2005

The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet

Ricardo J. Bascuas
University of Miami School of Law, rbascuas@law.miami.edu

VANDERBILT LAW REVIEW

VOLUME 58 APRIL 2005 NUMBER 3

The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet

*Ricardo J. Bascuas**

* Associate Professor of Law, University of Miami School of Law. Mark A. Drumbl, Beatriz Galhe-Bronis, and Kathleen M. Williams suggested valuable improvements over earlier drafts of this Article.

I. INTRODUCTION: "THE F.B.I. MESSES UP"

On March 11, 2004, terrorists affiliated with the Al Qaida network detonated bombs on four commuter trains in Madrid, Spain, killing 191 people and injuring 2,000 others.[1] Hours later, the Spanish National Police (SNP) recovered a fingerprint from a bag of detonators found in a stolen van parked at a station from which three of the bombed trains departed.[2] The SNP requested assistance from the United States Federal Bureau of Investigation to identify the owner of the print.[3] FBI experts concluded that the print belonged to Brandon Mayfield, a U.S. citizen living in a suburb of Portland, Oregon, and the agency began investigating and surveilling him.[4]

Weeks later, the federal agents watching Mr. Mayfield, an immigration and family law attorney, still did not believe they had sufficient evidence of wrongdoing to charge him with any crime. The agents, however, feared that he would become aware of their investigation and flee.[5] To prevent this, the FBI and the U.S. Attorney's Office sought a "material witness" warrant for Mr. Mayfield's arrest from a federal judge.[6] In the affidavit supporting the warrant application, the FBI claimed it had made a "100% positive identification" to fingerprints on file from Mr. Mayfield's eight years of service in the U.S. armed forces.[7] Because there was no record that Mr. Mayfield had ever left the country, the FBI alleged in the affidavit that he might have traveled to Spain using false documents.[8] Although Spanish officials had expressed grave doubts about the FBI's claimed match, the FBI claimed in the affidavit that "it was believed" that the SNP's doubts had been resolved.[9] The affidavit also included a series of other claims to insinuate Mr. Mayfield's alleged links to terrorists, including that Mr. Mayfield was the attorney in a child custody case to a man who later pled guilty to conspiring to help Al-

1. *See* Sarah Kershaw, *Lawyer Linked to Bombings Is Released*, N.Y. TIMES, May 21, 2004, at A14.

2. *See* Susan Schmidt & Blaine Harden, *Lawyer's Fingerprint Linked to Bombing; Bag, Detonators Found in Stolen Van in Spain*, WASH. POST, May 8, 2004, at A3.

3. *See* Sarah Kershaw & Eric Lichtblau, *Spain Had Doubts Before U.S. Held Lawyer in Blast*, N.Y. TIMES, May 26, 2004, at A1.

4. *See* Sarah Kershaw & David Johnston, *Arrest in Bombing Inquiry Was Rushed, Officials Say*, N.Y. TIMES, May 8, 2004, at A12.

5. *Id.*

6. *Id.*

7. Werner Affidavit, Application for Material Witness Order and Warrant Regarding Witness: Brandon Bieri Mayfield ¶ 8, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

8. *Id.* ¶ 23.

9. *Id.* ¶ 8.

Qaida and the Taliban.[10] Based on these representations, Judge Robert Jones issued a sealed warrant for Mr. Mayfield's arrest and the FBI arrested him as a "material witness" on May 6, 2004.[11]

The assistant federal public defender appointed to represent Mr. Mayfield argued for his client's release on the ground that the government was detaining Mr. Mayfield not because he was a witness but rather to investigate him as a criminal suspect.[12] In its four-page response, the government candidly admitted that it was doing precisely that: "Based on the evidence collected to date, the government cannot exclude the possibility that Mayfield was criminally, rather than innocently, involved in how his fingerprint got to Spain."[13] The government's position was that there was nothing illegal about holding Mr. Mayfield in jail as a "material witness" while it investigated him.

Meanwhile (and fortunately for Mr. Mayfield), the SNP remained skeptical of the FBI's claimed fingerprint match. Within a few days, the SNP independently determined that Brandon Mayfield's print had never, in fact, been in Spain. The recovered fingerprint actually belonged to an Algerian man, Daoud Ouhnane.[14] Though never charged with any crime, Mr. Mayfield had been jailed for two weeks before being exonerated of any involvement in the bombing and released on May 20, 2004. For the first week of his imprisonment, he was kept in solitary confinement and regularly strip-searched.[15] Even after his release, Mr. Mayfield remained a "material witness" under

---

10. Kershaw & Lichtblau, *supra* note 3. The affidavit also noted that Mr. Mayfield was married to a naturalized citizen of Egyptian origin, that his wife had spoken on the telephone with the director of an Oregon foundation said to have terrorist ties, and that Mr. Mayfield advertised his law practice in a business directory allegedly overseen by an individual linked to the former personal secretary of Osama Bin Laden. Werner Affidavit, ¶¶ 11, 15–16, 18, 20.

11. Executed Warrant for Arrest of Material Witness, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author). That same day, the FBI also sought and obtained from Judge Jones warrants to search Mr. Mayfield's law office and his family's home and cars. Application and Affidavit for Search Warrant (D. Or.) (No. 04-MC-9071) (on file with author); Application and Affidavit for Search Warrant, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author). A few days later, they obtained a warrant to search the Mayfields' safety deposit box. Application and Affidavit for Search Warrant (D. Or.) (No. 04-MC-9071) (on file with author).

12. Memorandum of Authority in Support of Emergency Motion for Release of Material Witness and Emergency Motion for Release of Material Witness at 9–11, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

13. Government's Response and Opposition to Emergency Motion for Release of Material Witness at 3, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

14. Sarah Kershaw et al., *Spain and U.S. at Odds on Mistaken Terror Arrest*, N.Y. Times, June 5, 2004, at A1, A13; Susan Schmidt & Blaine Harden, *Lawyer is Cleared Of Ties to Bombings*, Wash. Post, May 25, 2004, at A2.

15. Tomas Alex Tizon, *A Fuzzy Fingerprint Leaves a Lasting Mark*, L.A. TIMES, May 29, 2004, at A1.

court-supervised release for three more days while FBI examiners traveled to Madrid to confirm their error.[16] The government then filed a motion stating, "[T]here is no longer probably [*sic*] cause to believe that Mayfield is in possession of information material to a criminal proceeding . . . ."[17] The FBI issued a rare public apology to Mr. Mayfield,[18] who sued the government anyway.[19] A few months later, a panel of seven international forensic experts charged by the FBI with investigating Mr. Mayfield's arrest concluded that the agency's intimidating institutional culture discouraged anyone from second-guessing the faulty fingerprint match.[20]

Frighteningly, Brandon Mayfield's case is not an isolated incident. Since the terrorist attacks on the World Trade Center and the Pentagon of September 11, 2001, the United States Department of Justice has obtained "material witness" warrants to arrest (as far as is known) about fifty individuals. Like Mr. Mayfield, these so-called "material witnesses," though charged with no crime, have been secretly held in the highest-security federal prisons while authorities investigated whether they had terrorist ties.

The press seized upon the FBI's internationally embarrassing gaffe to criticize the secret imprisonment of these "material witnesses" in the investigation of terrorism. "The case smacks of a rush to judgment based on flimsy evidence," said a *New York Times* editorial.[21] "It is sobering evidence that the current legal crackdown on suspected terrorists can yield injustice for those who are innocent."[22] *The Washington Post* criticized the government for misusing the material witness statute to incarcerate suspects: "In Mr. Mayfield's case, the government's use of the law allowed the detention and public smearing of a man against whom the government was not prepared to make a case and whom it now concedes to be innocent."[23] In two

16. Schmidt & Harden, *supra* note 14, at A2; Sarah Kershaw & Eric Lichtblau, *Questions About Evidence In U.S. Arrest in Bombing*, N.Y. TIMES, May 22, 2004, at A14; Kershaw, *Lawyer Linked*, *supra* note 1, at A14.

17. Motion to Dismiss Material Witness Proceeding at 3, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

18. Kershaw et al., *supra* note 14, at A1.

19. Complaint for Violation of Civil Rights, Mayfield v. Ashcroft (No. CV-04-1427-AA) (on file with author).

20. Blaine Harden, *FBI Faulted in Arrest of Ore. Lawyer; Study by Forensic Experts Cites Mistakes in Fingerprint Identification*, WASH. POST, Nov. 16, 2004, at A2.

21. Editorial, *The F.B.I. Messes Up*, N.Y. TIMES, May 26, 2004, at A22.

22. *Id.*

23. Editorial, *Apology Is Not Enough*, WASH. POST, May 27, 2004, at A30 [hereinafter *Apology*]. In a *New York Times* article, the executive director of Oregon's American Civil Liberties Union similarly decried the DOJ's abuse of the statute: "The Justice Department is using the material witness statute in a way that it was never meant to be used, and this is just

editorials, *The Post* called for Congress to curtail the Department of Justice's aggressive use of "material witness" arrest warrants and "to clarify the new circumstances under which the material-witness law should apply."[24]

Even in light of the Department of Justice's systematic and secret detention of "material witnesses," the federal courts, the media, and legal academics have assumed that this practice does not violate the Fourth Amendment's prohibition against unreasonable seizures. As a result, criticism has been limited to a fallback argument: it may be legal to arrest and detain true material witnesses, but it is not legal to effect pretextual investigatory arrests of potential suspects as "material witnesses." The assumption that at least some material witness incarcerations must be constitutional is based on a combination of flawed historical analysis and flawed legal reasoning. This assumption is premised on the myth that the incarceration of material witnesses has been uncontroversially practiced since the time of the Founding—and even sanctioned by the Founders themselves. This myth has led to a misreading of a handful of Supreme Court cases that are said to expressly approve the incarceration of innocent witnesses. The Founders in fact never sanctioned such a practice and the Supreme Court has never approved it.

The few publicized accounts of "material witness" detentions since September 11th, some of which are discussed in this Article, demonstrate the need to debunk the notion that the government can indefinitely imprison people accused of no crime. To illustrate the extent of the practice culminating in Brandon Mayfield's arrest, Part II examines the federal government's unprecedented and calculated reliance on the material witness statute in its post-September 11th terrorism investigation. Part III reviews legal scholarship both on the practice of detaining "material witnesses" in general and on the government's more aggressive use of the tactic since September 11th. Laboring under the misapprehension that the incarceration of witnesses has long been held constitutional, legal commentators as well as advocates like Brandon Mayfield's attorney have merely echoed the mainstream media's complaint that DOJ is misusing the material witness statute. As a result, DOJ's arrests of many innocent people are made to seem heavy-handed, but legitimate. Part IV explores the root of the fallacy that incarcerating "material witnesses" has been deemed constitutional since the eighteenth century. Much of

---

the most dramatic example of that trend." Sarah Kershaw & Eric Lichtblau, *Bomb Case Against Lawyer is Rejected*, N.Y. TIMES, May 25, 2004, at A16.

