02-1269

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

-against-

OSAMA AWADALLAH,
Defendant-Appellee.

On Appeal From The United States District Court For The Southern District Of New York

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BRIEF SUBMITTED BY THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This case focuses on the twenty-day detention of Osama Awadallah from September 21, 2001 through October 10, 2001.[1] During this period, Mr. Awadallah was not accused of a crime but was, nonetheless, arrested and transported in shackles from his home in San Diego to the Metropolitan Correction Center in New York City. *United States v. Awadallah,* 202 F.Supp.2d 55, 60 (S.D.N.Y. 2002) ("*Awadallah III*"). At the Metropolitan Correction Center he was "treated as a high security inmate . . . held in solitary confinement and shackled and strip-searched whenever he left his cell. He was unable to have family visits or use the telephone . . . ." *Id.* at 58.

The government's purported interest in Mr. Awadallah's detention was to have him testify before a grand jury that was inquiring into criminal activity relating to the tragic events of September 11, 2001. *Id.* at 60-61. To secure his detention the government asserted that Mr. Awadallah possessed information material to matters before the grand jury and that it would not be able to secure his testimony by subpoena. Based on these *ex*

[1] Mr. Awadallah was held by the United States government for a total of eighty-three days, from September 21, 2001 until December 13, 2001. After his appearance before the grand jury, he was arrested and then indicted on charges of perjury. The District Court set bail with conditions on November 27, 2001, and Mr. Awadallah satisfied those conditions on December 13, 2001. *See United States v. Awadallah,* 202 F.Supp.2d 55, 59 (S.D.N.Y. 2002).

parte submissions, the government obtained his arrest and detention as a "material witness" pursuant to 18 U.S.C. § 3144. *Id.*

On October 10, Mr. Awadallah was brought before the grand jury and handcuffed to a chair in front of the grand jurors. *Id.* at 58. He was questioned about whether he knew two of the individuals who were suspected of involvement in the September 11 hijacking. Mr. Awadallah admitted to having known one of the hijackers, Nawaf Al-Hazami, during the spring of 2000, and that he last saw him in December 2000. *United States v. Awadallah,* 202 F.Supp.2d 17, 26-28 (S.D.N.Y. 2002) ("*Awadallah II*"). He also admitted to having seen a second apparent hijacker with Mr. Al-Hazami but he denied knowing the name of the second hijacker. *Id.* at 30. Based on this denial, the government accused Mr. Awadallah of committing perjury.

Mr. Awadallah concluded his testimony on October 15, 2001. A criminal complaint filed against Mr. Awadallah charged him with two counts of making false statements during his grand jury appearance on October 10, 2001.[2] *Awadallah III*, 202 F.Supp.2d

[2] The first count rested upon the allegation that Mr. Awadallah falsely denied knowing the name of the second apparent hijacker. The second count rested upon the allegation that Mr. Awadallah falsely denied writing the name of the second hijacker in an examination booklet that Mr. Awadallah used in the school he was attending in San Diego.

at 59. An indictment to this effect was filed on October 31, 2001. *Id.*

On April 30, 2002, United States District Judge Shira A. Scheindlin ordered the suppression of Mr. Awadallah's grand jury testimony and dismissed the indictment. The District Court did so upon two alternative grounds. First, the District Court held that 18 U.S.C. § 3144 -- upon which the government based its arrest and detention of Mr. Awadallah as a "material witness" -- does not apply to grand jury proceedings; that Mr. Awadallah's arrest and detention were, therefore, unlawful; that his compelled testimony before the grand jury was, therefore, unauthorized by law; and that the testimony before the grand jury could not, therefore, serve as the basis for a perjury indictment. *Awadallah III,* 202 F.Supp.2d 52.

