain has never been questioned."[114]

So what explains the unusual state of affairs in which a standard that was confusingly reasoned in the first place becomes so well-established that courts and commentators cite it without explanation and organizations like

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109 WITNESS TO ABUSE, *supra* note 1, at 10.

110 *Id.* at 10-11.

111 Bascuas, *supra* note 53, at 717 (explaining that the "fixed and well known meaning" of probable cause "has always been cause to believe the individual to be seized is involved in the commission of a crime") (internal quotation marks omitted); Cook, *supra* note 11, at 605 ("[T]he most fundamental Fourth Amendment principles will not support taking into custody an individual for whom there is no probable cause to arrest or even articulable suspicion of criminal activity.").

112 Bascuas, *supra* note 53, at 716; Cook, *supra* note 11, at 603 ("While the presence or absence of probable cause has frequently been a difficult decision, never has it been doubted that to make an arrest there must be reason to believe that the subject *had committed or was committing an offense*."); *see also al-Kidd*, 580 F.3d at 967 ("The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)) (internal quotation marks omitted)). The *al-Kidd* majority was bound by the *Bacon* decision (which was decided by an earlier panel of the Ninth Circuit Court of Appeals), but distinguished *Bacon* by saying that when the *Bacon* court said "probable cause," it did not mean probable cause in the Fourth Amendment sense, but rather "simply borrowed, by analogy, . . . the burden-of-proof component of probable cause." *Id.* at 968. The majority did not explain how the issuance of a warrant (to arrest a material witness) on something less than Fourth Amendment "probable cause" complied with the Fourth Amendment requirement that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV.

113 Bascuas, *supra* note 53, at 705, 716 ("'Probable cause' as used in the Fourth Amendment is a substantive concept of law. It is not a mere standard of proof that can be satisfied in various ways depending on the particular end to be achieved. Its meaning embraces not merely a certain quantum of evidence, but a certain quantum of evidence *related to one and only one specific thing*—the commission of a crime."). *But see al-Kidd*, 580 F.3d at 991 (Bea, J., concurring in part and dissenting in part) (explaining that prior to the majority's ruling, "[n]o court had held that 'probable cause' in the Fourth Amendment meant *only* probable cause to believe the subject of the search or seizure had committed criminal wrongdoing").

114 Bascuas, *supra* note 53, at 716.

Human Rights Watch and the ACLU (not to mention detained witnesses themselves) do not even challenge it? It appears that there is an explanation, but one that has not been clearly articulated—perhaps because it is intuitively obvious.

Properly viewed, probable cause is a two-prong concept, possessing both a "burden-of-proof component" and a "substantive component."[115] In the typical arrest situation, the burden of proof component is a set of facts "sufficient to make a reasonable person believe," and the substantive component is "that the suspect is involved in crime."[116] The material witness context obviously alters probable cause analysis, as the substantive component is not a belief that the person to be detained committed a crime. *Bacon* did not, however, dispense with the substantive component altogether. Obviously, to use a ridiculous example, a witness cannot be detained because there are facts sufficient to make a reasonable person believe that he is left handed or has bad breath. What is not clear—largely because *Bacon* and the courts that have cited its standard have not made a serious attempt to make it clear—is what the substantive component is for material witness probable cause. Perhaps the best way to answer this question is to ask, using the Supreme Court's language from *Stein*, why a material witness's duty to testify in a criminal case is "so vital that one known to be innocent may be detained, in the absence of bail" to enforce it?[117] The answer then becomes apparent: if a witness with important testimony is not required to testify, the court, the jury, the government, the victim, the defendant, and society are all deprived of critical information, and there arises a substantial risk that a miscarriage of justice will occur.[118] Viewed in this light, it is overly simplistic to say that there is "one and only one" thing that can justify a deprivation of liberty.[119] The idea that the potential for a miscarriage of justice is a

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115 *Al-Kidd*, 580 F.3d at 967.

116 *Id.*

117 Stein v. New York, 346 U.S. 156, 184 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964).

118 This risk of a miscarriage of justice is, for instance, undoubtedly what the Human Rights Watch report means when it justifies material witness arrest based on "the administration of a fair and workable criminal justice system." WITNESS TO ABUSE, *supra* note 1, at 10-11; *see also al-Kidd*, 580 F.3d at 987 (Bea, J., concurring in part and dissenting in part) ("The validity of a police action under the Fourth Amendment turns not on the guilt or innocence of the arrestee, but on whether the government's reasons for arresting the individual are weighty enough, and probably factually likely enough, to justify the intrusion into some individual's rights. . . . [T]he Supreme Court has stated that the government's interest in the integrity of the justice system is important enough to justify the arrest of a wholly innocent person to secure that witness's appearance at trial.").

119 The Supreme Court has repeatedly emphasized the importance of the duty to testify. *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 589 n.10 (1973) ("[The duty to testify] is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to." (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2192, at 72 (John T. McNaughton rev. ed., 1961))

sufficiently weighty societal interest to justify arrest explains not only the legitimacy of arrest in the material witness context, but also in the case of witness attachment, contempt,[120] refusal to testify,[121] and flight to avoid testifying.[122]

Accordingly, material witnesses are arrested based on a probable cause standard that differs from the probable cause standard relied upon in the vast majority of arrests,[123] but one based on no less weighty an interest—the integrity of the criminal justice system. This probable cause standard has both "a burden-of-proof component (facts sufficient to make a reasonable person believe . . .)"[124] and a substantive component (. . . that a miscarriage of justice will occur). *Bacon*'s incorporation of the specific criteria from the material witness statute now makes sense as an effort to establish a valid substantive component. If these criteria are present—that is, there are facts showing a reasonable basis to believe that a person possessing material testimony will not testify despite receiving a subpoena—then there is a reasonable basis to believe that a miscarriage of justice will occur, and the witness may be arrested and brought before the judge.

To say that the Fourth Amendment allows a judge to issue an arrest warrant to bring a material witness before the court does not mean, however, that all material witness arrests are constitutional or that all detentions imposed on such witnesses pass Fourth Amendment muster. One issue that may arise involves the role of the judge. The statute assigns to the judge the responsibility of reviewing the affidavit and ensuring that it contains prob-

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(internal quotation marks omitted)); New York v. O'Neill, 359 U.S. 1, 11 (1959) ("A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found.").

120 18 U.S.C. §§ 402, 3691 (2006).

121 28 U.S.C. § 1826.

122 18 U.S.C. § 1073. Another possible explanation is that these types of arrests are simply sui generis and outside the Fourth Amendment completely, justifiable purely because they are based on the inherent power of the court to ensure that justice is done. However, the Supreme Court has historically rejected attempts to place certain categories of detention outside the Fourth Amendment and instead expanded its Fourth Amendment analysis to include all significant infringements upon liberty. *See* Cook, *supra* note 11, at 605 (explaining in response to the argument that material witness detentions are sui generis: "the Supreme Court has shown little patience with attempts to define away Fourth Amendment issues"); *see also* Terry v. Ohio, 392 U.S. 1, 19 (1968) (rejecting argument that police stops are too low visibility to warrant Fourth Amendment scrutiny); Camara v. Mun. Court, 387 U.S. 523, 534 (1967) (explaining that routine building inspections, although not done for criminal investigation, are still searches requiring a warrant). Moreover, removing these detentions pursuant to a warrant from Fourth Amendment scrutiny is hard to square with the Fourth Amendment requirement that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV.