24. Editorial, *Arresting Witnesses*, WASH. POST, May 22, 2004, at A26; *Apology*, *supra* note 23, at A30.

the blame for this belief is attributable to *Bacon v. United States*,[25] a 1971 Ninth Circuit case whose flaccid reasoning has to this day deprived anyone labeled a "material witness" of the Fourth Amendment's protection. Part V examines the few federal court decisions ruling on the legality of detaining "material witnesses" in connection with the September 11th investigation and the authorities on which they rely. *Bacon*'s pernicious influence is reflected in these decisions. Moreover, these cases carelessly misread and misapply Supreme Court decisions that, rather than supporting the incarceration of witnesses, make clear that the practice has never been approved and is at best of dubious constitutionality. Finally, Part VI examines the Supreme Court's Fourth Amendment jurisprudence to show that imprisoning individuals without sufficient evidence of their involvement in criminal activity is necessarily unreasonable under the Fourth Amendment.

II. "MATERIAL WITNESS" ARRESTS IN THE SEPTEMBER 11TH DRAGNET

Shortly after the terrorist attacks of September 11, 2001, Attorney General John Ashcroft directed federal law enforcement agencies to use "'every available law enforcement tool'" to arrest those who "'participate in, or lend support to, terrorist activities.'"[26] Because it lacked reliable intelligence regarding potential terrorists in the United States, the Department adopted a policy of detaining all suspicious individuals on technical bases.[27] Strict enforcement of minor immigration violations that had previously gone unenforced provided justification for the majority of the arrests.[28] But not every

25. 449 F.2d 933 (9th Cir. 1971).

26. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. 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 1 (2003) [hereinafter INSPECTOR GENERAL'S REVIEW] (quoting Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (Sept. 17, 2001)), *available at* http://www.usdoj.gov/oig/special/0306/index.htm (last visited Apr. 10, 2005).

27. In a speech on October 25, 2001, the Attorney General said:

> 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.

Id. at 12 (quoting Attorney General's speech to U.S. Conference of Mayors (Oct. 25, 2001)).

28. *See id.* at 13, 41 (quoting one government official as saying "she understood that the Department [of Justice] was detaining aliens on immigration violations that generally had not been enforced in the past" and stating that "[i]t is unlikely that most if not all of the individuals arrested [for immigration violations during the Pentagon/Twin Towers Bombing (PENTTBOM)

person whom agents deemed suspicious had violated an immigration regulation; indeed, some were American citizens. In those cases, federal authorities needed another means to legitimate detention. The solution was to arrest and imprison such suspicious people under the federal material witness statute, 18 U.S.C. § 3144, as witnesses to the grand juries convened in connection with the terrorism investigation.

Enacted in 1984, Section 3144 purports to authorize the arrest and detention of an innocent individual on the ground that he or she is needed as a witness in some criminal proceeding. The only prerequisites to the arrest of such a person are: (1) the filing of an affidavit by a party stating that the witness's testimony is material to a criminal proceeding and (2) a showing that it "may become impracticable" to secure the witness with a subpoena.[29] There is no requirement that the party seeking arrest so much as attempt to serve a subpoena or demonstrate that exigent circumstances require swift action before obtaining an arrest warrant.[30]

A witness who has been served with a subpoena or who knowingly and willfully attempts to evade service of process is not the obvious or archetypical target of this statute. Courts can deal with such witnesses with their contempt power, and there is another federal statute specifically addressing the "recalcitrant witness."[31] Rather, Section 3144 targets those people who the government or a criminal defendant believes have material information and may not appear voluntarily. "Material" is not defined but rather is left to the judgment of the party requesting the warrant and the judge signing it. More importantly, no standards govern what evidence of the witness's refusal to testify must be adduced. The witness need not have done anything to avoid process. Indeed, the statute does not require even an

---

investigation] would have been pursued by law enforcement authorities for these . . . violations but for the PENTTBOM investigation").

29. 18 U.S.C.A. § 3144 (2005).

30. The 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 [the Bail Reform Act of 1984]. 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.

Id.

31. 28 U.S.C.A. § 1826 (2005).

attempt to serve process. The witness may be totally unaware that his or her testimony is desired in any proceeding.

The statute further provides that, once arrested, the witness will be "treated" under 18 U.S.C. § 3142, the same statute used to determine the conditions of pretrial release for criminal defendants. The least onerous terms of release that Section 3142 authorizes are release "on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release . . . ."[32] If the presiding judicial officer determines that further conditions are necessary to "reasonably assure the appearance of the person" or that the person poses a danger to another person or the community, the judge can impose additional conditions of release.[33] These conditions may include being placed in the custody of a particular person, maintaining or seeking employment, abiding by travel or residential restrictions, avoiding contact with certain others having knowledge about the case, reporting to a law enforcement or pretrial services agency, complying with a curfew, posting bail, or being placed in home detention.[34] Finally, the judicial officer may order that the person be held in custody without possibility of release until the case is resolved.[35]

---

32. 18 U.S.C.A. § 3142(b) (2005).

33. The legislative history of Section 3144 states, "Of course a material witness is not to be detained on the basis of dangerousness." S. REP. NO. 225, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 n.100. However, the statute itself does not state that. Moreover, the fact that at least some of those arrested under this statute after September 11th were placed in high-security confinement strongly suggests that presumed dangerousness was a factor in their incarceration.

34. 18 U.S.C.A. § 3142(c)(1)(B) (2005). The Act provides that "[t]he judicial officer may not impose a financial condition that results in the pre-trial detention of the person." 18 U.S.C.A. § 3142(c)(2) (2005). The courts of appeals have held that this provision does not prevent a judge from setting bail in an amount the prisoner cannot afford. *See, e.g.*, United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988) ("[A] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."); United States v. Wong-Alvarez, 799 F.2d 583, 584 (11th Cir. 1985) ("[Defendant] contends that if a pretrial detainee cannot make the financial provisions of a bond he is then held in detention in violation of [18 U.S.C. § 3142(c)]. We reject this sweeping contention."); United States v. Jessup, 757 F.2d 378, 388 (1st Cir. 1985) (stating that the "threat to the safety of the community [posed by the defendant] . . . if released," rather than his inability to post bail, is the cause of his continued detention and thus that said detention does not violate 18 U.S.C. § 3142(c)). Thus, the financial condition could result in material witnesses being imprisoned pending resolution of the case. Though nothing is known about the majority of material witness detentions after September 11th, the government requested detention without any provision for bail in every case that has come to light, many of which are described in this Section.

35. 18 U.S.C.A. § 3142(e) (2005). The statute makes pretrial detention an option depending upon the nature of the *case*, not the nature of the *arrestee*. *Id.*; United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) (stating that the legislative history of 18 U.S.C. § 3142 indicates that the "circumstances for invoking a detention hearing in effect serve to limit the types of cases in

To satisfy the statute's requirements in the September 11th dragnet, federal agents routinely claimed that individuals targeted for detention had information material to the grand jury investigations in New York and Virginia of the September 11th terrorist attacks. Federal district and magistrate judges granted prosecutors' requests to hold such witnesses in custody for weeks, as in Brandon Mayfield's case, or even months. These courts effectively allowed the government to imprison indefinitely suspicious individuals on scant or no evidence of wrongdoing until federal agents were satisfied of their innocence or had gathered sufficient evidence to support a charge. The government also was able to interrogate these individuals through grand jury proceedings for the purpose of developing investigatory leads.[36]

Perhaps as alarming as the detentions themselves is the fact that DOJ has to date kept secret the identities, characteristics, and circumstances of those held as "material witnesses" and has vigorously resisted every effort at uncovering any information about them. As a result, virtually nothing is known about the treatment of most of the "material witness" detainees, and public scrutiny has been greatly limited. The court files relating to the known "material witness" detentions are under seal (at the request of prosecutors), and there may exist any number of cases of which there is no public record whatsoever.

Civil liberties and news organizations sued DOJ in December 2001 under the Freedom of Information Act to obtain information identifying everyone detained in the September 11th investigation, the names of the attorneys representing them, and other data.[37] While DOJ released some information regarding those held on immigration and criminal charges, "[t]he government withheld all requested information with respect to material witnesses."[38] The government's principal arguments were that releasing any information about the "material witnesses" would interfere with the September 11th investigation and that grand jury secrecy rules and court orders

---

which detention may be ordered prior to trial"); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (holding that 18 U.S.C. § 3142 does not "authorize[] pretrial detention upon proof of danger to the community other than from those offenses which will support a motion for detention" under Section 3142(e)).

36. *See* Rachel Stevens, Center for National Security Studies v. United States Department of Justice: *Keeping the USA PATRIOT Act in Check One Material Witness at a Time*, 81 N.C. L. REV. 2157, 2164–67 (2003) (explaining how the USA PATRIOT Act of 2001 amended grand jury rules to allow prosecutors to share some grand jury testimony with federal law enforcement agencies).

37. Center for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 922 (D.C. Cir. 2003) [hereinafter *Center II*].

38. *Id.*

barred its production.[39] The district court rejected these contentions, noting that the names of twenty-six "material witnesses" had been published (some by DOJ itself) and that at least a few of those arrested were released without ever testifying before any grand jury.[40] The court further stated:

> [T]he Government's treatment of material witness information is deeply troubling. A person apprehended as a material witness is *not* accused of any crime but, instead, has been arrested because it is believed that his or her "testimony is material in a criminal proceeding." . . . Nevertheless, the Government has kept secret virtually everything about these individuals, including the number of people arrested and detained, as well as their identities. The public has no idea whether there are 40, 400, or possibly more people in detention on material witness warrants.[41]

Refusing to second-guess the government's claimed need for secrecy, the D.C. Circuit reversed the district court's order requiring the government to produce either the names of those detained as "material witnesses" or court orders demonstrating it could not legally do so.[42] The appellate court held that the district court had not been sufficiently deferential to the Executive Branch's contention that disclosing *any* of the requested information could hamper the September 11th investigation: "We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated."[43] Applying this deferential (that is to say, credulous) standard of review, the appellate court found the government's refusal to provide the information reasonable.[44] Accordingly, the court did not address the government's other grounds for withholding the information. The Supreme Court denied review.[45]

So reticent has DOJ been to say anything about the "material witnesses" that even when pointedly questioned by the House of Representatives Committee on the Judiciary, the Department refused to disclose any details about the "material witness" detainees—not even their exact number. DOJ's report to the committee stated only that as of January 2003 "fewer than 50" individuals had been detained as "material witnesses" in the September 11th investigation.[46] Of

---

39. *Id.* at 922–23.

