

**OVERLOOKING INNOCENCE:
REFASHIONING THE MATERIAL
WITNESS LAW TO
INDEFINITELY DETAIN
MUSLIMS WITHOUT CHARGES**

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I. Introduction

One of the most basic rights in international law is the safeguard against arbitrary detention. This protection of the right to liberty has been defined by international tribunals to mean, at a minimum, that the detention of any individual must be in accordance with previously established law and based on objectively reasonable criteria, defined without regard to race, religion, gender, or national origin. The architects of these international legal principles drew from the central tenets in the Magna Carta prohibiting arbitrary detention: the importance of curbing the power of the monarch to jail its subjects with unchecked authority.

A principle drafter and proponent of the international rules prohibiting arbitrary detention, the U.S. since September 11 has joined many countries in abrogating these rules in its counterterrorism investigations, implementing new policies and refashioning existing authority to indiscriminately hold Muslims, Arabs and South Asians without probable cause. Following September 11, FBI agents swept through Muslim communities to pick up suspects often based on leads that, according to the Justice Department, “were often quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant.”¹ Under the systematic programs the Justice Department implemented over the past three years, it has detained over 5,000 Muslims

since September 11 and registered more than 80,000 immigrants from Muslim communities, though yielding not one conviction of an individual involved in the attacks of September 11.²

One key tool the government has used to detain Muslim men without charges is the material witness law. Congress enacted the material witness statute to authorize the government to briefly hold a person who has witnessed a crime when it appears he may flee. Before September 11, this law was only to hold witnesses who were scared to testify, such as witnesses to a mafia or alien smuggling trial. Since September 11, however, the government has used this law to circumvent probable cause requirements to hold Muslim “witnesses” it believes to be suspects, indefinitely without charges.

The Justice Department has succeeded in using the material witnesses law to preventatively detain Muslim men since September 11 because it held witnesses to testify in terrorism-related grand jury proceedings, where the executive branch is given broad authority to investigate a crime. Also, relying on grand jury secrecy rules, the government has held witnesses pursuant to closed detention proceedings without any public accountability. Even on requests from Congress, the Justice Department has refused to disclose the names or number of witnesses it has held, where or for how long witnesses were detained, or the details surrounding material witness arrests. The Justice Department released general statistical information, including that half of the witnesses it has arrested in the September 11 investigation were held for more than 30 days.³

Concerned with these secret detentions, the ACLU, with Human Rights Watch, undertook a study this year to document how the government has used the material witness law in its counterterrorism investigation since September 11. Based on interviews with witnesses, their family members, lawyers and

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government officials, we documented the detention of more than 70 material witnesses held in connection with counterterrorism investigations. In documenting these cases, we learned how the government has systematically abused its material witness authority to hold Muslim men in violation of basic international protections against arbitrary detention. We will release the full findings of our research in a forthcoming report in January 2005. In this essay we describe the material witness law and how the government systematically used the law in a manner unauthorized by Congress to detain and investigate suspects and impermissibly used witnesses' race, national origin and religion as a basis for detaining witnesses.

II. The Material Witness Law: Framework

Enacted in its current form in 1984, the material witness statute authorizes the government to arrest and detain individuals to secure their testimony for a criminal proceeding.⁴ To arrest a material witness, the government must show (1) that a witness can provide information material to a criminal proceeding, and (2) that it would be impracticable to secure a witness's testimony without a subpoena. The material witness law favors ordering a deposition of a material witness in lieu of his detention, reflecting Congressional concern that witnesses should be detained only in narrow circumstances.⁵

Before September 11, the government generally used the material witness law to arrest individuals who had witnessed a crime and who had a legal reason or had made clear to the government that he or she would not comply with a subpoena to testify at a criminal trial. The former INS made the most material witness arrests, most commonly to hold immigrants who were smuggled into the country in order to obtain their testimony for trials against alien smugglers⁶ and courts were careful to release witnesses if they faced continued detention.⁷

Before September 11, courts were reluctant to jail a witness absent proof that the witness was a "fugitive" or had resisted government attempts to call witnesses to testify.⁸