123 *See al-Kidd*, 580 F.3d at 988 (Bea, J., concurring in part and dissenting in part) ("[I]n the great run of arrest cases, the relevant inquiry will be whether officers had probable cause to believe the subject committed wrongdoing.").

124 *Id.* at 967.

able cause as to both materiality of the witness's testimony[125] and impracticality of securing it by subpoena.[126] Most courts have required the government to establish the impracticality requirement by placing facts in the affidavit sufficient to show why the witness may not testify in spite of being subpoenaed.[127] As for the materiality requirement, however, the *Bacon* court held that, at least in the case of a witness detained to testify before the grand jury, a "mere assertion" by the prosecutor that the witness has material testimony will suffice.[128] This approach creates serious concerns as to the judge's ability to perform her constitutional duty to conduct an independent determination as to the existence of probable cause.[129] In a different context, the Supreme Court has held that reliance on a warrant is not objectively reasonable when either the affidavit is so lacking in probable cause that it is not reasonable to rely on it or the judge who signed the warrant wholly abandoned her judicial role.[130] As both of these appear to be present in a situation in which a judge signs a warrant based on nothing more than a prosecutor's assertion of materiality, the better approach is to require the affiant to place in the affidavit specific facts showing why there is reason to believe that the witness possesses material testimony.[131] If necessary due to grand jury secrecy requirements, such information could be provided to the judge under seal.[132]

Another potential constitutional issue pertains to the length of detention, as an arrest that is valid at its inception may become unreasonable in

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125 The statute provides that it must "appear[] from an affidavit . . . that the testimony of a person is material." 18 U.S.C. § 3144.

126 It must be "shown that it may become impracticable to secure the presence of the person by subpoena." *Id.* Although the involvement of a judge and issuance of a warrant is generally not required by the Fourth Amendment for arrests conducted outside the home, the statutory requirement of a judicially issued order to arrest a material witness makes sense in light of the interest at stake—protection of the integrity of the criminal justice system. *See* United States v. Watson, 423 U.S. 411, 417-18 (1976) (finding a warrantless arrest with probable cause in a public place legal under Fourth Amendment).

127 *See, e.g.*, Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

128 *Id.*

129 *See* Cook, *supra* note 11, at 594 (noting that the "[Supreme] Court has never deviated from its view that the determination of probable cause must be made by a judicial officer, and in that role the judicial officer is not to act as a rubber stamp"); Stoller et al., *supra* note 84, at 207 (arguing that the "mere assertion" standard is inconsistent with the principles of specificity and independent judicial review that are at the core of the Fourth Amendment).

130 United States v. Leon, 468 U.S. 897, 923 (1984).

131 *See* Stoller et al., *supra* note 84, at 207 (contrasting *Bacon*'s "mere assertion" standard with the Second Circuit Court of Appeals's more probing analysis in *Awadallah*, in which the court analyzed the facts provided in the FBI affidavit to see whether probable cause was established).

132 United States v. Awadallah, 349 F.3d 42, 61 (2d Cir. 2003) ("[C]ourts make similar determinations all the time, based on sealed submissions, when deciding whether a subpoena calls for relevant information, whether such information is privileged, and the like." (quoting *In re* Application of U.S. for Material Witness Warrant, 213 F. Supp. 2d 287, 294 (S.D.N.Y. 2002)) (internal quotation marks omitted)).

its duration.[133] The material witness statute does not explicitly authorize indefinite detention, but neither does it contain any express time limit.[134] While the Supreme Court has not addressed material witness detention, the Court has held—in the analogous context of illegal alien detention—that indefinite detention raises a "serious constitutional concern[]."[135] Accordingly, the Court read into the immigration statute "an implicit 'reasonable time' limitation," and found that a removable alien can be held only for a period reasonably necessary to secure removal.[136]

In *United States v. Awadallah*,[137] the Second Circuit Court of Appeals addressed the constitutionality of a material witness detention lasting several weeks.[138] By attempting to ensure that the witness was detained "no longer than necessary," the *Awadallah* court appears, like the Supreme Court in *Zadvydas v. Davis*,[139] to have adopted a "reasonable time" standard under which detention is reasonable only so long as is necessary to effectuate the statute's purpose.[140] In order to determine whether the detained witness's Fourth Amendment rights were violated, the *Awadallah* court used a balancing test.[141] On one side of the balance was the government's interest which, in the case of a terrorist attack, was "the indictment and successful prosecution of terrorists whose attack, if committed by a sovereign, would have been tantamount to war, and the discovery of the conspirators' means, contacts, and operations in order to forestall future attacks."[142] On the other side of the balance was the individual's interest in liberty, on which arrest and detention were "significant infringements."[143] The court held that the material witness statute "sufficiently limits that infringement and reasonably balances it against the government's countervailing interests."[144] According to the *Awadallah* court, a material witness has sufficient Fourth Amendment protection against an unreasonably long detention because of the procedural safeguards provided in the statute and rules, including the presumption in favor of deposition to preserve the witness's testimony and the bail and release provisions of § 3142.[145] The court also noted that perhaps the most important procedural safeguard was the Rule 46 requirement

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133 Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (stating that "a serious question" exists as to whether the Constitution permits indefinite detention).

134 *Awadallah*, 349 F.3d at 62.

135 *Zadvydas*, 533 U.S. at 682.

136 *Id.* The Court set six months as a "presumptively reasonable period of detention." *Id.* at 701.

137 349 F.3d 42 (2d Cir. 2003).

138 *Id.* at 62.

139 533 U.S. 678 (2001).

140 *See Awadallah*, 349 F.3d at 62.

141 *Id.* at 58.

142 *Id.* at 59.

143 *Id.*

144 *Id.*

145 *Id.* at 59-62.

that the government justify the continued detention of any witness held for more than ten days.[146]

Depending on how it is implemented, a "hold until cleared" policy of detaining material witnesses until they are affirmatively proven to lack terrorist connections could present serious Fourth Amendment issues. According to the DOJ's Office of Inspector General, one of the primary problems with the "hold until cleared" policy implemented after 9/11 was that instead of taking the anticipated "few days" to clear those arrested, the average detention lasted several months.[147] Obviously, the legality of such a policy in the event of a future attack depends largely on the amount of time required to "clear" detainees. While detention for a period of days, or perhaps even several weeks, might well be considered reasonable in light of the reasoning of *Awadallah*, detention for months in order to "clear" a witness will almost certainly be found to be unreasonable. Although the Supreme Court has not established a "presumptively reasonable" period of detention in the material witness context, the ten day statutory limit before which the government must justify further detention could serve as a benchmark that courts could use to assess the reasonableness of such detentions.

B. *Pretextual Use of the Material Witness Statute*

Assuming that detention of a witness who possesses material testimony is allowed under the Fourth Amendment, a further question arises when the actual reason for such a detention is not to ensure that the witness is available to testify, but rather to detain the individual due to suspicion—not rising to the level of probable cause—that he has committed a crime.[148] In *Awadallah*, the Second Circuit Court of Appeals, while upholding detention under the material witness statute, opined that "it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established."[149] Four years later, however, the Fourth Circuit Court of Appeals, after holding that the military detention of a terrorist suspect must cease, stated that the government was now free to "hold him as a material

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146 *Awadallah*, 349 F.3d at 62.