40. Center for Nat'l Sec. Studies v. Dep't of Justice, 215 F. Supp.2d 94, 107 (D.D.C. 2002) [hereinafter *Center I*].

41. *Id.* at 106 (emphasis added).

42. *Center II*, 331 F.3d at 937.

43. *Id.* at 927.

44. *Id.* at 925–33.

45. Center for Nat'l Sec. Studies v. Dep't of Justice, 540 U.S. 1104 (2004).

46. Letter from Jamie E. Brown, Acting Assistant Attorney General, Department of Justice, Office of Legislative Affairs, to Reps. F. James Sensenbrenner, Jr. and John Conyers, Jr., House

course, this was not exactly a revelation, as *The Washington Post* had already reported that forty-four individuals had been held as "material witnesses", seven of the forty-four were United States citizens, half had not been called to testify in any proceeding, and twenty-nine were released without being charged with a crime.[47] The fact that most of the "material witnesses" were released without ever being charged with any crime suggests that DOJ's dragnet indiscriminately cast people into federal prisons.[48]

The Department gave Congress the same explanation for refusing to disclose this information that it had given the D.C. Circuit; it argued that disclosure would hamper the September 11th investigation and violate the law:

> With respect to the request for details about material witnesses detained during terrorism investigations, the Department of Justice has consistently taken the view that Federal Rule of Criminal Procedure 6(e) and court orders in individual cases prohibit it from revealing the exact numbers of material witnesses who are detained pending their testimony before a grand jury. The Department also cannot reveal the details of cases, as that would reveal the direction and focus of secret grand jury proceedings. In addition, disclosing such specific information would be detrimental to the war on terror and the investigation of the September 11 attacks. Thus, it continues to be imperative that the specific number of material witnesses detained as part of the September 11 investigation, the districts and investigations to which they relate, and the length of their detention not be released.[49]

It is doubtful that Rule 6(e) prevents the government from divulging the identity of individuals arrested as "material witnesses" and certain that it does not prevent the government from divulging the names of those who were released without testifying.[50] The Department's claim that court orders prevented it from divulging the information is even thinner. DOJ itself requested every such sealing order on an *ex parte* basis at the same time that it requested each "material witness" arrest warrant.[51] The orders, as well as the

---

of Representatives, Committee on the Judiciary 50 (May 13, 2003) [hereinafter Justice PATRIOT Report] (on file with author).

47. Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo*, WASH. POST, Nov. 24, 2002, at A1, A12.

48. *Id.*

49. Justice PATRIOT Report, *supra* note 46, at 49. Interestingly, the Department also refused to provide Congress with the witnesses' national origin, race, or ethnicity, claiming that it did "not maintain data on these characteristics of detained material witnesses." *Id.* at 50. Presumably, this information could be compiled in short order for fewer than 50 people. The DOJ's Office of Inspector General was able to learn the age and nationality of all 762 people detained after September 11 for purported immigration violations. *See* INSPECTOR GENERAL'S REVIEW, *supra* note 26, at 21 fig.1-3 (providing demographics for September 11 detainees).

50. *See Center I*, 215 F. Supp.2d 94, 106–07 (D.D.C. 2002); *see also Center II*, 331 F.3d 918, 948–49 (D.C. Cir. 2003) (Tatel, J., dissenting).

51. For example, the government filed the application for Brandon Mayfield's arrest warrant under seal. Werner Affidavit, Application for Material Witness Order and Warrant

warrants, were obtained on the basis of the government's unchallenged allegations. Because the proceedings were not in any sense adversarial, DOJ's assurance to the Judiciary Committee that "[e]very single person detained as a material witness as part of the September 11 investigations was found by a federal judge to have information material to the grand jury's investigation" has little meaning.[52]

Perhaps realizing that DOJ was itself responsible for shrouding the "material witness" detentions in secrecy, the Judiciary Committee requested the government's motions to seal each "material witness" proceeding and the sealing orders. Tellingly, DOJ refused to provide those documents as well:

> We are prohibited by court orders from providing any information regarding specific sealed material witness proceedings, including copies of sealing orders. We routinely move to seal *all* grand jury material witness proceedings pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.[53]

DOJ also claimed that, because Rule 6(e) does not impose a secrecy obligation on grand jury witnesses, "each of the detained material witnesses is free to identify himself publicly. The fact that few have elected to do so suggests they wish their detention to remain non-public."[54] In fact, all available evidence indicates that the detainees and their lawyers are prevented from speaking because of the conditions of confinement or because of the sealing orders the Department obtained and refuses to disclose.[55]

Regarding Witness: Brandon Bieri Mayfield ¶ 8, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author). Judge Jones ordered it unsealed on June 17, 2004, after Mr. Mayfield had been released. Record of Order, *In re*: Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

52. Justice PATRIOT Report, *supra* note 46, at 48. Indeed, this claim of active judicial oversight is one the Department has repeatedly made. Attorney General John Ashcroft was quoted as saying that "[p]eople who are detained as material witnesses are detained by federal judges." Andrew Kramer, *Ashcroft Hails Work of Area's Authorities*, COLUMBIAN (CLARK COUNTY, WASH.), July 19, 2003, at A1. A Justice Department spokesman assured a reporter, "There are safeguards in place and the government follows those safeguards to the letter." Rose Ciotta, *Critics See Abuse of Material-Witness Law*, PHILA. INQUIRER, May 4, 2003, at A5. Ironically, the D.C. Circuit relied on this empty assurance as support for its conclusion that the judiciary should be highly deferential to the Executive Branch on national security matters. *See Center II*, 331 F.3d at 931 ("[M]aterial witness detainees have been found by a federal judge to have relevant knowledge about the terrorism investigation.").

53. Justice PATRIOT Report, *supra* note 46, at 51 (emphasis in original).

54. *Id.* at 49.

55. *See* Stevens, *supra* note 36, at 2161 ("The contention that detainees can self-identify, however, is inconsistent with reports of the conditions in which the government holds many of the detainees."); Dan Christensen, *Secrecy Appealed*, DAILY BUSINESS REVIEW (Miami), Sept. 25, 2003, at A1(stating that neither Mohammed Bellahouel nor his lawyer could discuss the case in detail due to gag order); Daniel de Vise, *Case Galvanizes Opponents of U.S. Secrecy*, MIAMI HERALD, Jan. 19, 2004, at A5 (same); Kershaw, *supra* note 1, at A14 (quoting Brandon Mayfield's

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. Most of the warrants and sealing orders were apparently obtained in the Southern District of New York or in the Eastern District of Virginia where grand juries were convened to investigate the terrorist attacks. The warrants were then enforced in other districts, wherever a "material witness" was found. This left the judge in the enforcing district with only the narrow task of performing a "removal hearing" — one in which the government must prove only the identity of the person who is the subject of the warrant.[56] All other issues could be litigated only in the district from which the warrant issued.[57] As a practical matter, the target of a "material witness" warrant had little or no opportunity to challenge his or her arrest until he or she was transported in shackles to New York or Virginia. The judge approving the transfer had no occasion to consider the legality of the arrest warrant or the sealing order.

The story of Mohammed Bellahouel's detention shows as starkly as that of Brandon Mayfield how judges have authorized "material witness" detentions on unsubstantiated allegations and deferred to prosecutors' claims regarding the need for secrecy. In October 2001, federal agents arrested Mr. Bellahouel, an Algerian immigrant working as a waiter at a restaurant in a South Florida strip mall. The affidavit filed in support of the government's application for a "material witness" arrest warrant alleged that Mr. Bellahouel had seen a movie in that mall with one of the September 11th terrorists. The source of this information was purportedly an unidentified employee of the movie theatre.[58] The affidavit speculated: "It is likely that Bellahouel would have waited on both [Mohammed] Atta and [Marwan] al Shehhi since Bellahouel had worked at the

---

wife as stating that Mr. Mayfield and his lawyers were barred by court order from discussing the case); Rachel L. Swarns, *Muslims Protest Monthlong Detention Without a Charge*, N.Y. TIMES, Apr. 20, 2003, at A16 (noting that the judge barred Maher Hawash's lawyers from discussing case and lawyers advised wife not to discuss it).

56. FED R. CRIM. P. 5(c)(3)(D).

57. *See, e.g.*, United States v. Green, 499 F.2d 538, 540–41 (D.C. Cir. 1974) ("The upshot of it all is that once a certified copy of the indictment is produced at a removal hearing, the only issue remaining litigable is the identity of the arrestee as the indictee."); *In re* Ellsberg, 446 F.2d 954, 957 (1st Cir. 1971) (holding petitioner had no right to challenge legality of wire tap in removal proceeding); United States v. Provoo, 16 F.R.D. 341, 343–44 (S.D.N.Y. 1954) (holding that indicted defendant could not contest probable cause at removal hearing).

58. Dan Christensen, *Low Burden of Proof: Coincidence, Uncorroborated Report Enough To Get Arab Waiter in South Florida Detained Five Months*, DAILY BUS. REV. (Miami), Mar. 14, 2003, at A1; Christensen, *supra* note 55.

restaurant for 10 months, and both Atta and al Shehhi were frequent patrons during shifts that Bellahouel worked."[59] The affidavit went on to reveal candidly (if inadvertently) that the FBI had no real reason to suspect Mr. Bellahouel of any wrongdoing. It stated: "In the meantime, the FBI has been unable to rule out the possibility that the respondent is somehow linked to, or possesses knowledge of, the terrorist attacks."[60]

Despite an affidavit setting forth nothing but conjecture, relying on an undisclosed source, and *conceding* that the government had no idea whether Mr. Bellahouel had *any* useful information, a judge in Virginia issued a warrant for his arrest as a "material witness" to the September 11th attacks. The unsupported inferential leap that Mr. Bellahouel must have waited on two of the September 11th terrorists is as senseless as the FBI's contention in Mr. Mayfield's case that, because there was no record of Mr. Mayfield traveling to Spain, he must have done so under a false identity.[61] And, just as the FBI's reason for incarcerating Mr. Bellahouel was that it had "been unable to rule out" any possible terrorist ties, the government argued three years later that it could not "exclude the possibility that Mayfield was criminally" involved in the Spain bombings.[62]

As unsettling as the fact that Mr. Bellahouel was incarcerated on such thin allegations were the lengths to which the executive and judicial branches of the government went to keep the entire incident from the public. Mr. Bellahouel was secretly held in custody for five months. He was released around March 2002 after testifying before the grand jury in Virginia and being cleared of terrorist links. During his time in custody, Mr. Bellahouel filed in the Southern District of Florida a petition for a writ of *habeas corpus* challenging his detention. Even though the case continued to be litigated after Mr. Bellahouel's release, it was never docketed by either the district court or the Eleventh Circuit Court of Appeals. Not only were all the filings sealed, but the very existence of a case was kept secret. It was discovered only because a clerk inadvertently published the case name on a list of scheduled oral arguments, and a reporter realized that the

59. Christensen, *supra* note 58 (alteration in original).

60. *Id.*

61. *See* Werner Affidavit, Application for Material Witness Order and Warrant Regarding Witness: Brandon Bieri Mayfield ¶ 23, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author) (suggesting that Mr. Mayfield traveled under a false name or false documentation).