Following September 11, however, the government used the material witness law in a manner that reduced judicial oversight protecting these standards for holding a witness, detaining witnesses who had cooperated with the government, demonstrated no risk of flight, and had little or no relevant information to a crime. According to lawyers who represented witnesses since September 11, one reason for this change is that courts have deferred to the governments' arguments that witnesses need be detained because of national security concerns. The Second Circuit's recent decision in *U.S. v. Awadallah*, the only appellate case to resolve the government's post 9/11 use of the material witness law, reflects this deference; the Second Circuit substantially lowered the burden on the government to prove a witness is not likely to comply with a subpoena, holding that the material witness in that case was a flight risk largely because he did not step forward to the FBI to volunteer information that he may have.⁹ In crafting this standard, the Second Circuit not only made "several significant inferential leaps"¹⁰ in presuming that an individual has relevant knowledge to the investigation, but also broke with pre-September 11 case law that required the government to prove the witness was a flight risk because she had previously evaded service or was a fugitive from justice.¹¹

The second reason the government has been able to detain witnesses without judicial oversight is that it held material witnesses more frequently for grand jury proceedings, where courts are largely restricted in reviewing the Justice Departments' subpoena powers. Unlike a trial, where there is a defendant and a concrete crime, the Justice Department "has exceedingly broad powers of investigation"¹² in grand jury investigations to determine "whether a crime has been committed and whether criminal proceedings should be instituted against any

person.”¹³ Thus, in *Awadallah*, the Circuit held that the government need only produce a “mere statement” from a government official that a witness has material information to establish that his testimony is necessary for a grand jury investigation.¹⁴

Arresting material witnesses for grand jury investigations has also allowed the government to hold material witnesses in complete secrecy. Grand jury proceedings and records have long been kept under seal because of the preliminary nature of the investigation.¹⁵ The government has applied these rules to detain grand jury material witnesses in closed proceedings and with sealed records, although some courts reviewing post-9/11 material witness detentions have balanced these rules against the “presumptively public”¹⁶ determination to jail a witness. The secrecy surrounding the post-September 11 grand jury material witness arrests also departed from past practice; for example, the government read the material witness arrest warrant in an open bond proceeding for material witness Terry Lynn Nichols, arrested in connection with the grand jury investigation to the 1996 Oklahoma City bombing.¹⁷

III. Exceeding Congressionally defined material witness authority to hold suspects without proof of probable cause

Behind the unprecedented secrecy surrounding post-September 11 material witness arrests, our review of material witness detentions indicates that the Justice Department has arrested and detained witnesses in a manner unauthorized by Congress and the U.S. constitution to evade proving probable cause. In the days following September 11, Attorney General John Ashcroft made clear that the material witness law was part of the Justice Department’s legal arsenal to hold suspects, declaring that “[a]ggressive detention of lawbreakers and material witnesses is vital to

preventing, disrupting, or delaying new attacks.”¹⁸ Material witnesses consistently described to the ACLU and HRW that from the moment of their arrest, the Justice Department treated them as high profile terrorism suspects, arresting witnesses in their homes or in public with armed agents with their guns drawn, shackling witnesses and transferring them to maximum security prisons and holding them in solitary confinement with the lights on 24 hours a day. Many witnesses report being subjected to the same or similar physical and verbal abuse and detention conditions that “high interest detainees” faced at MDC Brooklyn, documented by the Inspector General of the Justice Department.¹⁹

During interrogations of material witnesses, FBI agents and U.S. attorneys made direct and veiled threats to material witnesses and their families. In a number of cases, the Justice Department made clear that it arrested individuals as witness to his own criminal proceeding, often initiating a criminal proceeding only after arresting the witness, submitting evidence replete with admissions that the witness was a major suspect in a terrorism-related crime, and telling witnesses that they faced long jail sentences or capital punishment. In other cases, the Justice Department roadblocked witnesses efforts for release by seeking continuances to delay witnesses testimony when they were prepared to testify and refusing to grant witnesses immunity in exchange for their testimony.