147 OIG REPORT, *supra* note 41, at 196. According to the OIG report, the clearance process for immigration detainees took an average of 80 days. *Id.* As for material witnesses, Human Rights Watch reports that one-third were incarcerated for at least two months. WITNESS TO ABUSE, *supra* note 1, at 3.

148 If suspicion rises to the level of probable cause, the need for pretextual use of the material witness statute disappears—the "witness" can simply be charged with the crime and detained as a defendant.

149 *Awadallah*, 349 F.3d at 59. The court went on to note that it saw no evidence to suggest "that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation." *Id.*

witness in connection with grand jury proceedings."[150] Finally, in 2009, the Ninth Circuit Court of Appeals directly addressed the constitutionality of "pretextual" detention. *Al-Kidd v. Ashcroft*[151] was a civil lawsuit brought against former Attorney General John Ashcroft by a plaintiff who was ostensibly detained as a material witness in a case against another individual for visa fraud and making false statements.[152] The plaintiff alleged, however, that the DOJ, under policies instituted by Ashcroft, "unlawfully used the federal material witness statute . . . to investigate or preemptively detain him."[153] A majority of the panel held that such pretextual use of the statute would violate the Fourth Amendment and, moreover, that Ashcroft was not entitled to qualified immunity because the law on the issue was "clearly established" in 2003.[154] A dissenting judge argued vigorously, however, that not only was the right to be free from detention for purposes other than testimony not clearly established, but no such right existed at all.[155]

Pretext in the Fourth Amendment sense occurs when a government agent performs an arrest, stop, or search purporting to rely on a facially valid legal theory, but the action is in fact motivated by a different consideration that could not itself support it.[156] Challenge on the basis of pretext generally takes the form of an assertion that the court should look at the agent's actual, subjective motivation for the action.[157] One of the main principles that emerged in Fourth Amendment analysis during the latter part of the twentieth century, however, was a move toward examining objective

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150 Al-Marri v. Wright, 487 F.3d 160, 195 (4th Cir. 2007), *vacated*, al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008). Other options available to the government, according to the court, were to "transfer al-Marri to civilian authorities to face criminal charges, initiate deportation proceedings against him, . . . or detain him for a limited time pursuant to the Patriot Act." *Id.*

151 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98). A divided panel of the Ninth Circuit denied rehearing en banc in the case. Al-Kidd v. Ashcroft, 598 F.3d 1129, 1130 (9th Cir. 2010). The United States Supreme Court recently granted certiorari. Ashcroft v. Al-Kidd, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

152 *Al-Kidd*, 580 F.3d at 952.

153 *Id.* The case was before the court on Ashcroft's appeal of the district court's denial of his motion to dismiss on the grounds of absolute and qualified immunity. *Id.* at 956. Accordingly, the court took as true the plaintiff's allegations. *Id.*

154 *Id.* at 970, 973. The majority held that "genuine[] use[]" of the statute to secure testimony was permissible, but "misuse" that "result[ed] in the detention of a person without probable cause for purposes of criminal investigation" violated the Fourth Amendment. *Id.* at 970 (emphasis omitted).

155 *Id.* at 984 (Bea, J., concurring in part and dissenting in part). Judge Bea noted succinctly that "[i]t is really quite simple. If you are engaged in conduct that justifies your detention, you must put up with that detention, even if the officer who detained you did so out of some secret—and constitutionally insufficient—motive." *Id.* at 985.

156 George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 441 (2006).

157 *See, e.g.*, United States v. Gillyard, 261 F.3d 506, 509 (5th Cir. 2001) (noting the defendant's argument that "the stop was motivated by [the officer's] racial animus and was a pretext to search for narcotics").

aspects of police encounters with citizens rather than inquiring into actual, subjective intent.[158] In fact, according to one commentator, "[t]he Supreme Court has increasingly used language suggesting that Fourth Amendment standards are entirely objective ones that give no significance to the state of minds of the officers whose actions are under analysis."[159]

The issue of pretext reached the Supreme Court in 1996 in *Whren v. United States*.[160] *Whren* involved a vehicle stop based on a traffic violation.[161] Whren alleged that the traffic violation was merely a pretext and that the real reason for the stop was suspicion of drug dealing—a suspicion which did not rise to the level of probable cause or even reasonable suspicion.[162] Notably, Whren himself did not advocate a test that would evaluate subjective intent but rather noted that "[t]his Court's reluctance to attempt to pin down the subjective motivations of the police who actually made an intrusion makes sense, and the standard urged here does not require any finding of subjective motivation."[163] Writing for a unanimous Court, Justice Scalia observed that the Court had repeatedly held that an officer's subjective motivation does not invalidate "objectively justifiable behavior under the Fourth Amendment."[164] Although other arguments could be made in favor of an objective approach (such as difficulty of proving motive and disparate outcomes on similar facts), Justice Scalia asserted that the real basis for it was simple: "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[165] When the action at issue is a traffic stop, the required circumstances consist of the existence of probable cause to believe a traffic violation has occurred, as probable cause "afford[s] the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained."[166]

Since *Whren*, the Court has addressed on several occasions the question of what role, if any, subjective considerations should play in Fourth Amendment analysis, and in each case, the Court has evidenced increasing hostility toward the notion that any role exists for consideration of actual,

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158 Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1025 n.320 (2004).

159 Dix, *supra* note 156, at 373.

160 517 U.S. 806 (1996).

161 *Id.* at 808.

162 *Id.* at 809.

163 Dix, *supra* note 156, at 420 n.186 (quoting Brief for Petitioners at 31, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758, at *31) (internal quotation marks omitted). Only the American Civil Liberties Union advocated an approach that had a subjective component. *Id.* at 420-21.

164 *Whren*, 517 U.S. at 812.

165 *Id.* at 814.

166 *Id.* at 817-18 (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

subjective motivation. In *Devenpeck v. Alford*,[167] the Court addressed the constitutionality of the "'closely related offense' rule" used by some courts, which required examination of an officer's announced reason for an arrest to determine whether the arrest was actually for that offense or a closely related one.[168] The parties' submissions in *Devenpeck* "make clear the disrepute into which subjective aspects of the Fourth Amendment standards have fallen" as even the respondent "focused desperately on characterizing the position of the lower court as 'objective.'"[169] It was to no avail, however, as the Court, in another unanimous decision, struck down the rule, holding that "[e]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[170] Two years later, in *Brigham City, Utah v. Stuart*,[171] the Court granted certiorari to decide between objective and subjective tests used by various state and federal courts in the event of warrantless entry by officers in an emergency situation.[172] The objective/subjective issue was nearly ignored during oral argument,[173] however, and the Court, in yet another unanimous opinion, indicated that it "saw the argument for a subjective component [to Fourth Amendment analysis] as undeserving of serious consideration."[174] Using its strongest language to date, the Court announced unequivocally that police officers' subjective mental states are simply irrelevant to Fourth Amendment analysis.[175]

Standing virtually alone against this tidal wave toward objective Fourth Amendment analysis in the last fifteen years is the Supreme Court's 2000 decision in *Indianapolis v. Edmond*.[176] *Edmond* involved a challenge to a vehicle checkpoint program in the city of Indianapolis that was targeted specifically at interdicting unlawful drugs.[177] The Court held that such stops violated the Fourth Amendment because their "primary purpose" was to detect "evidence of ordinary criminal wrongdoing."[178] While conceding that

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167 543 U.S. 146 (2004).