62. Memorandum of Authority in Support of Emergency Motion for Release of Material Witness and Emergency Motion for Release of Material Witness at 9–11, *In re* Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

case was mysteriously not docketed in either the trial or appellate court.[63]

Once Mr. Bellahouel's attorneys petitioned the Supreme Court for a writ of certiorari, the story of his arrest was widely publicized in newspapers across the country.[64] Even though the facts of the case had been widely reported, the government fought to keep the entire matter sealed and asked to file even its response to the certiorari petition under seal.[65] By then, Mr. Bellahouel had been living freely in Florida for months and had never been charged with any crime. The Court in fact did keep most of Mr. Bellahouel's petition and most of the government's opposition under seal and ultimately denied review.[66]

DOJ's own investigation into the treatment of those arrested after September 11th for immigration violations suggests that the government's insistence on secrecy is motivated by its desire to limit public scrutiny of the bases for "material witness" arrests. The DOJ Office of Inspector General's report, which is highly critical of the treatment of immigration detainees, provides important insights into the government's systematic reliance on "material witness" arrest warrants. It describes an indiscriminate dragnet that ensnared nearly 800 individuals, almost none of whom had any terrorist ties. Given the potentially disastrous consequences of letting *any* possible terrorist remain at large after September 11th and the lack of reliable

63. Dan Christensen, *Secrecy Within: Algerian Native's Federal Appeal in Miami Has Court Altering Records, Closing Hearing in Name of Security*, DAILY BUS. REV. (Miami), Mar. 12, 2003 at A1.

64. *See* Dan Christensen, *Plea for Openness, National Press Group Asks U.S. Supreme Court to Unseal Case Files of Broward Man Imprisoned After Sept. 11 Attacks*, DAILY BUS. REV. (Miami), Nov. 5, 2003, at A1 (commenting additionally on the amicus brief filed by the Reporters Committee for the Freedom of the Press seeking to have the sealed judgment declared unconstitutional); Christensen, *supra* note 55 (emphasizing that even the public copy of Mr. Bellahouel's petition for certiorari was heavily redacted); Marcia Coyle, *U.S. Told To Defend Secret Court Actions: High Court Acts on Algerian's Petition*, NAT'L L. J., Nov. 10, 2003 at 1, 1, 17 (explaining how the distance from September 11th and the Bush administration's reliance on secrecy might cause the Court to take Mr. Bellahouel's case); Charles Lane, *White House Told To Justify Secrecy: High Court Issues Order in Terror Case*, WASH. POST, Nov. 5, 2003, at A6 (reporting the Court's request that Solicitor General Olson respond to Bellahouel's constitutional challenge and distinguishing the case from earlier challenges to the administration's secrecy in terrorism-related cases).

65. United States' Motion for Leave to File Brief in Opposition with Appendix Under Seal, M.K.B. v. Warden, 540 U.S. 1213 (2004) (No. 03-6747), *available at* http://news.findlaw.com/hdocs/docs/terrorism/mkbwarden10504sgmot.pdf; *see also* Gina Holland, *Bush Administration Wants Entire 9/11 Case Kept Secret: Immigrant Contests His Jailing and Secrecy of Proceedings*, CHI. SUN-TIMES, Jan. 6, 2004, at 46 (noting that Solicitor General Olson's request to keep the case sealed was one paragraph long); *U.S. Requests Secrecy in 9/11 Detainee's Case*, WASH. POST, Jan. 6, 2004, at A10 (same).

66. M.K.B. v. Warden, 540 U.S. 1213, 1213 (2004).

intelligence identifying actual terrorists, investigating agents initially arrested everyone they encountered who was not in compliance with immigration regulations — regardless of whether there was any reason to suspect them of terrorist ties. "[N]o distinction generally was made between the subjects of [an investigative] lead and any other individuals encountered at the scene 'incidentally' because the FBI wanted to be certain that no terrorist was inadvertently set free."[67] The Inspector General's report indicates that INS detentions as well as "material witness" warrants were pretextual tactics used to achieve DOJ's goal of incapacitating all suspicious individuals until the government could gather some real intelligence:

> [FBI and INS agents] clearly understood from the earliest days after the terrorist attacks that the Department wanted September 11 detainees held without bond until the FBI cleared them of any connections to terrorism. This "hold until cleared" policy was not memorialized in writing, and our review could not determine the exact origins of the policy. However, this policy was clearly communicated to INS and FBI officials in the field, who understood and applied the policy.[68]

The FBI directed agents to ensure that all those detained for immigration violations as well as all those detained as "material witnesses" were held without bond without consideration of the individualized circumstances of each case. An electronic message sent around September 18, 2001, from FBI Headquarters to its field offices instructed agents to articulate reasons why detained individuals should be kept in custody. These were to be "used by INS to argue for continued custody in imminent bail recommendation hearings as well as by the Criminal Division for possible preparation of material witness warrants."[69]

As "hold until cleared" implies, DOJ would not release an imprisoned detainee before clearing multiple levels of bureaucracy. In one case, even after an FBI agent confirmed that a Nepalese man he arrested for a technical immigration violation had no terrorist ties, the man remained in solitary confinement for two and a half months before finally being deported.[70] Frustrated by the clearance process,

---

67. Inspector General's Review, *supra* note 26, at 16; *see also id.* at 39 (stating that Deputy Assistant Attorney General Alice Fisher recalled Assistant Attorney General Michael Chertoff telling her that "we have to hold these people until we find out what is going on" (internal quotations omitted)).

68. *Id.* at 37; *see also id.* at 38–40 (explaining officials' perception that policy originated at highest levels of Justice Department, was unprecedented and risky, would likely be challenged legally, and would require explanation). "[I]t was understood that the INS was holding September 11 detainees because the Deputy Attorney General's Office and the Criminal Division wanted them held." *Id.* at 38.

69. *Id.* at 44 (quoting the FBI's electronic communication to its field offices).

70. Nina Bernstein, *In F.B.I., Innocent Detainee Found Unlikely Ally*, N.Y. TIMES, June 30, 2004, at A1.

the FBI agent took the extremely unusual step of contacting Legal Aid on behalf of the man he had arrested.[71] "I felt some—not responsibility, but I felt that there was no one else," the agent told *The New York Times*.[72] If a detainee was somehow able to obtain release before being "cleared", federal agents could use "material witness" warrants in tandem with immigration detention to prolong custody.[73]

Zakaria Soubra's detention was one such case. Two months before September 11, 2001, FBI Special Agent Kenneth Williams sent an email to his superiors warning that Middle Eastern aviation students posed a potential terrorist threat. On May 22, 2002, Agent Williams testified before Congress about his by-then famous Phoenix Memo. The following day federal agents arrested Mr. Soubra, a politically active Lebanese man named in the Phoenix Memo. Although Mr. Soubra had been a flight safety student at Embry Riddle Aeronautical University in Prescott, Arizona, there was no evidence that he had committed any crime. The sole legal basis for his arrest and detention without bond was a technical violation of the terms of his student visa: he had registered for too few credits.[74]

While he resisted deportation to Lebanon in secret immigration proceedings,[75] agents who thought he had provided support to terrorists repeatedly questioned Mr. Soubra. Around early January 2003, Mr. Soubra either agreed to voluntary deportation or was ordered deported to Lebanon by an immigration court. The government, however, was not yet convinced of his innocence and, in keeping with the unofficial "hold until cleared" policy, did not want him released from custody. To prevent Mr. Soubra's departure, agents sought and obtained a "material witness" warrant for his arrest, claiming that Mr. Soubra's detention was necessary to ensure that he

71. *Id.*

72. *Id.*

73. *See* DAVID COLE, ENEMY ALIENS 38–39 (2003) (discussing the case of Mr. Tony Ovlia, who was held for 422 days despite having no connection to terrorism).

74. Dennis Wagner, *Deportee Assails 9/11 'Paranoia'; Says FBI in Arizona Targeted Him Unfairly*, ARIZ. REPUBLIC, June 15, 2003, at A1.

75. Secret immigration proceedings were another widely-employed legal maneuver in the post-September 11th investigation. For background and an interesting First Amendment analysis of these proceedings, see Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 95–100, 119–25, 157–67 (2004). Professor Kitrosser's analysis of the First Amendment implications of secret government proceedings is, of course, also relevant to the secret detentions of the "material witnesses." In fact, the Reporters Committee for Freedom of the Press filed an amicus brief and sought leave to intervene in the Supreme Court to argue that the public had a right to know about Mohammed Bellahouel's case. Brief Amici Curiae of The Reporters Committee for Freedom of the Press, M.K.B. v. Warden, 540 U.S. 1213 (2004) (No. 03-6747); M.K.B. v. Warden, 540 U.S. 1213, 1213 (2004) (denying motion for leave to intervene).

would testify before a Virginia grand jury investigating the September 11th attacks. While Mr. Soubra thought he was being driven to the airport for his return to Lebanon, he was instead being driven to a federal prison.[76]

For months, Mr. Soubra was confined as a "material witness" in the Administrative Maximum Security Penitentiary in Florence, Colorado,[77] the highest-security federal prison in the United States.[78] The most dangerous *convicted* federal criminals, among them Theodore "the Unabomber" Kaczynski, comprise its population.[79] In May 2003, a year after first being detained, Mr. Soubra testified before the grand jury in Virginia. For two days, he was interrogated about what he knew about several other Middle Easterners. Afterward, he was released and deported to Lebanon.[80]

Because the government used the material witness statute to arrest individuals against whom it had little or no real evidence of wrongdoing, it is no surprise that the vast majority of the "material witness" detainees turned out to have no knowledge of terrorist activity whatsoever. Like Mr. Mayfield, Mr. Bellahouel, and Mr. Soubra, the scant information uncovered and published suggests that the government released nearly all of them after extended incarcerations when it was satisfied of their innocence.[81]

---

76. Greg Krikorian, *Detainee Facing Deportation Summoned to Probe*, L.A. TIMES, Jan. 24, 2003, at A21.

77. *Id.*

78. Greg B. Smith, *An Alcatraz for al Qaeda Terrorists*, N.Y. DAILY NEWS, Nov. 14, 2002, at 8. According to the Department of Justice, ADX-Florence "is the first federal penitentiary in the nation to be designed specifically for dangerous offenders and to meet the special circumstances of prisoners whose activity must be severely confined." Press Release, U.S. Dept. of Justice, AG Reno to Open New Maximum Federal Prison in Florence, Colorado (Jan. 6, 1995), *available at* http://www.usdoj.gov/opa/pr/Pre_96/January95/12.txt.html.