In reaching this conclusion, in a detailed opinion that rested upon a close reading of the text of Section 3144, the District Court noted that Section 3144 begins by requiring that an application for the arrest and detention of material witnesses be made by a "party" in a "criminal proceeding." *Id.* at 62. The Court further observed that there are no "parties" to a grand jury proceeding and such proceedings are not "criminal proceedings." *Id.* at 62-63. Accordingly, the District Court held that Section 3144, by its terms, applies to trial witnesses, but not grand jury witnesses. *Id.* at 79. The Court

reinforced this conclusion by noting that the statute authorizes the detention only of those witnesses whose testimony is found by a judicial officer to be material"; and that while "materiality" is a matter that can be evaluated in the context of a trial, it is virtually impossible for a judge to determine who is a "material" witness in a grand jury proceeding. *Id.* at 63. The Court further supported these conclusions by surveying the legislative history leading to the enactment of Section 3144 which reaffirmed the Court's holding that the statute was not intended to apply to grand jury proceedings. *Id.* at 67-72.

As an alternative basis for dismissing the indictment, the District Court concluded that the affidavit submitted in support of the application for Mr. Awadallah's arrest contained material and intentional misrepresentations and omissions in violation of the principles of *Franks v. Delaware*, 438 U.S. 154 (1978), and that the grand jury testimony constituted the "fruit" of that unlawful arrest and subsequent detention. *United States v. Awadallah,* 202 F.Supp.2d 82 (S.D.N.Y. 2002) ("*Awadallah IV*").

The American Civil Liberties Union (ACLU) is a nationwide non-profit organization of nearly 300,000 members, devoted to the protection of civil rights and civil liberties. The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the ACLU and is similarly devoted to the protection and enhancement of the fundamental rights and liberties secured

by the U.S. Constitution. Among the most fundamental of liberties are the powerful presumption against deprivations of physical liberty secured by the Due Process Clause of the Fifth Amendment and the equally demanding prohibition against unreasonable seizures of individuals secured by the Fourth Amendment. The government's behavior in this case and its attempted application of 18 U.S.C. § 3144 to grand jury proceedings deeply implicate these constitutional provisions.

The reach of the material witness statute and its application in this case must be understood in light of fundamental constitutional principles protecting freedom from physical restraint. It is these matters that the ACLU and NYCLU respectfully seek to address in this brief, as *amici curiae*. Accordingly, the Argument, set forth below, begins with a basic and unexceptional proposition emerging out of the Supreme Court's Fourth and Fifth Amendment jurisprudence: When the government seeks to restrain the liberty of an individual -- particularly one who is not accused of any wrongdoing -- it may do so only in the service of special and substantial needs and, even then, only if less restrictive mechanisms will not adequately serve those needs.

Section 3144 -- the statute upon which the government relies -- provides that "[n]o witness may be detained because of inability to comply with any condition of release if the

testimony can adequately be secured by deposition . . . ." 18 U.S.C. § 3144. The use of deposition testimony in lieu of live testimony before the grand jury clearly suggests itself as a viable and less restrictive alternative to detention and comports with constitutional sensibilities. Yet, no deposition of Mr. Awadallah was taken.

Mr. Awadallah suggests that no deposition was taken because Rule 15 of the Federal Rules of Criminal Procedure -- the only rule that authorizes and prescribes the procedures for taking depositions -- only applies to depositions taken to preserve testimony for trial and not to preserve testimony for grand jury proceedings. The government expressed the same view in the District Court. *Awadallah III,* 202 F.Supp.2d at 65. Indeed, Rule 15 seems to be so limited. But, if Awadallah is correct in this regard, and if depositions are not available for grand jury witnesses under the statutory matrix set out in Section 3144, such a conclusion reinforces the holding of the District Court that Section 3144 was not intended to apply and does not apply to the detention of grand jury witnesses.

> Moreover, if the Federal Rules of Criminal Procedure do not provide for the taking of a deposition to secure the grand jury testimony of a witness, constitutional strictures prohibiting restraints on liberty when other less restrictive alternatives might be available require the government to bring witnesses whose testimony is sought before the grand jury promptly and without delay. No prolonged detention of the sort experienced by Mr. Awadallah in this case, pursuant to Section 3144, would be constitutionally permissible.