168 *Id.* at 148, 154-56.

169 Dix, *supra* note 156, at 432.

170 *Devenpeck*, 543 U.S. at 153 (quoting Horton v. California, 496 U.S. 128, 138 (1990)) (internal quotation marks omitted).

171 547 U.S. 398 (2006).

172 *Id.* at 402.

173 Argument focused instead on whether an objective test was satisfied. Dix, *supra* note 156, at 438-39.

174 *Id.* at 439.

175 *Id.* at 374. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.' The officer's subjective motivation is irrelevant." *Stuart*, 547 U.S. at 404 (alteration in original) (citation omitted) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

176 531 U.S. 32 (2000).

177 *Id.* at 34.

178 *Id.* at 41-42.

"reasonableness under the Fourth Amendment is predominantly an objective inquiry," the Court held that "purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue."[179] The Court cautioned that the purpose inquiry "is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers."[180]

The primary dispute between the majority and Judge Bea in *al-Kidd* was whether a test evaluating objective or subjective intent was the proper one for analyzing an allegation that the material witness statute was used pretextually.[181] In holding that Attorney General Ashcroft violated al-Kidd's Fourth Amendment rights, the majority applied *Edmond*'s programmatic purpose analysis.[182] Because the purpose behind the DOJ's material witness detention program was criminal investigation (i.e., detaining those it suspected of terrorism), according to the majority, it violated the Fourth Amendment.[183]

Material witness detention, based as it is on an altogether different type of suspicion, is neither exactly like the traffic stops based on suspicion of criminal activity at issue in *Whren* nor identical to the suspicionless stops in *Edmond*. In order to decide which analysis is appropriate, then, it is necessary to determine the rationale for resorting to a "programmatic purpose" analysis—by all appearances a narrow exception to the general rule that

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179 *Id.* at 47.

180 *Id.* at 48. The purpose analysis has been criticized as a "problematic approach." Clancy, *supra* note 158, at 1024-25. The commentator stated further:

> Nothing in the Court's analysis would prevent Indianapolis from simply relabeling its program and conducting the same screening for drugs as an incident of an otherwise permissible checkpoint, which is to say that the distinction between a criminal law enforcement purpose and other purposes is illusory. Even if viable, such a distinction is unwise: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Id. at 1025 (footnotes omitted) (quoting Camara v. Mun. Court, 387 U.S. 523, 530-31 (1967)).

181 Al-Kidd v. Ashcroft, 580 F.3d 949, 986 (9th Cir. 2009) (Bea, J., concurring in part and dissenting in part) (stating that the programmatic purpose test applies as an exception to the general rule that "courts are limited to an examination of the objective circumstances" and disagreeing with the majority's interpretation of "probable cause" to mean "only probable cause to believe the subject of the arrest committed some wrongdoing"), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

182 According to the majority, *Edmond* provided the proper analysis because material witness arrests are "seizures without suspicion of wrongdoing." *Id.* at 968 (majority opinion). Judge Bea countered that the programmatic purpose test is used to test the validity of warrantless seizures, not arrests made with a warrant (such as those made pursuant to a material witness warrant). *Id.* at 986 (Bea, J., concurring in part and dissenting in part).

183 Indeed, it appears that the decision as to whether an objective or subjective standard is the proper one is the dispositive question, at least as it pertains to post-9/11 use of the statute. Because the Justice Department made no secret that its programmatic purpose in using the material witness statute after 9/11 was to detain terrorist suspects, the government will apparently always lose under a subjective test. *See* Bascuas, *supra* note 53, at 699 ("[T]here is no doubt that DOJ has detained people as 'material witnesses' to investigate and interrogate them as possible terrorists. The Department of Justice has made no secret of it.").

subjective intent is irrelevant to Fourth Amendment analysis—and whether that rationale applies to material witness detentions. A close reading of the Supreme Court's pretext cases indicates that the primary evil that the Court sought to alleviate was unconstrained discretion by law enforcement officials.[184] In the case of the traffic stop in *Whren*, individualized suspicion (in the form of probable cause) "establishe[d] an objective, and thus reasonable, basis for police action regardless of any ulterior police motives."[185] Stops at suspicionless checkpoints like those at issue in *Edmond*, in contrast, "inherently lack the individualized suspicion" necessary "to regulate the reasonableness of police action."[186] As a result, the only constraint on police conduct is provided by the limits established by the purpose of the program behind the checkpoint.[187] To be reasonable, such checkpoints must operate under clear guidelines that constrain the discretion of individual officers.[188] If the purpose is a proper one, "such as immigration, sobriety, or license and registration status," then the actual motivation of the officer performing the stop is irrelevant.[189] If, on the other hand, the purpose of the program is an improper one like general crime control, then the entire program is unconstitutional, again without regard to the motivation of any individual officer.[190]

So do material witness detentions provide an objective, and thus reasonable, basis for police action, or is the only constraint on law enforcement conduct provided by the limits established by the purpose of the program behind the detention? The *al-Kidd* majority used purpose analysis "[b]ecause material witness arrests are seizures without suspicion of wrongdoing."[191] Technically, this is certainly correct, but it is really just another way of saying that the probable cause found in material witness detentions is, as previously discussed, based not on suspicion of criminal activity, but rather on a belief that a person with material testimony may flee, and as a result, a miscarriage of justice will result. That such detentions are based on a different kind of objective criterion is not the same thing as saying that they are constrained only by the purpose behind the program. The material witness context, in fact, is replete with constraints on

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184 *See, e.g.*, *Edmond*, 531 U.S. at 39.

185 Brooks Holland, *The Road 'Round* Edmond*: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 305 (2006); *see also* Whren v. United States, 517 U.S. 806, 817-18 (1996) (stating that probable cause "afford[s] the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained" (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979))).

186 Holland, *supra* note 185, at 305-06.

187 *See id.* at 300-01.

188 *Id.* at 300.

189 *Id.* at 300-01.

190 *See id.* at 295.

191 Al-Kidd v. Ashcroft, 580 F.3d 949, 968 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

law enforcement action. Objective criteria for detention are set out in a statute passed by Congress.[192] These criteria must be found to exist at a hearing at which the person to be detained has a right to counsel, a right to testify, a right to present witnesses, a right to proffer evidence, and a right to cross examine witnesses. Numerous other statutory safeguards exist, including the right to judicial review of detention every ten days.[193] Moreover—and most significantly—the necessary fact finding is done by a federal judge in the context of issuing a warrant—the gold standard of Fourth Amendment law.[194] Whatever else the Court may have meant in *Whren* when it said "certain actions" were reasonable under "certain circumstances,"[195] it is hard to argue that the actions and circumstances established by the material witness statute—including issuance of an arrest warrant by a federal judge based on objective criteria in a statute—do not sufficiently constrain law enforcement such that they ensure "reasonable" conduct. Such a process unquestionably provides immensely more protection against unconstrained government action than a traffic stop made by a police officer on the street based on probable cause of any existing traffic violation.[196]

Moreover, practical problems abound with using a subjective approach to material witness analysis. Although it is not clear how a future Attorney General will respond in the event of another catastrophic terrorist attack inside the United States, given a finding of personal liability by a Court of Appeals of the United States against a previous Attorney General, it is

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192 18 U.S.C. § 3142 (2006).