79. *See* Federal Bureau of Prisons Inmate Locator (allowing the website visitor to learn an inmate's location by typing in the inmate's first and last name), *at* http://www.bop.gov/iloc2/LocateInmate.jsp (last visited Apr. 10, 2005).

80. Wagner, *supra* note 74, at A1.

81. The cases discussed in this Article are not the only ones that have been reported. Some facts about a few other cases have been published as well. For example, Egyptian-born Abdallah Higazy was arrested as a "material witness" when a hotel security guard lied to the FBI about having discovered a radio transceiver in Mr. Higazy's room, which overlooked the World Trade Center. The FBI later claimed that Mr. Higazy had confessed. Mr. Higazy was cleared when another hotel guest claimed the radio, prompting questions about how the false confession was obtained. In the interim, Mr. Higazy spent thirty-one days in solitary confinement and was charged with lying to federal agents. Mark Hamblett, *FBI Examiner Sued Over False 9/11 Confession*, N.Y. L.J., Dec. 13, 2002, at 1. More recently, the FBI arrested Ismail Selim Elbarasse as a material witness after his wife was seen videotaping the Bay Bridge in Baltimore, Maryland. Mr. Elbarasse was released on a one million dollar bond following a sealed detention hearing. Stephanie Hanes, *Material Witness in Hamas Case is Released; Va. Man Was Held 10 Days After Wife Taped Bay Bridge; 3 Houses Secure $1 Million Bond*, BALT. SUN, Aug. 31, 2004, at 1A.

III. CRITICISM OF THE SECRET "MATERIAL WITNESS" DETENTIONS

Despite the government's unprecedented use of "material witness" warrants to effectuate widespread secret detentions since September 11th, neither legal scholars nor courts have seriously questioned the constitutionality of imprisoning "material witnesses". This practice gained acceptance because, before incorporation of the Fourth Amendment against the states,[82] the state and federal governments primarily used material witness detentions to keep witnesses from crossing state lines and not testifying. Scholarship before September 11th focused on whether the practice of detaining witnesses could be squared with evolving notions of due process rather than on the Fourth Amendment's requirement that probable cause underlie every arrest and detention.[83] In line with this thinking, a federal court in Nebraska held in 1977 that the arrests of a murder suspect's two brothers pursuant to the state's material witness statutes violated due process because they were made "without adequate advance notice and without a written statement of reasons in support of the result."[84] Such procedural due process concerns, however, implicitly concede that a witness can constitutionally be held without bond if the right procedures are followed.[85] The question that the DOJ's indiscriminate post-September 11th dragnet raises is how the prolonged detention of innocent individuals can be squared with the Fourth Amendment's categorical ban on unreasonable seizures.

---

82. *See* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) ("The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

83. *See, e.g.*, Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 11–12 (1969) (stating vaguely that evolving notions of equal protection will require reexamination of material witness statutes should they "pass new constitutional tests likely to be posed"); Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L.Q. 1, 12–15 app. 8 (1980) (noting that constitutional challenges to state material witness statutes have generally failed and proposing model statute); Daniel W. Henry, Comment, *The Wetback as Material Witness: Pretrial Detention or Deposition?*, 7 CAL. W. L. REV. 174, 182 (1970) (noting but not analyzing possible constitutional objections to witness detention); Roger A. Lowenstein, Comment, *Detention of Material Witnesses in Criminal Cases*, 2 HARV. C.R.-C.L. L. REV. 115, 127–28 (1966) (positing that detention could be reasonable "only in the most extreme cases" and listing factors to satisfy due process).

84. *In re* Cochran, 434 F. Supp. 1207, 1216 (D. Neb. 1977).

85. Indeed, despite ordering the immediate release of the witnesses challenging their detention, the judge in the Nebraska case stated that the statutes were not facially unconstitutional because they "merely provide the authority to require material witnesses to make recognizance." *Id.* The judge presumed that in the future the statutes "would be construed in such a way as to avoid the constitutional questions." *Id.*

Curiously, however, since September 11th, criticism of the Department's incarceration of "material witnesses" in legal scholarship as well as the mainstream press has focused on the material witness statute's proper purpose and scope rather than on its constitutionality.[86] The principal complaint accuses DOJ of "abusing" the material witness statute because it is intended to ensure witnesses' availability at legal proceedings rather than to provide a means of capturing and investigating suspicious characters.[87] Naturally, the question of whether a grand jury investigation is a "criminal proceeding" under the statute receives much attention.[88] In the end, all such criticism boils down to a policy argument against "material witness" detentions rather than a legal argument. The complaints, in other words, implicitly concede that the government is acting rashly but constitutionally—which turns out not to be the foregone conclusion it is widely assumed to be.

Professor David Cole's book examining the disparate treatment of noncitizens and citizens in the September 11th investigation, for example, implies that the material witness statute has some constitutional applications: "Since September 11 . . . the Justice Department has aggressively exploited the material witness law, not

---

86. *See, e.g.*, Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 13, 16–34 (2003) (arguing that material witness statute should not reach grand jury witnesses to avoid potential constitutional problems); Roberto Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY'S L.J. 401, 424–28 (2003) (arguing that material witness statute applies to grand jury witnesses); Laurie E. Levenson, *Detention, Material Witnesses and the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1222–25 (2002) (arguing that DOJ is using material witness statute for investigatory purposes); 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, 511–31 (2002) (arguing that material witnesses can be arrested for grand jury proceedings but that investigatory arrests are an abuse); MICHAEL GREENBERGER, INDEFINITE MATERIAL WITNESS DETENTION WITHOUT PROBABLE CAUSE: THINKING OUTSIDE THE FOURTH AMENDMENT 40–41 (Univ. of Md. Sch. of Law, Research Paper No. 2004-01, 2004), *at* http://papers.ssrn.com/sol3/Delivery.cfm/ssrn_ID494763_code342745.pdf (Jan. 29, 2004) (arguing that material witness statute should be revised by Congress); *see also* Angie Cannon, *Taking Liberties: Are Tough New Responses to Terrorism Upsetting the Balance Between Legal Rights and National Security?*, U.S. NEWS & WORLD REP., May 12, 2003, at 44, 46 (describing the intended purpose of the material witness statute for detaining those who would flee the country to avoid testifying); Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, at A1 (explaining that those held as material witnesses are eventually charged with crimes themselves); Tomas Alex Tizon et al., *Critics Galvanized by Oregon Lawyer's Case: His Arrest and Release in the Madrid Bombings Show That the U.S. Ignores Civil Liberties in Pursuit of Terrorists, Some Legal Experts Say*, L.A. TIMES, May 22, 2004, at A13 (commenting that detention of material witnesses gives the government time to develop its case).

87. *See, e.g.*, Liptak, *supra* note 86 (quoting law professors and a former U.S. Attorney as stating such arrests are legal but that the government is misusing them).

88. *See, e.g.*, Boyle, *supra* note 86, at 17–20; Greenberger, *supra* note 86, at 41; Iraola, *supra* note 86, at 413–28; Studnicki & Apol, *supra* note 86, at 511–19.

for its legitimate purpose of ensuring that reluctant witnesses are available for trial, but for preventive detention of persons who could not otherwise be held."[89] Professor Cole does note, however, that Section 3144 can "serve as an end run around the Fourth Amendment rule barring arrest and detention without probable cause of criminal activity. . . ."[90] Professor Michael Greenberger likewise accepts that detaining "material witnesses" is legal in some circumstances: "Section 3144 has been widely recognized as applicable to the detention of witnesses pending a criminal trial, a practice that generally has been constitutionally sanctioned."[91] He proposes revising the "highly confusing and ambiguous" statute to limit the length of time that a witness can be incarcerated.[92] This proposal is along the lines of what the editorial board of *The Washington Post* advocated when it urged Congress to "clarify the new circumstances under which the material-witness law should apply" after Brandon Mayfield's release.[93] Similarly, Professor Laurie Levinson posits: "In the name of security, we have pushed the legal envelope by using laws that were created for other purposes to assist in detaining perceived enemies."[94] Her essay cautions that these detentions represent a "dangerous trend" but accepts that detaining witnesses is legal as long as it is not a pretext for detaining suspects.[95]

The idea that the government is "abusing" its authority under Section 3144 accepts as a premise that the government can in some circumstances incarcerate innocent witnesses. The argument is therefore merely a complaint that the government is acting heavy-handedly but not illegally. It concedes that the government *legitimately has* the power to arrest witnesses but should exercise that power with better judgment, purer motives, and greater restraint.

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

---

89. Cole, *supra* note 73, at 37.

90. *Id.*

91. Greenberger, *supra* note 86, at 10.

92. *Id.* at 40–41; *see also* Studnicki & Apol, *supra* note 86, at 529–31 (proposing alternative model material witness statute to prevent its misuse for investigatory purposes).

93. *Arresting Witnesses*, *supra* note 23; *see also Apology*, *supra* note 23 (lamenting that "sustained legislative interest has been sadly lacking").

94. Levenson, *supra* note 86, at 1225.

95. *Id.* at 1222–23, 1226; *see also* Studnicki & Apol, *supra* note 86, at 521–23 (arguing that "'investigatory detentions' are not the intended purpose of the material witness laws" and would be unreasonable under Fourth Amendment though material witness arrests for proper purposes are constitutional).

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. If Section 3144 authorizes a practice that is in fact constitutional, the Judiciary has the responsibility to ensure that the requisites of the statute are satisfied in every particular. That is, after all, why judges rather than prosecutors authorize warrants.[96]

If, on the other hand, 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.[97] Such determinations are not only extremely difficult to make—imagine a defense attorney cross-examining a prosecutor about the government's true reasons for seeking a given "material witness" warrant—but are ultimately irrelevant. If Section 3144 in fact authorizes a constitutional procedure and a person is a "material witness" under that statute's criteria, why should the arresting agent's or the prosecutor's motivation affect the legality of the seizure? As the Court put it, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."[98] The Constitution either permits the incarceration of innocent witnesses or it does not. The government's subjective reasons

96. As Justice Jackson famously noted in the context of searches rather than seizures:

> 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. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Johnson v. United States, 333 U.S. 10, 13–14 (1948) (footnote omitted).

97. *See* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) ("[S]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." (quoting Whren v. United States, 517 U.S. 806, 813 (1996))); Ohio v. Robinette, 519 U.S. 33, 38–39 (1996) (same).