Finally, even if Rule 15 does apply to grand jury witnesses, the decision of the District Court must be affirmed. For, if the government could have taken Mr. Awadallah's deposition but did not, it must be faulted for detaining the witness without utilizing an available and less restrictive alternative. In such circumstance, the government must be seen as having violated the statutory standard set forth in Section 3144 as well as basic constitutional principles demanding the use of less restrictive alternatives.

Each of these matters is amplified in the Argument set forth below.

The ACLU and NYCLU have authority to submit this brief because the appellant United States, by their attorney Assistant United States Attoney Robin Baker, and the appellee, by his attorney Robert Boyle, have consented to this filing. *See* Fed. R. App. Proc. 29(a).

ARGUMENT

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . ." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Accordingly, the Due Process Clause of the Fifth Amendment requires stringent safeguards to ensure against arbitrary deprivations of physical liberty. The Fourth Amendment similarly imposes a demanding prohibition against unreasonable seizures of the person.

Specifically, under the Fourth Amendment, seizures of the person are governed by a rule of "reasonableness." *See Terry v. Ohio*, 392 U.S. 1, 19 (1968). But in the absence of probable cause to believe an individual has committed a crime, the scope of a search or seizure "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 19 (*quoting Warren v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). Thus, the Supreme Court has held that an investigative detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality). Likewise, in cases where an individual has been

arrested without a warrant but where the arresting officer maintains probable cause to believe that the arrestee has committed a crime, any detention must be brief and only for a period of time sufficient to bring the arrestee before a magistrate. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Any subsequent restraint on liberty is justified only after a neutral magistrate determines that there was probable cause. *Id.* Moreover, although seizures of individuals generally provoke constitutional concern to a greater degree than seizures of property, this Circuit has recently found that the prolonged detention of property by New York City, pursuant to civil forfeiture laws and prior to a final adjudication on the merits, is justified only after a hearing to determine "whether means short of retention" could satisfy the City's need to preserve the property during the pendency of the proceedings. *Krimstock v. Kelly*, 306 F.3d 40, 67 (2d Cir. 2002).

Similarly, the Fifth Amendment's Due Process Clause allows civil detention only where a "special justification" is "sufficiently weighty" to overcome an individual's "interest in avoiding physical restraint," where the scope and nature of that detention "is not excessive" to its purpose, and is subject to the strictest procedural safeguards. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *United States v. Salerno*, 481 U.S. 739, 746 (1987). In *Zadvydas*, the Supreme Court held:

> [G]overnment detention violates [the Fifth Amendment's Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" non-punitive "circumstances," where a special justification, such has harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."

Id., 533 U.S. at 690 (citing *Salerno,* 481 U.S. at 746; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). The Supreme Court has sanctioned non-punitive detention only in a few very limited circumstances. *See Zadvydas,* 533 U.S. 678 (detention of alien deportees permissible only so long as deportation is reasonably foreseeable); *Salerno,* 481 U.S. at 749 (pretrial detention of narrow category of criminal defendants solely on the basis of dangerousness only with strict procedural protections); *Addington v. Texas*, 441 U.S. 418 (1979) (detention permissible only where government shows by clear and convincing evidence mental illness *and* danger to self or others); *Jackson v. Indiana*, 406 U.S. 715 (1972) (detention of criminal defendant solely on account of his incompetency to stand trial, without finding that defendant was mentally ill and dangerous violated due process).

Even where the government has a sufficient interest, the Due Process Clause strictly limits the use of detention to situations where the deprivation of liberty is not "excessive in

relation to the [non-punitive] purpose for which the individual is detained," and is subject to strong procedural safeguards. *Salerno*, 481 U.S. at 747 (concluding that pretrial detention of accused individuals was not excessive in relation to compelling regulatory goal of preventing danger to the community where, *inter alia*, detention could be sought only for the most serious crimes, maximum length of pretrial was sharply limited, and other critical procedural protections applied); *Schall v. Abrams,* 467 U.S. 253, 270 (1984) (noting maximum length of dangerousness-based detention of seventeen days for youth suspected of serious crimes and six for those suspected of less serious crimes). *See also Jackson v. Indiana*, 406 U.S. at 733 (criminal defendant incompetent to stand trial may be detained only for "a reasonable period of time *necessary* to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future") (emphasis added) (internal citations omitted).