193 For a discussion of safeguards found in the material witness statute, see *supra* notes 24 to 37 and accompanying text.

194 As Justice Jackson famously observed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948); *see also* Illinois v. Gates, 462 U.S. 213, 236 (1983) (stating that the use of the warrant process is the preferred method under the Fourth Amendment); United States v. U.S. Dist. Court for E. Dist. of Mich. (*Keith*), 407 U.S. 297, 318 (1972) ("Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.").

195 Whren v. United States, 517 U.S. 806, 814 (1996).

196 Indeed, at least one staunch opponent of material witness detentions gives short shrift to the argument that it is pretextual use of the statute that is problematic:

> If . . . the argument is that the government is not respecting the spirit of the Fourth Amendment, then there is no legal problem because the Fourth Amendment is not concerned with the government's motives for arresting any witness. The subjective reason for the seizure—*i.e.* whether the arresting agent or prosecutor believes that the target is a potential criminal or a witness necessary at some proceeding—is of no constitutional significance. The Supreme Court has unanimously rejected the notion that the constitutionality of a seizure under the Fourth Amendment depends on the government agent's subjective motivation for making it. . . . The government's subjective reasons for wanting to detain the witnesses legally do not and should not matter.

Bascuas, *supra* note 53, at 698-99.

highly unlikely that the Attorney General will announce a department-wide policy of using the material witness statute to detain terrorist suspects.[197] Absent such a declaration as to programmatic purpose, courts will be left to determine "pretext" on a case-by-case basis. Not only is such an endeavor extremely difficult, but it is fraught with problematic possibilities. Imagine, as one commentator has, "a defense attorney cross-examining a prosecutor about the government's true reasons for seeking a given 'material witness' warrant."[198] In addition, in the face of a pretext allegation there appears to be no principled way to distinguish between any of the various rationales for detention used post-9/11. If pretextual use of the material witness statute is forbidden, then "pretextual" use of the immigration laws—that is, detention for immigration violations when the "real" purpose is something else—would appear to be equally improper.[199] Likewise, use of minor criminal charges to detain someone who is really suspected of being a terrorist apparently would be just as "pretextual." Because the action set out in the material witness statute—issuance of an arrest warrant by a federal judge—under the objective circumstances set out in the statute constrain law enforcement conduct sufficiently to ensure reasonable behavior, both the subjective motivation behind a given material witness detention and the programmatic purpose behind the use of the statute should be irrelevant under the Fourth Amendment.

IV. GOING FORWARD: CHARACTERISTICS OF A CONSTITUTIONAL WITNESS DETENTION SCHEME

Perhaps one of the most surprising aspects of the law in this area is how little has changed in the nine years since the events of September 11, 2001. If the hypothetical case of Hasan Abdallah—or some similar event—actually occurred today, the detention options available to law enforcement officials would essentially be the same as those available on 9/11.[200] Facing

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197 *See* al-Kidd v. Ashcroft, 580 F. 3d 949, 952 (9th Cir. 2009).

198 Bascuas, *supra* note 53, at 698.

199 One federal district court judge, however, made short work of the pretext argument in an immigration context:

> After the September 11 attacks, our government used all available law enforcement tools to ferret out the persons responsible for those atrocities and to prevent additional acts of terrorism. We should expect nothing less. One of those tools was the authority to arrest and detain illegal aliens. . . .
>
> But the government was allowed to do that. An ulterior motive in this context does not render illegal conduct that was within the bounds of the government's authority. . . . [T]he government may use its authority to detain illegal aliens pending deportation even if its real interest is building criminal cases against them.

Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663, at *1 (E.D.N.Y. June 14, 2006), *aff'd in part*, *vacated in part*, 589 F.3d 542 (2d Cir. 2009).

200 The USA PATRIOT Act did add one detention provision, allowing aliens to be held for up to seven days before charging them and then to be held while immigration proceedings were pending if the

the possibility of additional terrorist attacks, detention on immigration violations would likely be the tactic employed in the case of alien terrorist suspects against whom such charges could be made, while criminal charges would be lodged against those for whom there was probable cause of a crime.[201] It is, however, the individual who cannot be held on either immigration or criminal charges but whose actions give rise to considerable suspicion of terrorist activity—someone like Hasan Abdallah—who presents the hardest case.[202]

One answer to the dilemma is simple: either charge or release. Under this view, no new detention options are needed because the criminal justice system will work just fine in dealing with future attacks and suspects. While this "criminal law purist" approach has a number of advocates,[203] it is becoming "increasingly clear that the United States—even under a Democratic administration and with substantial Democratic majorities in both houses of Congress—is not going to . . . revert to a pure law enforcement

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Attorney General certified, at least every six months, that their release would threaten national security. USA PATRIOT Act § 412(a), 8 U.S.C. § 1226a (2006). Apparently, the provision has been used infrequently.

201 As previously discussed, detention as an enemy combatant theoretically provides an additional basis for arrest inside the United States, but domestic law of war detention is problematic and has rarely been used. *See supra* note 44.

202 To appreciate the still unsettled nature of the law regarding domestic detention of terrorist suspects, one need only look at the confusion and controversy surrounding the detention of Umar Farouk Abdulmutallab for the attempted bombing of Northwest Airlines flight 253 near Detroit on Christmas Day 2009. Scott Wilson & Anne E. Kornblut, *Debate Is Engaged on National Security*, WASH. POST, Feb. 4, 2010, at A1. The specific question regarding Abdulmutallab (i.e., whether criminal or law of war detention was appropriate) would not apply to someone like Hasan Abdallah, but in many ways, Abdulmutallab presented an easier case than Abdallah, as Abdulmutallab clearly could be detained on a criminal charge, while there is no clear basis to detain someone like Abdallah at all.

As for the "rest of the story" of Abdallah Higazy—the real-life character upon whom our hypothetical is based—he was detained as a material witness for 27 days and then charged with making a false statement. *In re* Application of U.S. for Material Witness Warrant, 214 F. Supp. 2d 356, 358-59 (S.D.N.Y. 2002). Two days later, he was released when an airline pilot came forward to claim the radio that the security guard claimed to have found in Higazy's safe. *Id.* at 359. After further questioning, the guard admitted that he had lied about where the radio was found. *Id.* The guard was charged and convicted of making false statements. *Id.* at 360.