98. *Whren*, 517 U.S. at 814.

for wanting to detain the witnesses legally do not and should not matter.[99]

To be sure, there 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. Indeed, Michael Chertoff, then head of the DOJ's Criminal Division and now Secretary of the Department of Homeland Security, told *The Washington Post* that a material witness warrant is "an important investigative tool in the war on terrorism."[100] Mr. Chertoff added, "Bear in mind that you get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of evidence you can get from a witness."[101] Federal agents candidly told reporters that Brandon Mayfield was arrested as a "material witness" to prevent him from fleeing while authorities built a case against him.[102] Prosecutors opposed Mr. Mayfield's release by arguing that they were investigating him as a criminal suspect.[103] The affidavit filed to obtain Mohammed Bellahouel's arrest suggests the same motive for his detention; it stated that the FBI had not been able to "rule out the possibility that the respondent is somehow linked to, or possesses knowledge of, the terrorist attacks."[104]

Moreover, the tactic is occasionally effective in uncovering a criminal. In a very small number of cases, the government has ultimately brought charges against an individual originally detained as a "material witness." On March 20, 2003, FBI agents executed a material witness arrest warrant on thirty-nine year-old computer programmer Maher Hawash as he arrived for work. A little while later, armed agents awoke Mr. Hawash's children and wife, Oregon native Lisa Ryan, and searched their home in Hillsboro, Oregon.[105] Mr. Hawash had been a United States citizen since 1990 and had worked for Intel Corporation from 1992 until he was laid off in 2001.

---

99. *Id.*

100. Fainaru & Williams, *supra* note 47.

101. *Id.*

102. *See* Kershaw & Johnston, *supra* note 4 (noting that law enforcement officials planned to monitor Mr. Mayfield covertly until news leaked to the media).

103. Government's Response and Opposition to Emergency Motion for Release of Material Witness, *In re*: Federal Grand Jury 03-01 (D. Or.) (No. 04-MC-9071) (on file with author).

104. Dan Christensen, *Low Burden of Proof: Coincidence, Uncorroborated Report Enough To Get Arab Waiter in South Florida Detained Five Months*, DAILY BUS. REV. (Miami), Mar. 14, 2003, at A1 (quoting FBI affidavit).

105. Timothy Egan, *Terrorism Task Force Detains an American Without Charges*, N.Y. TIMES, Apr. 4, 2003, at A15; Blaine Harden, *Engineer Held as Part of Portland Probe*, WASH. POST, Apr. 5, 2003, at A2.

At the time of his arrest, he was again working for Intel as a contract employee.[106]

The day after his arrest, Mr. Hawash appeared before United States District Judge Robert E. Jones, who scheduled a detention hearing for more than two weeks later. In the meantime, Mr. Hawash remained incarcerated, and his friends and relatives received no information about the reasons for his arrest and detention.[107] Mr. Hawash's family and friends created a website to publicize his imprisonment and to solicit donations for legal fees.[108] Their effort garnered considerable media attention and criticism of the secretive detention.[109]

On the day of the detention hearing, Judge Jones explained in a written order that the hearing would be "closed to the public because of the potential that the related grand jury proceedings may be compromised."[110] Judge Jones granted the government's request to hold Mr. Hawash in custody without bail, "but not indefinitely," and scheduled a hearing to revisit the matter of detention for April 29, 2003.[111] Any documents on which the judge relied as well as the judge's reasons for ordering detention were kept under seal.[112] Because Mr. Hawash's family and friends learned nothing about the reasons for his detention, they speculated that his arrest was connected to some donations he had made to an Islamic charity.[113]

For five weeks, Mr. Hawash was held as a "material witness" at the Federal Correctional Institution in Sheridan, Oregon, pursuant to Judge Jones's order. The day before the April 29th hearing, the

---

106. Matthew Yi, *FBI Jails ex-Intel Worker*, S.F. CHRON., Apr. 2, 2003, at B1.

107. *Questionable Detention*, SEATTLE TIMES, Apr. 23, 2003, at B6.

108. Egan, *supra* note 105, at A15; Harden, *supra* note 105, at A2.

109. *See, e.g.*, Hal Bernton, *Intel Colleagues Incensed Over Man's Imprisonment*, SEATTLE TIMES, Apr. 19, 2003, at B1 (reporting that a former Intel vice-president had "put his business on hold" to raise money and public awareness for Mr. Hawash); Robyn E. Blumner, *Go Directly to Jail, Crime or Not, in Ashcroft's U.S.*, ST. PETERSBURG TIMES, Apr. 20, 2003, at 8D (describing Mr. Hawash as fortunate to have colleagues in the computer industry eager to inform the public of his detention); Timothy Egan, *Terrorism Task Force Detains an American Without Charges*, N.Y. TIMES, Apr. 4, 2003, at A15 (quoting the former Intel executive's description of Mr. Hawash's arrest as "some kind of 'Alice in Wonderland' meets Franz Kafka"); Blaine Harden, *Engineer Held as Part of Portland Probe*, WASH. POST, Apr. 5, 2003, at A2 (announcing the establishment of the website and a rally on the day of Mr. Hawash's closed hearing); Kristi Heim, *Detained Intel Engineer Becomes Internet Cause*, SAN JOSE MERCURY NEWS, Apr. 22, 2003, at 1 (mentions that the site had attracted more than 70,000 visitors and generated more than 15,000 in donations); Swarns, *supra* note 55 (reporting that some Muslims did not publicly protest or contribute to the fund because they were "fearful of government retaliation").

110. *In re* Grand Jury Material Witness Detention, 271 F. Supp. 2d 1266, 1268 (D. Or. 2003).

111. *Id.* at 1269.

112. *Id.*

113. Swarns, *supra* note 55.

government filed a criminal complaint against Mr. Hawash, charging him with conspiring to provide material support to Al Qaida and the Taliban and to wage war against the United States. Specifically, the government alleged that Mr. Hawash was part of a group that traveled from the Portland, Oregon, area to Hong Kong, intending to enter Afghanistan and fight with the Taliban against United States forces.[114] Thus, on April 29th, Mr. Hawash appeared before Judge Jones as an accused criminal rather than as a "material witness."[115] On May 2, 2003, a superseding indictment was filed against Mr. Hawash and six previously charged co-conspirators.[116]

Ultimately, Mr. Hawash cooperated with the government, pled guilty, and was sentenced to seven years in prison.[117] Mr. Hawash's guilty plea, however, did not silence complaints that the government abused its authority by jailing him for five weeks as a material witness.[118] Because Mr. Hawash's co-defendants had been indicted seven months before he was, it appeared the government had imprisoned Mr. Hawash to facilitate its investigation of him. Commenting on the case, the director of the Center for National Security Studies (lead plaintiff in the civil suit against DOJ to obtain information on material witnesses) told the *Philadelphia Inquirer*: "It's an abuse of authority to jail someone whom you have targeted as a potential criminal suspect under the guise of trying to obtain his testimony in front of a grand jury."[119]

That sentiment, echoed by legal scholars and pundits alike, is an understatement. Indeed, as the Supreme Court has observed, the Fourth Amendment was specifically intended to prevent arrests of suspicious characters for investigatory purposes:

---

114. McCartney Affidavit ¶ 164, United States v. Maher Mofeid Hawash, (No. 03-481) (D. Or.) (on file with author).

115. Criminal Complaint, United States v. Maher Mofeid Hawash, (No. 03-481) (D. Or.) (on file with author).

116. All seven defendants were charged with conspiring to levy war against the United States in violation of 18 U.S.C.A. § 2384 (2005); conspiring to provide material support and resources to Al Qaida in violation of 18 U.S.C.A. § 2339(b) (2005); and conspiring to contribute services to Al Qaida and the Taliban in violation of 50 U.S.C.A. § 1705(b) (2005), 31 C.F.R. §§ 545.204, 545.206(b), 595.205 and Executive Order Nos. 13099, 13224, 13129, 13268. The superseding indictment also charged some of Mr. Hawash's co-defendants with certain firearms offenses. The charges all stemmed from events relating to their alleged effort to join the Taliban's battle against United States forces. Indictment, United States v. Jeffrey Leon Battle et al., (No. CR 02-399) (D. Or.) (on file with author).

117. Lynn Marshall & Tomas Alex Tizon, *3 Members of Terrorist Cell Sentenced: One of the 'Portland Seven' Expresses Sorrow For Trying To Join The Taliban After 9/11*, L.A. TIMES, Feb. 10, 2004, at A12.

118. *See, e.g.*, *Questions Unanswered Despite Guilty Plea*, SEATTLE TIMES, Aug. 11, 2003, at B6; Ciotta, *supra* note 52.

119. Ciotta, *supra* note 52.

> Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest."[120]

Calling such individuals "detainees" or "material witnesses" does not mitigate the unconstitutional nature of these incarcerations. As Justice Scalia recently noted:

> To be sure, certain types of permissible *non*criminal detention—that is, those not dependent upon the contention that the citizen had committed a criminal act—did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions—civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.[121]

What is "unthinkable" to Justice Scalia has become a routine investigatory practice of the Department of Justice. Even if the government occasionally catches a criminal through the artifice of arresting him or her as a "witness," the Fourth Amendment was meant to stand as an obstacle to the ends justifying the means. Thus, the real issue is not whether the government has "abused" the material witness statute in its terrorism investigation. It is whether it is *ever* legal to incarcerate a presumptively innocent witness regardless of the government's reasons. By what lights can the government arrest and hold someone as a witness when it lacks sufficient evidence to charge that person with any crime?

IV. THE *BACON* HERESY

The incarceration of material witnesses seems to have escaped close constitutional analysis partly because, prior to September 11th, it was rarely used (at least federally) and partly because, when it was used, it was to jail the poor for relatively short periods.[122] For example, in the early 1970s, a group of Mexican immigrants was smuggled into the United States illegally and jailed as material witnesses in the

120. Dunaway v. New York, 442 U.S. 200, 213 (1979) (quoting Henry v. United States, 361 U.S. 98, 101 (1959)).

121. Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2662 (2004) (Scalia, J., dissenting) (citations omitted).

122. *See* COLE, *supra* note 73, at 36–37; Lowenstein, *supra* note 83, at 116 ("Although it is rarely litigated, the detention of material witnesses is not an uncommon practice, especially in municipal and county courts."). The government occasionally used the statute before September 11th as an investigative tool, notably when it arrested Timothy McVeigh as a "material witness" to the Oklahoma City bombing investigation. *See* United States v. McVeigh, 940 F. Supp. 1541, 1562 (D. Colo. 1996).

prosecution of their smugglers.[123] The immigrants later sued the government for money they claimed they were owed under a federal statute providing a *per diem* payment to witnesses.[124] The case reached the United States Supreme Court, but only on the issue of what payment was owed. The Court noted: "[T]he petitioners do not attack the constitutionality of incarcerating material witnesses, or the length of such incarceration in any particular case."[125] The Court therefore did not address the constitutionality of the witnesses' detention and ultimately awarded them some, but not all, of the compensation they sought.[126] Apparently, obtaining the witness fee was more important to the immigrants than challenging their confinement.