In sum, the Supreme Court's Fourth and Fifth Amendment jurisdprudence holds that when the government seeks to restrain the liberty of an individual -- particularly one who is not accused of any wrongdoing -- it may only do so in the service of a special and substantial need, and even then, only if less restrictive mechanisms will not adequately serve that need.

The reach of the material witness statute, 18 U.S.C. § 3144, and its application in this case must be evaluated in light of these fundamental constitutional principles protecting freedom from physical restraint by the government. That statute 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.

The statutory matrix requires a series of determinations to be made before a witness can be ordered detained without bail.[3]

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[3] The statutory scheme at issue here emerged relatively recently. Statutory authority to order outright detention, as opposed to imposition of release conditions, for material witnesses is the product of 1984 legislation. Under all previous authority, judicial officers were empowered only to arrest material witnesses whose appearance could not be secured by subpoena and to impose conditions on their release as a means of ensuring appearance to testify; witnesses were detained only when they would not or could not satisfy the conditions of their release. *Compare* 18 U.S.C. §§ 3142, 3144, *with* Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 216; Fed. R. Crim. P. 46(b) (1946); 28 U.S.C. §§ 657, 659 (1925); Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 73; Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 23, 91. The legislative history indicates that Congress was conscious of its departure from this longstanding historical precedent. *See* S. Rep. No. 98-225, 1984 U.S.C.C.A.N. 3182 (Aug.

First, in order for an arrest warrant to issue, a neutral magistrate must make a determination, based on articulable facts in a sworn affidavit, that a witness's testimony is "material in a criminal proceeding" *and* that "it may become impracticable to secure the presence of [the witness] by subpoena." *Id.*

Once arrested, the witness is subject to the provisions of Section 3142, which directs judicial officers to "order the . . . release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). If the judicial officer concludes that release on personal recognizance or upon execution of an unsecured appearance bond is insufficient, then the officer should order release *subject to the least restrictive condition(s) that will reasonably assure the person's appearance*. *Id.* Detention can be ordered after an adversarial hearing, only if the judicial officer finds that no condition or combination of conditions will reasonably assure

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4, 1983) ("The first change in current law is that, in providing that a material witness is to be treated in accordance with Section 3142, Section 3144 would permit the judicial officer to order the detention of the witness if there were no conditions of release that would assure his appearance.").

the person's appearance. *See* 18 U.S.C. § 3142(e). Because the district court found that Section 3144 does not apply at all in the grand jury context, the court did not have occasion to consider the process by which Mr. Awadallah was detained.[4]

[4]If the detention of a material witness is to comport with constitutional strictures, it must be conditioned on strong procedural safeguards. In *Salerno* the Supreme Court allowed pretrial detention of defendants charged with serious crimes only after "stress[ing] 'stringent time limitations,' the fact that detention is reserved for the 'most serious of crimes,' the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards." *Zadvydas v. Davis*, 533 U.S. 678 at 691 (describing and citing *Salerno*, 481 U.S. at 747, 750-752). Notably, the very safeguards upon which the Court relied in *Salerno* are lacking in the case of material witnesses, who in any event cannot be detained on the basis of dangerousness. *See* 18 U.S.C. § 3142; S. Rep. No. 98-225, 1984 U.S.C.C.A.N., at n.100 (Aug. 4, 1983). *First*, there is no set limit on the length of detention. A witness has no speedy trial rights and is at the mercy of parties who may decide it is advantageous to postpone trial. This problem is magnified in the grand jury context, where an investigation may be ongoing and no statute limits its duration. *Second*, witness detention is not reserved for the most serious crimes. Indeed, the witness is accused of *no* crime. Thus, the question of flight risk is different for a witness, who is accused of no wrongdoing, than for a defendant who risks a guilty verdict and attendant sentencing. *Cf. Stack v. Boyle*, 341 U.S. 1, 4 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."); *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985) (reviewing evidence that accused drug offenders pose a heightened risk of flight). *Third*, the standard of proof applied here was a mere preponderance rather than the "clear and convincing" standard. *See* Findings of Fact and Order of Detention (Sept. 26, 2001) (Brooks, M.J.). An innocent person not suspected of any crime, however, should be entitled to at least the standard that is afforded persons for whom there is probable cause to believe they have committed a serious offense. *See, e.g.*, *New Jersey v. Misik*, 569 A.2d 894, 902 (N.J. Super. Ct. Law Div. 1989) ("[A]t the very least a heavy burden of proof should be imposed upon the State whenever it decides it is