203 *See, e.g.*, Jane Mayer, *The Hard Cases: Will Obama Institute a New Kind of Preventive Detention for Terrorist Suspects?*, NEW YORKER, Feb. 23, 2009, at 38, 45 ("In the more than two hundred and thirty years since this country's founding, we have not found a better way to find the truth than through a criminal trial." (internal quotation marks omitted)); *see also* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 2 (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf ("[T]he criminal justice system is reasonably well-equipped to handle most international terrorism cases."); Jack Cloonan & Sarah Mendelson, Editorial, *How to Close Guantanamo*, WASH. POST, Nov. 30, 2008, at B7 (stating that in the context of long term detentions, the creation of a "'third category' [for] individuals who have not committed crimes but are perceived as 'too dangerous to release' . . . strikes us as exactly what is done by countries not governed by the rule of law . . . . Our current legal system works, and we should use it.").

model" for dealing with terrorist suspects.[204] President Obama has acknowledged as much by recognizing that, in the context of long-term detention, national security may require non-criminal detention of terrorists who cannot be tried but are too dangerous to release.[205] By the same logic, it would appear that, in the context of initial terrorist investigations, some individuals who cannot be charged with immigration or criminal violations are simply too dangerous not to detain at all, pending some type of preliminary investigation.

Another possibility for dealing with cases like the hypothetical Abdallah is continued use of the material witness statute—the "tool" used to detain such hard cases after 9/11. As previously discussed, it appears that the statute is constitutional and its use to detain terrorist suspects is lawful under the Fourth Amendment so long as the objective requirements of the statute are met.[206] There are, however, several problems with reliance on the statute as the primary vehicle for such "hard case" detentions. One problem is that some dangerous individuals who cannot be charged with immigration or criminal violations will also not be covered by the statute if there is no legitimate argument that they possess material testimony and are likely to flee. Because the statute was not designed specifically for this situation, there is not a perfect fit between the class of suspected terrorists sought to be detained and the statutory requirements for detention.

A second reason that the statute may not prove optimal for terrorist detention is that, for reasons discussed at length earlier, in order for future material witness detentions to comply with the Fourth Amendment, more vigilance by the judiciary will likely be required to ensure compliance with the safeguards contained in the statute.[207] In all likelihood, this includes not only the rights to counsel and a prompt hearing, but also the presumption in favor of deposition and release, with a burden placed on the government to justify material witness detentions lasting longer than ten days. While these safeguards make sense in the context of material witness detention, their application—particularly the depose and release provision—to terror suspects may be more problematic.[208]

Finally, and perhaps most fundamentally, a serious question remains as to whether using a federal statute pretextually—some would say dishon-

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204 BENJAMIN WITTES & COLLEEN A. PEPPARD, BROOKINGS INSTITUTION, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION 1 (2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf.

205 Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 22, 2009, http://www.nytimes.com/2009/05/22/us/politics/22obama.html.

206 *See supra* Part III.A.

207 *See supra* Part III.B.

208 The DOJ's opposition to deposing all post-9/11 terrorist suspects detained as material witnesses is certainly an indication that the DOJ did not consider deposition and release to be appropriate for those detained as potential terrorists. *See supra* note 72 and accompanying text.

estly—to accomplish a purpose for which it was not intended is how the DOJ should conduct business;[209] that is, in the words of the *Washington Post*, whether change in the terrorist detention arena should come via deliberate decision or "the mission creep of an old statute envisioned for other problems."[210]

A number of proposals have been made since the 9/11 attacks regarding statutory detention schemes for terror suspects.[211] The solution proposed in the remainder of this Article is based on analyzing such detentions in light of a concept that has already been introduced: the formulation of probable cause sufficient to justify an arrest under the Fourth Amendment. Recall that while the burden of proof component of probable cause to arrest remains the same in all cases—"facts sufficient to make a reasonable person believe"—and the substantive component is, in the vast majority of cases, a belief of involvement in a crime, there is at least one other societal interest—the integrity of the criminal justice system—that is sufficiently weighty to justify a deprivation of liberty, and as a result, provides the substantive component for probable cause to arrest.[212] The critical question in assessing the arrest and detention of terrorist suspects is whether the national security context in which terrorist detentions occur also alters the permissible formulation of probable cause.

That national security modifies Fourth Amendment probable cause formulation is already established for searches. Congress, with the passage of Title III in 1968, regulated wiretaps conducted in ordinary criminal investigations by requiring prior judicial approval in a warrant-like process.[213] Title III did not, however, address Executive power to conduct wiretaps for national security purposes, and the Attorney General continued to conduct

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209 This is particularly true in light of a ruling by a court of appeals of the United States that pretextual use of the material witness statute is unconstitutional. Al-Kidd v. Ashcroft, 580 F.3d 949, 970 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98). This ruling—although wrongly decided in the opinion of the author—has the force of law (at least in the Ninth Circuit) unless it is overruled by the Supreme Court. It also arguably makes the right not to be pretextually detained "clearly established" such that future Attorneys General are unlikely to risk personal liability by detaining terrorist suspects under the statute.

210 Editorial, *Arresting Witnesses*, WASH. POST, May 22, 2004, at A26. Regarding the use of the material witness statute to detain suspects, the *Washington Post* observed: "In typical criminal cases, the government is required to bring charges in order to hold any suspect. If that is to change in terrorism cases, the change should come as a result of a deliberate legislative decision, not the mission creep of an old statute envisioned for other problems." *Id.*

211 These proposals have included overhauls of the material witness statute itself, as well as the creation of new, specially designed detention systems. S. 1739, 109th Cong. (2005) (proposing "[t]o amend the material witness statute to strengthen procedural safeguards"); Studnicki & Apol, *supra* note 9, at 529-31 (proposing a model material witness statute); *see also, e.g.*, WITTES, *supra* note 8, at 157-78; Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, http://www.nytimes.com/2007/07/11/opinion/11katyal.html.

212 *Al-Kidd*, 580 F.3d at 967; *see also supra* notes 115-22 and accompanying text.

213 18 U.S.C. § 2518 (1970) (amended 1970, 1978, 1984, 1986, 1994, 1998).

national security wiretaps on his own authority.[214] In 1972, the issue of the legality of wiretaps for the purpose of ensuring domestic security reached the Supreme Court in *United States v. United States District Court for the Eastern District of Michigan* ("*Keith*").[215] In *Keith*, the defendant was charged with bombing a Central Intelligence Agency office in Ann Arbor, Michigan.[216] The defendant had been subjected to warrantless wiretaps "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."[217] The Supreme Court held that when the President acted in a domestic security role, the action must be conducted in a manner compatible with the Fourth Amendment, including an "appropriate prior warrant procedure."[218] The Court went on to note, however, that:

> [d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause . . . should allege other circumstances more appropriate to domestic security cases [and] that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court . . . .[219]

The Court also observed that it "ha[d] not addressed, and express[ed] no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."[220]

In 1978, Congress acted on the Supreme Court's suggestion in *Keith* and enacted the Foreign Intelligence Surveillance Act ("FISA").[221] Rather than establish a separate system for domestic security wiretaps, however, FISA set up a system for wiretaps relating to national security and foreign intelligence.[222] In FISA, Congress did, however, implement the Supreme Court's guidance that the probable cause standard in national security cases may be different than in criminal cases.[223] Rather than requiring probable cause that a crime has been committed, FISA wiretaps are justified by a

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214 United States v. U.S. Dist. Court for E. Dist. of Mich. (*Keith*), 407 U.S. 297, 300-03 (1972); WITTES, *supra* note 8, at 224.