Another factor explaining the few constitutional challenges may be that practitioners and judges have simply accepted the constitutionality of a practice that apparently has withstood the test of time.[127] This was the animating principle underlying *Bacon v. United States,*[128] the 1971 Ninth Circuit opinion that is primarily responsible for Section 3144's presumed constitutionality. If *Bacon* was wrongly decided, the practice of detaining innocent witnesses under Section 3144 is left without any legal foundation. Not only have federal courts relied on and followed *Bacon* in assessing the constitutionality of "material witness" detentions,[129] but the legislative history of Section 3144 cites *Bacon* as the exclusive legal authority for the statute:

> [T]he Ninth Circuit found the power to arrest a material witness to be implied in the grant of authority to release him on conditions under 18 U.S.C. § 3149. In its research on the law, the court discovered that specific arrest authority existed in federal law from

123. Hurtado v. United States, 410 U.S. 578, 579–80 (1973).

124. *Id.* The statute is 28 U.S.C.A. § 1821 (2004).

125. *Hurtado*, 410 U.S. at 588.

126. *Id.* at 586–87, 590.

127. *See* Carlson, *supra* note 83, at 3 ("Lack of awareness by the bench and bar accounts significantly for the shoddy treatment accorded the material witness under our laws."); Lowenstein, *supra* note 83, at 122 (positing that many cases are resolved on statutory grounds, obviating the need to reach constitutional questions).

128. 449 F.2d 933, 939, 943–45 (9th Cir. 1971).

129. *See* United States v. Awadallah, 349 F.3d 42, 50, 64 (2d Cir. 2003) (*Awadallah V*) (approving and following *Bacon*); In re Grand Jury Material Witness Det., 271 F. Supp. 2d 1266, 1268–69 (D. Or. 2003) (approving and following *Bacon*); In re Application for Material Witness Warrant, 213 F. Supp. 2d 287, 290–91, 297–300 (S.D.N.Y. 2002) (approving and following *Bacon*); United States v. Awadallah, 202 F. Supp. 2d 82, 96–97 (S.D.N.Y. 2002) (*Awadallah IV*) (adopting *arguendo Bacon*'s probable cause standard) *rev'd*, 349 F.3d 42 (2d Cir. 2003); United States v. Awadallah, 202 F. Supp. 2d 55, 75–76 (S.D.N.Y. 2002) (*Awadallah III*) (faulting *Bacon* only for not conducting a Fourth Amendment reasonableness inquiry) *rev'd*, 349 F.3d 42 (2d Cir. 2003); Perkins v. Click, 148 F. Supp. 2d 1177, 1182–83 (D.N.M. 2001) (following *Bacon*'s probable cause standard); *see also* United States v. McVeigh, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (stating same probable cause standard without citing *Bacon*).

> 1790 to 1948. The court concluded that the dropping of the authority in the 1948 revision of federal criminal laws was inadvertent. The committee agrees with that conclusion and expressly approves the finding of the implied right to arrest in the authority granted to the judicial officer to release on conditions that is set forth in 18 U.S.C. § 3149.[130]

The *Bacon* case has had a singularly far-reaching influence on the acceptance of "material witness" detentions. Astonishingly, *Bacon* itself expressly refused to address the appellant's argument that her arrest and detention violated the Constitution.[131] The strange reason provided by the court was that she did not "cite us to any provision of the Constitution which supports her claim, nor does she refer to any case authority."[132]

The petitioner in *Bacon*, Leslie Bacon, was arrested in Washington, D.C., as a "material witness" to a grand jury proceeding in Seattle.[133] A judge ordered Ms. Bacon imprisoned unless she posted bail of $100,000, which she was unable to do.[134] Ms. Bacon petitioned for a writ of *habeas corpus* on the ground that her detention was illegal.[135] Following a removal hearing, the district court for the District of Colombia dismissed her petition.[136] After being flown across the country in custody, Ms. Bacon refiled her petition at the federal courthouse in Seattle.[137] She argued that the government had no power to assure her appearance before the grand jury by detaining her before she had been served with a subpoena and disobeyed it.[138] The court rejected that argument but granted the petition on the narrow ground that the government failed to show that procuring Ms. Bacon's presence by subpoena was impracticable.[139]

The *Bacon* court's holding that the government could arrest and detain Ms. Bacon even though she had never been subpoenaed is the product of two errors that have since gone unquestioned. First, the *Bacon* court mistakenly concluded that the Founding Fathers themselves authorized the arrest and detention of "material witnesses" in the First Judiciary Act of 1789.[140] Second, the court justified this supposedly longstanding practice by redefining "probable

130. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211–12.
131. 449 F.2d at 941.
132. *Id.*
133. *Id.* at 935.
134. *Id.* at 934–35.
135. *Id.* at 935.
136. *Id.*
137. *Id.*
138. *Id.* at 936.
139. *Id.* at 944–45.
140. *Id.* at 938.

cause" and thus rewriting the Fourth Amendment.[141] The *Bacon* heresy—that there must be cases in which there is "probable cause" to incarcerate witnesses because statutory authority to arrest and detain such witnesses has existed since 1789—has infected every case to examine the constitutionality of imprisoning material witnesses since.

A. Bacon's *Flawed History*

When Ms. Bacon was jailed, there was no statute authorizing the arrest and detention of material witnesses. Nonetheless, the Ninth Circuit held that a congressional grant of authority to detain material witnesses could be inferred from a statute and a rule of criminal procedure then in effect.[142] The court found in 18 U.S.C. former Section 3149[143] and former Federal Rule of Criminal Procedure 46(b)[144] an implied power to arrest and detain material witnesses.[145] Each of these provided that, if a person had testimony that was material to a criminal proceeding and if it appeared that he or she could not practicably be served by subpoena, the court could require

---

141. *Id.* at 941–43.

142. These were former 18 U.S.C. § 3149 and former Federal Rule of Criminal Procedure 46(b). The rule was withdrawn and replaced by an unrelated provision in 1972 because it was redundant with Section 3149. Section 3149 was repealed in 1984 and replaced with current 18 U.S.C. § 3144.

143. The statute 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, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall 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 further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3149, *repealed by* Pub.L. 98-473, Title II, c. 1, § 203(a) (1984).

144. 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.

Hurtado v. United States, 410 U.S. 578, 579 n.1 (1973).

145. *Bacon*, 449 F.2d at 937. Rule 46(b) was enacted in 1948 and apparently replaced 28 U.S.C. former § 659. *Id.* at 938. Section 3149 was enacted as part of the Bail Reform Act of 1966. *Id.* at 937.

the person to give bail for his or her appearance.[146] If the person failed to give bail, the person could be committed to jail.[147]

Conceding that "neither of the foregoing provisions expressly grants the power to arrest a material witness,"[148] the court observed that a series of precursor statutes had contained "express reference to a power to arrest witnesses."[149] Indeed, the Ninth Circuit believed that the power to imprison innocent witnesses dated to the time of the Founding Fathers. Citing Section 33 of the Judiciary Act of 1789 as well as two successor statutes,[150] the court concluded that the lack of an express arrest provision after 1948 was a congressional oversight.[151] "The uninterrupted existence from 1789 to 1948 of legislative authority to arrest and detain material witnesses does not appear to have been broken by the repeal in 1948 of Sections 657 and 659."[152] Relying on *Bacon*'s reasoning, Congress sought thirteen years later to cure the supposed oversight by enacting Section 3144.[153]

The major problem with the *Bacon* decision has nothing to do with whether the Ninth Circuit was right to infer a power to arrest witnesses where none was expressly granted. The problem is more serious and fundamental. The *Bacon* court's belief that the First Judiciary Act authorized the detention of material witnesses cannot be reconciled with the firmly established Fourth Amendment doctrine that every significant detention must be supported by probable cause to believe that the detainee was involved in the commission of a crime.[154] If the *Bacon* court's history is correct, it means that the Founding Fathers themselves authorized the incarceration of individuals who were not even suspected of committing a crime.[155] As

146. *Id.* at 937.

147. *Id.* at 937 (citing FED. R. CRIM. PROC. 46(b)).

148. *Id.*

149. *Id.* at 938 & n.5.

150. Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 73; 28 U.S.C. § 659 (1925).

151. 449 F.2d at 938.

152. *Id.*

153. S. REP. NO. 98-225, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3212 n.100.

154. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 700 (1981) ("[E]very arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by prohable cause."); Dunaway v. New York, 442 U.S. 200, 213 (1979) ("[A]ny 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause."); Henry v. United States, 361 U.S. 98, 102 (1959) (holding that FBI lacked both constitutional and statutory authority to make arrest without probable cause).

155. Professor Akil Reed Amar has argued that the Fourth Amendment in fact does not require that every seizure be supported by probable cause. He argues that some seizures may be reasonable even where there is not sufficient evidence of criminal activity to satisfy the probable cause standard. AKHIL REED AMAR, THE BILL OF RIGHTS 70–71 (1998). Professor Amar does not contend, however, that individuals suspected of no crime can be arrested — much less

history and common sense have it, the *Bacon* court got history wrong. Accordingly, the constitutionality of detaining "material witnesses" under Section 3144 should not be presumed as it has been.

Properly construed, the Judiciary Act of 1789 gives no reason to believe that the Founding Fathers countenanced the indefinite or extended incarceration of witnesses. Rather, the Act—as well as each successive federal material witness statute in effect through 1948—recognized that, because witnesses had a duty to testify, courts could compel them *only* to promise to appear to give testimony. No bond could be required of them. Each version of the law expressly limited the courts' authority to imprison a witness to instances when a witness willfully refused to promise to appear. The witness could regain his or her freedom at any time by promising to appear.

The *Bacon* court believed that the Judiciary Act of 1789 authorized the detention of witnesses because it misunderstood the Act as treating defendants and witnesses the same. This, however, was not at all the case. Section 33 of the Act provided:

> That for any crime or offence against the United States, the offender may . . ., agreeably to the usual mode of process against offenders in such state, . . . be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. And copies of the process 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.[156]

The Act thus distinguished between "offenders" and "witnesses". Only "offenders" could be "arrested, and imprisoned or bailed." The Act did not state how a defendant could post bail, but left that to the manner prescribed by state law.[157] Generally, there were two possible ways a defendant could do this: by giving a recognizance or posting a bail bond.[158] A "recognizance" was merely an acknowledgment, given orally and entered into the record of the case, by which one conceded that he or she had to appear in court for some

---

incarcerated for weeks or months. Even under Professor Amar's interpretation of the Fourth Amendment, the post-September 11th seizures of innocent people under the pretext of "material witness" arrests would be constitutionally unreasonable. *Id.*

156. Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91.