Finally, and perhaps most significantly, the government may not continue to detain a witness 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." 18 U.S.C. § 3144.

In providing that "no material witness may be detained . . . if the testimony of such witness can be adequately secured by deposition," it is clear that Congress intended that detention of a witness must be a last resort, and that, if a deposition would adequately secure a witness's testimony, that witness must be released.[5] The deposition requirement of Section 3144 thus acts as a constitutional safety-valve. It mandates that a less

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necessary to seek detention of an innocent person, not even a suspect, much less an accused.") (relying on *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

[5] In 1984, Congress made clear its intent that *no* material witness should be detained if a deposition will adequately preserve his testimony:

> However, if a *material witness cannot comply with the release conditions or there are no release conditions that will assure his appearance, but he will give a deposition that will adequately preserve his testimony, the judicial officer is required to order the witness's release after the taking of the deposition if this will not result in a failure of justice.*

S. Rep. No. 98-225, 1984 U.S.C.C.A.N. 3182 (Aug. 4, 1983)(emphasis added).

restrictive alternative to detention must be used if at all possible.

Mr. Awadallah argues to this Court, however, that under Rule 15(a) of the Rules of Criminal Procedure a deposition is available to preserve trial testimony but not grand jury testimony. And a reading of the text of Rule 15 would seem to support that claim. But, if Mr. Awadallah is correct in this regard, such an observation lends further support to the District Court's determination that Section 3144 was not intended to apply and cannot apply to grand jury witnesses. This is so because the deposition alternative is of central importance in the statutory scheme set forth in Section 3144.

Moreover, if Rule 15 does not permit the use of depositions to preserve grand jury testimony, constitutional difficulties would be raised by the application of Section 3144 to grand jury witnesses. For, as suggested above, the deposition alternative is an essential element of the statute from a constitutional standpoint. It ensures that a witness may not be subjected to prolonged detention if there is a less restrictive mechanism for securing the witness's testimony. Therefore, in the circumstance where a deposition could have served as an entirely adequate alternative to detention but is not being utilized only because of the failure of Federal Rules of Criminal Procedure to authorize such a deposition, the government cannot simply

subject the witness to prolonged detention prior to calling him or her before the grand jury. In such a circumstance, the government's constitutional obligation is to bring the witness before the grand jury promptly and without any prolonged detention.

> Perhaps now recognizing the central importance that the deposition alternative plays in the statutory scheme, the Government has completely reversed itself with respect to whether a deposition is available to grand jury witnesses. In the Court below, it argued:
>
> > The deposition provision of § 3144 does not apply here . . . [T]he provision is meant to address the detention of material witnesses in the pretrial, as opposed to the grand jury, context. Indeed, the provision makes explicit reference to the taking of depositions in accordance with the Federal Rules of Criminal Procedure, and Rule 15, regarding depositions in lieu of *trial* testimony in the pretrial context, after charges have been initiated. Thus, the rule contemplates the taking of depositions on notice to the opposing party; no such "opposing party" exists until criminal charges against a defendant have been filed.

quoted in Awadallah III, 202 F. Supp.2d at 65. However, in its brief to this Court, the Government has now conceded that this position was wrong:

> [A] deposition to preserve grand jury testimony necessarily would differ in procedure from a deposition to preserve trial testimony – because, for example, a witness in the grand jury has no right to have counsel present for questioning, although counsel may be available for consultation outside the grand jury room. . . However, *nothing in Rule 15 bars the availability of any deposition procedure to grand jury witnesses simply because that procedure is available principally for a trial witness.*

Appellant's Brief dated July 31, 2002, p. 70 (emphasis added).