215 407 U.S. 297 (1972). The case is generally called the "Keith" case because the district court judge was Judge Damon Keith. Kerr, *supra* note 87, at 1674-76.

216 *Keith*, 407 U.S. at 299.

217 *Id.* at 300 (quoting Mitchell Aff. ¶ 3) (internal quotation marks omitted).

218 *Id.* at 320.

219 *Id.* at 322-23.

220 *Id.* at 321-22.

221 Viet D. Dinh & Wendy J. Keefer, *FISA and the PATRIOT Act: A Look Back and a Look Forward*, 35 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii-ix (2006).

222 *Id.*

223 *Id.*

showing of probable cause to believe that the target of surveillance is either a "foreign power" or an "agent of a foreign power" who "engages in clandestine intelligence gathering activities."[224] As suggested by the Court in *Keith*, such a showing is made to a special court established by FISA, the Foreign Intelligence Surveillance Court ("FISC").[225]

In the thirty-eight years since the *Keith* decision, the Supreme Court has never again addressed the subject of intelligence surveillance and has never been presented with the issue of FISA's constitutionality.[226] Other federal courts that have addressed the issue, however, have almost uniformly held that the statute does not violate the Fourth Amendment, with some courts holding that a FISA order constitutes a warrant under the Fourth Amendment[227] and others reasoning that, although a FISA order is not a warrant, FISA is constitutional because its procedures are reasonable.[228]

Does the rationale underlying *Keith* and FISA—that national security alters the Fourth Amendment analysis and permits a different and more appropriate probable cause standard—apply in the arrest context as well? Could Congress enact legislation establishing a FISA-like system of "national security detention"? *Keith* stated that a different Fourth Amendment standard may be used so long as it is "reasonable both in relation to the legitimate need of Government" to provide for national security "and the protected rights of . . . citizens."[229] The right of citizens to be free from un-

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224 WITTES, *supra* note 8, at 225 (internal quotation marks omitted). "Agent of a foreign power" is defined to include "any person other than a United States person who . . . engages in international terrorism or activities in preparation therefore." 50 U.S.C. § 1801(b)(1)(C) (2006) (internal quotation marks omitted).

225 Dinh & Keefer, *supra* note 221, at ix. The FISC was originally comprised of seven judges appointed by the Chief Justice of the United States Supreme Court and selected from among sitting federal district court judges. *Id.* The PATRIOT Act increased the number of judges to eleven. *Id.* at ix n.43.

226 Trevor Rush, Mayfield*, FISA, and the Fourth Amendment*, 56 NAVAL L. REV. 87, 102-03 (2008).

227 United States v. Cavanagh, 807 F.2d 787, 789-90 (9th Cir. 1987); *see also* United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) (stating that a FISA order can be considered a warrant because it is issued by a detached judicial officer and is based on a reasonable showing of probable cause).

228 *In re* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) ("[A]pplying the balancing test drawn from *Keith*, . . . FISA as amended is constitutional because the surveillances it authorizes are reasonable."); *see also* United States v. Ning Wen, 477 F.3d 896, 898-99 (7th Cir. 2006); United States v. Damrah, 412 F.3d 618, 25 (6th Cir. 2005); United States v. Johnson, 952 F.2d 565, 573 (1st Cir. 1991); United States v. Duggan, 743 F.2d 59, 73-74 (2d Cir. 1984); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 32 (D.D.C. 2003). *But see* Mayfield v. United States, 504 F. Supp. 2d 1023, 1041-43 (D. Or. 2007) (holding that FISA as amended by the PATRIOT Act violates the Fourth Amendment), *vacated on other grounds*, 599 F.3d 964 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3007 (U.S. June 22, 2010) (No. 09-1561).

229 United States v. U.S. Dist. Court for E. Dist. of Mich. (*Keith*), 407 U.S. 297, 322-23 (1972).

reasonable arrest is different—and almost certainly higher—than the right to be free from unreasonable searches.[230] The question, then, is whether the government's legitimate need to detain certain dangerous individuals with connections to terrorism in order to provide for national security is sufficiently compelling to outweigh it.

At the outset, it is noteworthy that the Constitution allows detention for a number of reasons besides probable cause or conviction of criminal conduct. An individual may be detained—often even indefinitely—because he or she is mentally ill,[231] a sex offender,[232] a dangerous alien,[233] a dangerous defendant who becomes incompetent to stand trial,[234] a pretrial detainee who may pose a threat to society,[235] or a person subject to civil commitment proceedings.[236] The truth is, as Benjamin Wittes has observed, the U.S. legal system "tolerates indefinite detention in a number of settings less compelling than the disabling of overseas terrorists with no connection to the United States save the desire to kill its nationals."[237] The Supreme Court, in a case decided three months before 9/11, implied that detention of dangerous terrorist suspects may constitute a compelling governmental interest in the national security arena where deference to the Executive is appropriate. In *Zadvydas v. Davis*, the Supreme Court interpreted federal statutory law such that it did not allow the indefinite detention of removable aliens.[238] Central to the Court's reasoning, however, was the fact that the detention provision at issue applied "broadly to aliens ordered removed for many and various reasons, including tourist visa violations," rather than applying "narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists."[239] The Court went even further to make clear that it did not have occasion to consider "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[240]

The Supreme Court's reference in *Zadvydas* to the propriety of deference to the "political branches" implies that deference is appropriate when evaluating Congressional or Executive actions in the national security

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230 Terry v. Ohio, 392 U.S. 1, 26-27 (1968).

231 Minnesota *ex rel.* Pearson v. Probate Court of Ramsey Cnty., 309 U.S. 270, 276-77 (1940).

232 United States v. Comstock, 130 S. Ct. 1949, 1954 (2010); Kansas v. Crane, 534 U.S. 407, 409-11 (2002).

233 Carlson v. Landon, 342 U.S. 524, 538 (1952).

234 Jackson v. Indiana, 406 U.S. 715, 738 (1972) (stating that due process concerns impose limits on the length of detention for dangerous, incompetent defendants).

235 United States v. Salerno, 481 U.S. 739, 747 (1987).

236 Addington v. Texas, 441 U.S. 418, 425-26 (1979).

237 WITTES, *supra* note 8, at 162.

238 Zadvydas v. Davis, 533 U.S. 678, 697 (2001).

239 *Id.* at 691 (citation omitted) (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)).

240 *Id.* at 696.

arena.[241] While either branch could attempt to act independently to establish a system of national security detention based on a modified definition of probable cause,[242] such a system would have the strongest justification if the two branches acted in concert. As Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*,[243] "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[244] A FISA-like statute passed by Congress requiring execution by the President in appropriate cases would provide the maximum constitutional authority "because the President's inherent authority to [act] for national security purposes [would be] combined with the congressional legislation."[245] If such a statute also involved decisions made in each case by an Article III judge—as FISA does—the system would appear to posses the most authority possible under the Constitution, as all three branches of government would have to work in concert to detain a given terrorist suspect.[246]

Although it is beyond the scope of this Article to attempt to establish the exact parameters of a permissible terrorist detention system, it does appear that such a system is possible within the constitutional framework. If designed by Congress and executed by the executive branch, while requiring participation in individual cases by Article III judges, the system would have maximum constitutional authority. If it were narrowly tailored to detain only "a small segment of particularly dangerous individuals"[247] based on a flexible FISA-like probable cause standard using criteria more appropriate to the national security context, it would appear to comply with the rationale of *Keith*.[248] Perhaps such a detention scheme could be based on definitions currently used in FISA, such as whether there was reason to believe that the individual to be detained was an "agent of a foreign power"—a standard already defined to include suspected terrorists.[249] Also,

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241 *See* Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (proposing that the Fourth Amendment would permit a roadblock for the purpose of thwarting an imminent terrorist attack).