Almost half of the material witness detained in counterterrorism investigations since September 11 did not testify in any criminal proceeding. This pattern, however, also reflects the costs of the governments end-run around the constitutional requirement of proving that there is probable cause to detain a suspect; in many cases, the government used flawed and unsubstantiated evidence to hold material witnesses who had no information about any crime. Government officials have issued statements acknowledging or apologizing for the

wrongful detention of at least 11 material witnesses, most of whom spent weeks in detention, often in solitary confinement, and Congress, federal courts and the Department of Justice's internal review agencies has initiated investigations into flawed or prolonged material witness arrests.²⁰

The May 2004 arrest of Oregon attorney and Islam-convert Brandon Mayfield as a material witness to a grand jury investigation into the March 11 Madrid bombing illustrates the governments' pattern of using the material witness law to hold suspects. In sealed proceedings, the FBI obtained a warrant to arrest Mr. Mayfield, a U.S. citizen and a father of three, on the basis of proof suggesting that Mr. Mayfield was involved with the bombing—that it had made a “100 % positive identification” of Mr. Mayfield's fingerprint with a print found on a bag of detonators found near the Madrid bombing.²¹ The FBI further informed the court that it believed that Mr. Mayfield was in Spain even though he did not have a valid passport or records indicating he had left the country in ten years; the government argued that Mr. Mayfield was a flight risk because his fingerprint was found in Spain, making it likely that he “traveled under a false or fictitious name, with false or fictitious documents.”²² In justifying the arrest of Mr. Mayfield, it did not connect him with anyone who was under investigation for the bombing and had not yet convened a grand jury investigation. To the contrary, the Justice Department identified Mr. Mayfield in court filings as a “potential target.”²³

Based on this evidence, armed FBI agents arrested Mr. Mayfield as a material witness at his law office and jailed him in solitary confinement, restricting contact with his family. The FBI searched his law offices, his home and seized his legal files. During his detention, U.S. attorneys suggested that he could face capital punishment if criminally charged and refused to grant him immunity in exchange for his testimony.

After detaining Mr. Mayfield for three weeks in jail and under house arrest, on May 24, 2004 the Justice Department moved to dismiss him as a material witness when Spanish authorities apprehended an Algerian man who had a real match to the Madrid print. The FBI subsequently admitted that it mismatched Mr. Mayfield's print and issued an “apolog[y] to Mr. Mayfield and his family for the hardships that this matter has caused.”²⁴ The Department of Justice's Office of Inspector General and Office of Professional Responsibility is currently investigating the conduct of the U.S. Attorneys and the FBI in this case.

IV. International Legal Prohibitions against Arbitrary Detention

By using its material witness authority to hold suspects like Mr. Mayfield without probable cause, the U.S. government has violated the basic guarantee that detention must be previously authorized by legislation. Article 9(1) of the International Covenant on Civil and Political Rights guarantees that “no one shall be deprived of his liberty on such grounds .. as are established by law.” The U.N. Human Rights Committee defines this right to mean that it is “a violation [of Article 9(1)] if an individual is arrested or detained on grounds which are not clearly established by domestic legislation.”²⁵

Congress has made clear by the language of the statute that it only authorizes the government to detain witnesses for the purpose of obtaining their testimony and that detention of witnesses is permissible in very limited circumstances.²⁶ There is no other legislatively authorized purpose for using the material witness law within the text of the statute, or within the legislative history, that suggests that the government may hold a material witness for any purpose other than securing his testimony.²⁷ To the contrary, when Congress enacted the current version of the material witness law, it emphasized that a witness should be deposed in

order to limit the prolonged detention of a witness.²⁸

Courts have also underscored 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.”²⁹

As illustrated by arrest and detention of Brandon Mayfield, the government has arrested “material witnesses” in a manner unsanctioned by Congress. In doing so, it has held such witnesses without previously established authority, in violation of ICCPR Art. 9(1) and the guarantee to due process.

V. Impermissible use of race, religion, and national origin to detain material witnesses

The arrest of Mr. Mayfield also demonstrates the governments’ pattern of impermissibly using religion to arrest and detain material witnesses. In addition to the fingerprint evidence, the government argued that Mr. Mayfield had links to terrorists based on insinuations tied to his religion. In its affidavit supporting the arrest of Mr. Mayfield, the government detailed how Mr. Mayfield was a Muslim convert who was married to an Egyptian and that agents had observed Mr. Mayfield drive to his mosque on a number of occasions in the weeks before his arrest.³⁰ The affidavit also pointed to his numerous professional associations with Muslims, including an advertisement he placed for his law firm in a widely used internet directory.³¹