But, if, as the government *now* asserts, nothing in Rule 15 prevents the taking of a deposition of a grand jury witness, it must now explain why it did not take the deposition of Mr. Awadallah in this case. For this is a case where deposition testimony would appear to have been entirely sufficient to satisfy the government's interests.

There may be some circumstances where a deposition will not "adequately secure the testimony" of a witness. This may be particularly true in the trial context where the right of confrontation is implicated. *Roberts v. United States,* 448 U.S. 56, 64-65 (1980). However, even where a criminal defendant's confrontation rights are at stake courts have found the interest in *live* testimony at trial does not always override a witness's liberty interest in remaining free from detention. *See, e.g.* *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 412 (5th Cir. 1992) (noting that "[i]f the deposition would prove admissible over any objection under the Confrontation Clause of the United States Constitution or the Federal Rules of Evidence, then the material must be deposed rather than detained"); *United States v. Eufracio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989) (holding that use of deposition testimony of illegal aliens in criminal trial was proper after weighing the right of the accused to confront witnesses against him against the witnesses' due process rights).

In the grand jury context, however, concerns about preserving defendants' right of confrontation plainly do not exist. And in this case, the government has offered no explanation as to why deposition testimony would have been inadequate to its needs.

It follows, therefore, that the government misused the material witness statute, 18 U.S.C. § 3144, in this case. Where, as here, a deposition to preserve testimony would have fully satisfied the government's interest in presenting Mr. Awadallah's testimony to the grand jury, prolonged detention of the witness is inconsistent with both the statute and constitutional strictures. Mr. Awadallah was wrongfully and unconstitutionally detained, and the order mandating his detention was improper. The District Court was, therefore, correct in suppressing the testimony that was compelled pursuant to the improper detention order and in dismissing the indictment.

The misapplication of the statute and the unconstitutional detention are so clear in this case as to suggest that the government's treatment of Mr. Awadallah rested not so much on an interest in securing testimony as upon other considerations. Throughout the twenty-day period at issue, Mr. Awadallah -- although not accused of a crime -- was treated as though he were a criminal. In the weeks following the horrific events of

September 11, it is understandable that the government sought to interrogate anyone associated with the hijackers, however remote and intermittent those associations may have been. But, in our constitutional system, interrogation is one thing, incarceration is another. To preserve that critical constitutional distinction, the Court should make clear that the material witness statute cannot be used simply as a means of preventative detention.

Fifteen years ago, Justice William J. Brennan addressed the delicate balance that must be struck between civil liberties and security in times of crisis. He observed:

> The struggle to establish civil liberties against the backdrop of . . . security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger -- bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile . . . . For in this crucible of dangers lies the opportunity to forge a . . . jurisprudence of civil liberties that can withstand the turbulence of war and crisis. In this way, adversity may yet be the handmaiden of liberty.

William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Speech at the Law School of Hebrew University, Jerusalem, Israel (Dec. 22, 1987) (as published by the Brennan Center for Justice at NYU School of Law) (*quoted in Church of American Knights v. Kerike,* 2002 WL 315171718, *10 (S.D.N.Y.)). The Due Process Clause and Fourth

Amendment to the federal Constitution are important components of that jurisprudence.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that the brief contains 4,188 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2002, I caused to be served two copies of the attached Brief of *Amici Curiae* New York Civil Liberties Union and American Civil by delivering two true copies thereof via regular mail to the following counsel of record:

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