242 Indeed, it could be argued that to the extent the DOJ has used the material witness statute to detain suspected terrorists rather than true material witnesses, such use was an attempt by the Executive branch to establish a form of "national security detention."

243 343 U.S. 579 (1952).

244 *Id.* at 635 (Jackson, J., concurring).

245 Rush, *supra* note 226, at 121-22.

246 *Id.* at 122-23. Detention decisions could be made by federal district court judges or by a specially appointed court like the FISC, made up of Article III judges.

247 Zadvydas v. Davis, 533 U.S. 678, 691 (2001) (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)) (internal quotation marks omitted).

248 "Flexible" in this context presumably means broad enough to capture a class of "dangerous" individuals who do not have material testimony, but distinct from the usual standard requiring probable cause of participation in a crime.

249 *See supra* note 224. One example of such a terrorist detention system has been proposed by Benjamin Wittes and Colleen Peppard. WITTES & PEPPARD, *supra* note 204, at 11. Wittes and Peppard

inclusion of other factors already determined by the Supreme Court to provide a legitimate basis for detention, such as an individual's dangerousness or risk of flight, might be an appropriate consideration in the detention decision as well.[250] Other critical aspects of the statute would include the quantum of proof required to detain a suspected terrorist,[251] when and under what conditions access to counsel would be provided, the degree to which interrogation by intelligence officials could be conducted, and the length of time detention would be allowed. Although a number of such details would have to be determined, the general principle—that legislative action in formulating a FISA-like system of national security detention based on a flexible probable cause standard like that suggested in *Keith* and involving all three branches of government—appears sufficiently sound to merit an honest discussion and is, at any rate, preferable to reliance on an ad hoc system of detention like the one developed in the aftermath of the 9/11 attacks.

CONCLUSION

Professor Bruce Ackerman makes the following prediction:

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suggest—as a threshold basis for detention evidence—that the individual is an "agent of a foreign power"—a term drawn directly from, and intended to draw on the case law of, FISA. *Id.* Wittes and Peppard propose a three-part test under which detention is allowed if the individual is:

> (1) an agent of a foreign power, if (2) that power is one against which Congress has authorized the use of force, and if (3) the actions of the covered individual in his capacity as an agent of the foreign power pose a danger both to any person and to the interests of the United States.

Id.

250 *See* United States v. Salerno, 481 U.S. 739, 748-49 (1987) (holding that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" and also that an individual may be detained "if he presents a risk of flight or a danger to witnesses" (citation omitted)). Although the degree to which international practice should influence U.S. law is often debated, it is worth noting that many other nations have laws that allow investigative or preventive detention. *See* Aziz Huq, *Can a Foreign System of Preventive Detention Work in the United States?: Finders Keepers*, THE NEW REPUBLIC (July 23, 2007), http://www.brennancenter.org/page/-/Justice/20070723.can.a.foreign.system.of.preventive.detention.work.in.the.United.States.pdf (explaining that Britain, Israel, France, and Spain all have preventive detention schemes); Mukasey, *supra* note 61 (noting that the material witness statute "was used frequently after 9/11, when the government tried to investigate numerous leads and people to determine whether follow-on attacks were planned—but found itself without a statute that authorized investigative detention on reasonable suspicion, of the sort available to authorities in Britain and France, among other countries").

251 Wittes and Peppard, for instance, propose a two-stage detention scheme in which a reasonable belief that the detention criterion is met is required to detain for an initial two-week period, while continued detention would require a showing by a preponderance of the evidence. WITTES & PEPPARD, *supra* note 204, at 15-16.

> Terrorist attacks will be a recurring part of our future. The balance of technology has shifted, making it possible for a small band of zealots to wreak devastation where we least expect it . . . . The attack of September 11 is the prototype for many events that will litter the twenty-first century.[252]

Whether such dire predictions turn out to be true, there is no question that the potential consequences of such an attack are so devastating that it is irresponsible for our government not to do everything legally possible to avoid them. And yet, despite a general realization that a devastating attack by terrorists is—if not inevitable—at least a distinct possibility, the "tools" available to law enforcement in the United States to preventively or investigatively detain suspected terrorists today are essentially unchanged from 9/11. As for individuals like our hypothetical Hasan Abdallah—hard cases in which the individual cannot be detained on immigration or criminal charges—the likely detention device is the ancient material witness statute. Developed over centuries for the purpose of ensuring the testimony of reluctant witnesses, the statute was forced into service as part of the post-9/11 "war on terror" to detain suspected terrorists as part of the DOJ's post-9/11 attempt to "prevent terrorist attacks by taking suspected terrorists off the street."[253]

The statutory safeguards provided by the material witness statute—including the requirement of an arrest warrant issued by a federal judge as well as the rights to a hearing, an attorney, and a presumption in favor of deposition and release—combine to ensure that the arrest of material witnesses, although based on a different kind of probable cause than most arrests, is permissible under the Fourth Amendment. Even the use of the statute to detain an individual as a terrorist suspect rather than as a witness is allowed under the Fourth Amendment because issuance of an arrest warrant by a federal judge under the objective circumstances set out in the statute constrains law enforcement conduct sufficiently to ensure reasonable behavior, thereby making the subjective motivation behind detention irrelevant.

Serious questions exist, however, as to whether bending an old statute to make it fit a new set of circumstances for which it was not designed is the best approach to dealing with terrorist detention. It appears that within existing Fourth Amendment law, there may lie the principles necessary for construction of a constitutionally permissible framework for detention of suspected terrorists. The key to such a framework lies in the United States Supreme Court's *Keith* decision, which suggested that the national security context permits a modification of Fourth Amendment probable cause to search, allowing a different standard more appropriate to national security.

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252 Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029 (2004).

253 OIG REPORT, *supra* note 41, at 12-13 (quoting Ashcroft, *supra* note 42) (internal quotation marks omitted).

Congress's enactment of FISA in response to *Keith* provides a model for deliberative legislative action to create a reasonable tool for law enforcement.

While it is not entirely clear that the *Keith* rationale applies in the arrest context—permitting a similar modification to probable cause and the potential for the creation of a FISA-like statute to establish a system of "national security detention"—such a discussion is one that we should be having as a nation. No doubt the debate on such a statute would be heated and passionate. Hard decisions would have to be made about some aspects of the new statute, such as the quantum of proof required to detain, whether there would be access to counsel, the degree to which interrogation by intelligence officials could occur, the degree of secrecy in which proceedings would be conducted, and the length of time that detention would be allowed. However, the one unquestionable advantage that a deliberately designed system of national security detention would have over the "mission creep" of an existing statute is that it would be based on debate and analysis during the legislative process and a deliberate decision by the political branches—accountable to the American people—rather than the bending of an old statute designed for other purposes to make it fit.