International human rights law forbids states from discriminating based on race, religion and national origin. ICCPR Art. 2(1), to which the US is a signatory, imposes an affirmative duty to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin,

property, birth or other status.”³² The U.S. has agreed to the same principles under other treaties it has ratified, including the United Nations Charter, the UDHR, and the International Convention on the Elimination of All Forms of Discrimination.³³ These non-discrimination principles are based on promoting peace and security, on the view that discrimination “is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same.”³⁴

Out of the 70 post-September 11 counter-terrorism material witness arrests that we documented, only one witness was not Muslim, and Brandon Mayfield was among the two material witnesses who were not of Middle Eastern or South Asian descent. Our review of material witness cases indicates that the government consistently used witnesses’ race, religion, and national origin in violation of international principles to argue that material witnesses had material information or were flight risks, in violation of these basic protections against international discrimination.

Endnotes

¹ U.S. Department of Justice, Office of the Inspector General (OIG), *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*, April 2003, p 16.

² David Cole, “No More Roundups,” *Washington Post*, June 16, 2004.

³ Letter from James E. Brown, Acting Assistant Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., chairman, House Judiciary Committee, May 13, 2003 at 49, <http://www.house.gov/judiciary/patriotlet051303.pdf> (last visited November 22, 2004).

⁴ 18 U.S.C. § 3144.

⁵ S. Rep. No. 98-225, 1984 U.S.C.C.A.N. 3182 (Aug. 4, 1983) (“[T]he committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.”).

⁶ Bureau of Justice Statistics, U.S. Dep’t of Justice, Compendium of Federal Justice Statistics 2000, <http://www.ojp.usdoj.gov/bjs/abstract/cfjs00.htm> (last visited November 22, 2004).

⁷ See, e.g., *Torres-Ruiz v. U.S. Dist. Court for Southern Dist. Of California*, 120 F.3d 933 (9th Cir. 1997).

⁸ See, e.g., *Arnsberg v. United States*, 757 F.2d 971, 976 (9th Cir. 1984) (holding government did not establish impracticability where witness informed government he would not attend a grand jury unless personally served because the government could not show Arnsberg was a fugitive or likely to flee the jurisdiction).

⁹ *United States v. Awadallah*, 349 F.3d 42, 81 (2d Cir. 2003). The Court reversed the District Court and held that the government sufficiently proved that it would be impracticable to obtain Mr. Awadallah’s testimony by a subpoena, even where the FBI agents testified he had been “very, very cooperative” agreed to voluntary interviews before his arrest, and that he lived in the same city as his U.S. citizen father, and three brothers, one of whom was a U.S. citizen because Mr. Awadallah “did not step forward” and go to the FBI offices after September 11 to volunteer information. As of this writing, the Supreme Court is considering whether to grant certiorari in *Awadallah*.

¹⁰ *Awadallah*, 349 F.3d at 104 (Straub, J., concurring).

¹¹ See *infra*, footnote 10. *Awadallah* also disregards the post 9/11 context, where Muslim men were detained as witnesses even when they went to the FBI offices to volunteer information. In fact, the government immediately detained material witness Eyad Alrababah after he voluntarily went to the FBI office in Bridgeport, Connecticut on September 29, 2001 to inform authorities that he had recognized four of the alleged hijackers whose pictures were shown on television. U.S. Senate Judiciary Committee

Hearing on Reorganizing and Reforming the FBI, May 8, 2002 (Submitting an inquiry to Deputy Attorney General Larry Thompson on the arrest of material witness Eyad Alrababah).

¹² *Bacon v. United States*, 499 F.2d 933, 943 (9th Cir. 1971).

¹³ *United States v. Calandra*, 414 U.S. 338, 343-44 (1974).

¹⁴ *Awadallah*, at 70. In *Awadallah*, the Second Circuit also further extended the government’s power by authorizing a material witness arrest based on a statement from an FBI agent who has no personal knowledge of the witness. *Id.*

¹⁵ *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979).

¹⁶ *In re Application of United States for Material Witness Warrant*, 214 F.Supp.2d 356, 364 (S.D.N.Y. 2002) (internal case citations omitted) (emphasis added).

¹⁷ Pam Belluck, “Affidavit describes Bomb suspect’s warning,” *New York Times*, April 27, 1995.

¹⁸ Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force,” Opening Remarks of John Ashcroft at *1, available at www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm.

¹⁹ U.S. Department of Justice, Office of the Inspector General (OIG), “Supplemental Report on September 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York,” June 2003.

²⁰ See, e.g., Federal Bureau of Investigation, Department of Justice, Statement on Brandon Mayfield case, May 24, 2004, <http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm> (last visited November 22, 2004); U.S. Senate Judiciary Committee on the Inspector General’s Report on the 9/11 Detainees, June 25, 2003 (Senator Patrick Leahy requesting an investigation on use of material witness law in light of the wrongful detention

of eight material witnesses in Evansville, Indiana); *In re Application of United States for Material Witness Warrant*, 214 F.Supp.2d 356, 364 (S.D.N.Y. 2002) (ordering investigation into false confession and detention of material witness Abdallah Higazy).

²¹ Affidavit of Federal Bureau of Investigation officer Richard Werder in support of the U.S. Government's application for a material witness warrant for the Arrest of Brandon Mayfield, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. Filed May 6, 2004).

²² Affidavit of Federal Bureau of Investigation officer Richard Werder in support of the U.S. Government's application for a material witness warrant for the Arrest of Brandon Mayfield, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. Filed May 6, 2004).

²³ Government's Response to Witness' motions for return of materials seized pursuant to search warrants, for disclosure of search warrant affidavits and for access to seized material, dated May 17, 2003, p 2. No. 04-MC-9071 (D. Or. 2004).

²⁴ U.S. Justice Department, Federal Bureau of Investigation, Statement on Brandon Mayfield Case, issued May 24, 2001. *Available at* (<http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm>) (last visited September 20, 2004). Weeks later, in response to a Congressional inquiry, Attorney General Ashcroft characterized the wrongful arrest of Mr. Mayfield as "an unfortunate situation which I regret." June 8, 2004 Senate Judiciary Committee Hearing held by U.S. Senator Orrin G. on the Federal Government's counterterrorism efforts."

²⁵ Communication No. 702/1996, *C. McLawrence v. Jamiaca* (Views adopted on 18 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 230-231, para 5.5. Article 2 of the American Convention on Human Rights similarly provides that "no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." The Inter-American Court on Human Rights interprets this prohibition to mean that "no person may be deprived of his or her personal freedom except for reasons,

cases or circumstances expressly defined by law and, furthermore, subject to the strict adherence to the procedures objectively set forth in that law." *I-A Court HR, Gnagaram Panday Case v. Suriname, judgment of January 21, 1994*, in OAS doc. OAS/Ser.L/V/III.31.

²⁶ 18 U.S.C. § 3144. Congress also indicates that the § 3144 is intended only to detain witnesses by requiring that a material witness may not be detained if the government can secure the witness's testimony by deposition. *Id.* ("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.").

²⁷ *Cf. Ex Parte Endo*, 323 U.S. 283, 300 (1944) (stating "[w]e must assume, when asked to find implied powers in a grand of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.").

²⁸ *See infra*, footnote 5.

²⁹ *Awadallah*, 349 F.3d at 59.

³⁰ Affidavit of FBI agent Richard Werder in support of the United State's Application for Material witness order and warrant regarding witness: Brandon Mayfield, P 19, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. filed May 6, 2004).

³¹ The government argued that his business listing in the directory was suspect because the directory was registered to a Muslim man who four years ago admitted to the FBI that he knew a convicted terrorist. Affidavit of FBI agent Richard Werder in support of the United State's Application for Material witness order and warrant regarding witness: Brandon Mayfield, P 13-14, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. filed May 6, 2004). The government also described at lengths the beliefs of one of his Muslim clients in a family court case, Jeffrey Leon Battle, Mr. Mayfield to establish probable cause that Mr. Mayfield may have material information to the Madrid bombing. Mr. Mayfield represented Mr. Battle, who pleaded guilty with seven

other Portland-area residents to terrorism charges in 2003, in a wholly unrelated child custody case.

³² ICCPR Art. 2(1).

³³ U.N. Charter, art. 1, para. 3; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1984), art. 2.; International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly Dec. 21, 1968, entered into force Jan. 4, 1969, ratified by the United States in 1994 art. 2, 660 U.N.T.S. 195 (1966).

³⁴ CERD, preamble, para. 5.