157. United States v. Zarafonitis, 150 F. 97, 100 (5th Cir. 1907). From the time of the first Judiciary Act of 1789 through the adoption of the Federal Rules of Criminal Procedure in 1940, federal courts followed local practice and procedure with respect to matters not specifically addressed by Congress. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1435–41 (1984) (discussing origins and development of the supervisory power doctrine).

158. Swan v. United States, 9 P. 931, 935 (Wyo. 1886) (Blair, J., concurring).

proceeding.[159] If the condition to appear was not later satisfied, the recognizance had the effect of a judgment against the recognizor because it was an acknowledgment of an existing duty to testify.[160] A bail bond, on the other hand, was a contract between the state and a defendant's sureties to deliver the defendant for trial.[161] Failure to comply would give rise to a claim of future liability by the government against the sureties.[162] In modern usage, the distinction between the two is usually disregarded but still exists:

> Recognizance and bail bond are often used interchangeably, although there is a distinction between them. A recognizance, properly speaking, is an obligation or record entered into before a court of record or magistrate duly authorized, conditioned on the doing of some specified act, while a "bond, or as it is commonly called, a bail bond, is [also] an obligation but under seal, signed by the party giving the same, with one or more sureties, under a penalty, conditioned to do some particular act."[163]

"Witnesses," unlike "offenders," were not subject to arrest, imprisonment, or bail under the First Judiciary Act. Rather, the statute authorized only the taking of "recognizances" from them. If a witness acknowledged his or her duty to appear in that manner, no other security could be required under the Judiciary Act. It is true that the Act did provide that a witness's recognizance could be required "on pain of imprisonment." This, however, did not mean that a witness could be imprisoned at the court's option. It meant only that a witness's *refusal* to recognize his obligation to appear could be *punished*. Such a refusal was deemed a contempt of court because the common law imposed on every individual a duty to testify in court. As one federal judge made clear at the beginning of the nineteenth century, there was no authority to incarcerate a witness absent a willful refusal to testify:

> It has been the practice in Pennsylvania to commit to prison such witnesses for the commonwealth as cannot find security for their appearance at court to testify, in cases where the justice does not think their personal recognizance sufficient; but I find no authority for it. By the statutes of 1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10, the

159. *See id.* (defining recognizance as "an obligation of record which a man enters into before some court of record or magistrate duly authorized, binding himself under a penalty to do some particular act.").

160. State v. Hays, 2 Or. 314, 317–18 (1868); New York v. Kane, 4 Denio 530 (1847) (Beardsley, J., dissenting).

161. *Hays*, 2 Or. at 317–18; *Kane*, 4 Denio 530 (Beardsley, J., dissenting).

162. *Id.*

163. Western Surety Co. v. United States, 72 F.2d 457, 460 (9th Cir. 1934) (quoting *Swan*, 9 P. at 935 (Blair, J., concurring)); *see also* State v. Bradsher, 127 S.E. 349, 351–52 (N.C. 1925) (discussing differences between bail bonds and recognizances). The blurring of the distinction between "recognizance" and "bail" is evidenced in some late nineteenth century and early twentieth century cases that carelessly use the words interchangeably. *See, e.g.*, United States v. Zarafonitis, 150 F. 97, 100 (5th Cir. 1907); New Haven v. Rogers, 32 Conn. 221, 224 (1864) ("Nothing is more common than to speak of a recognizance as a bond.").

> justice has power to bind the witnesses by recognizance or obligation to testify, and if they refuse to be bound, to commit them for contempt. The same power is said to be virtually included in their commissions; but it is no where said that they may be compelled to find security, or be committed.[164]

The practice referred to in *Moore* may not have been uncommon, contributing to the false modern notion that such detentions are constitutional, but no reasoned authority for it existed, as Judge Griffith found.[165]

The Judiciary Act's acknowledgment of a court's power to hold in contempt a witness who refused to promise to appear in court does not support the idea that a witness who did promise to appear could be jailed. Not only does the text of the Act not permit that, but such a provision would have been a sharp deviation from the courts' common law power. As the *Bacon* court acknowledged, most state courts "have held that in the absence of statutory authority there is no common-law power to detain witnesses before disobedience of a subpoena."[166] What the *Bacon* court failed to appreciate was that the same courts that found no common law authority for the practice also held that there was no *statutory* authority for the practice, stressing the importance of the distinction between taking a recognizance and bailing a defendant.[167]

Two cases cited by *Bacon* demonstrate that *Bacon* misinterpreted the words of the Judiciary Act of 1789.[168] In *Comfort v. Kittle*, the Iowa Supreme Court was called upon to determine whether a judge exceeded his authority by requiring a witness to secure his appearance with a bond when Iowa law authorized the judge to take only recognizances.[169] The court understood the gravity of the issue, which the *Bacon* court failed to grasp: "The power to require persons, without accusation of wrong, and without a hearing, to give even their own pledge for their appearance as witnesses, is surely an

---

164. United States v. Moore, 26 F. Cas. 1308, 1309 n.3 (C.C.D. Pa. 1801) (opinion of Griffith, C.J.) (citation omitted). Judge Griffith referred to Pennsylvania's practice because federal courts followed state rules and practices of criminal procedure. The first Federal Rules of Criminal Procedure were not enacted until 1944. Beale, *supra* note 157, at 1439–40 & n.39.

165. *See, e.g.*, United States v. Durling, 25 F. Cas. 944, 944 (N.D. Ill. 1869) (asserting without citation of any authority that court can imprison witness for failure to give security for appearance).

166. Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971). Like a refusal to give recognizance, disobedience of a subpoena would constitute a contempt of court and would be punishable as such.

167. *See, e.g.*, New York ex rel. Troy v. Pettit, 44 N.Y.S. 256, 256 (N.Y. Sup. Ct. 1897); State v. Calhoun, 13 So. 425, 425–26 (Ala. 1893); State v. Lane, 11 Kan. 458, 459 (1873).

168. 449 F.2d at 939 (citing Comfort v. Kittle, 46 N.W. 988 (Iowa 1890)); Bickley v. Commonwealth, 25 Ky. 572 (1829).

169. 46 N.W. at 990.

extraordinary power, and still more extraordinary when security may be required and imprisonment imposed for a failure to give it."[170] The court concluded that the witness's detention was illegal, resting this holding on the difference between giving a recognizance and posting a bail bond, which typically required sureties:

> There is a difference between a recognizance and a bond. Webster says: "A recognizance differs from a bond, being witnessed by the record only, and not by the party's seal." He defines a "bond" to be, in law, "a writing under seal, by which a person binds himself, his heirs, executors, and administrators." It is certainly questionable whether authority to require a recognizance confers power to require a bond . . . . It is of grave importance to a witness whether he may be required to give other security than his own promise, and graver still whether for failure, through inability or otherwise, he may be arrested and imprisoned. To require sureties and to order imprisonment, in such cases, is the exercise of an unusual and extraordinary power, and should not be exercised where the authority is doubtful.[171]

Decades earlier, the Court of Appeals of Kentucky had reached the same result in *Bickley v. Commonwealth*.[172] John Bickley had been subpoenaed as a witness against a felony defendant and twice failed to appear. In due course, he was arrested and brought before the court. The judge ordered that he post security in the sum of five hundred dollars to be released. Bickley could not pay the security and the court refused to accept his personal recognizance. On Bickley's habeas petition, the court of appeals reversed, holding that the judge exceeded his authority by requiring security:

> [A]uthority is conferred on the magistrates to recognize witnesses to attend at a future time in court; but nothing is said about requiring security of them. We have not been able to find any statute, which authorizes the circuit court, to compel witnesses to enter into recognizances with surety, and on their failure, to commit them to jail. That circuit courts may require of a witness in a criminal case, a recognizance binding him personally to appear at a future day of the court, we will not question; but that the circuit court, can add at pleasure other conditions, which, if not complied with, will authorize an imprisonment of the witness, can not be conceded.[173]

The court further held that, even if security could be required of a witness, the failure to give it because of poverty or other inability would not authorize imprisonment because it would not constitute a contempt of court:

> We merely suggest that Bickley's failure to enter into the recognizance with surety, could not amount to a contempt, for the purpose of fortifying the idea that he was imprisoned solely upon the ground that he did not give security, and that the circuit court must have entertained the opinion, that such failure was sufficient to justify his commitment. Had Bickley failed to enter into a recognizance personally (a thing which

170. *Id.* at 989.

171. *Id.* at 990.

172. 25 Ky. at 574–76.

173. *Id.* at 574.

he could do, and which he offered to do) that might have been construed by the court into a contempt of its authority, and imprisonment might have legally resulted.[174]

The reasoning of *Bickley* and *Comfort*—cases which the *Bacon* court cited—show that *Bacon*'s reading of the First Judiciary Act is incorrect. In each case, the court respected the distinction between a recognizance and a bond in interpreting a state statute. The *Bacon* court, however, failed to appreciate that crucial distinction in interpreting the First Judiciary Act. The *Bacon* court's confusion may be understandable, as the terms are closely related and the difference between them has not been respected over the years. Nonetheless, there is no support for *Bacon*'s conclusion that the Founding Fathers authorized the detention of witnesses who promised to appear and testify.

Despite some rewording, the material witness statutes enacted in 1846 and 1925 likewise lend no support to *Bacon*'s holding. Both provided that a witness could be detained only upon neglect or refusal to give a recognizance. The 1846 version differed from the 1789 Act in that it provided that the judge could require a witness's recognizance "with or without sureties in his discretion".[175] The 1925 version, which was later codified at 28 U.S.C. § 659 and remained on the books until its repeal in 1948, retained this language.[176] The insertion of this

174. *Id.* at 574–75.

175. The 1846 statute provided:

> [O]n the application of any attorney of the United States for any district, and upon satisfactory proof of the materiality of the testimony of any person who shall be a competent witness, and whose testimony shall, in the opinion of any judge of the United States, be necessary upon the trial of any criminal cause or proceeding in which the United States shall be a party or interested, any such judge may compel such person, so required or deemed by him necessary as a witness, to give recognizance, with or without sureties in his discretion, to appear on the trial of said cause or proceeding and give his testimony therein; and for that purpose, the said judge may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute criminal or civil process in behalf of the United States, to arrest such person and carry him before such judge. And in case the person so arrested shall neglect or refuse to give said recognizance in the manner required by said judge, the said judge may issue a warrant of commitment against such person, which shall be delivered to said officer, whose duty it shall be to convey such person to the prison mentioned in said mittimus. And the said person shall remain in confinement until he shall be removed to the court for the purpose of giving his testimony, or until he shall have given the recognizance required by said judge.

Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 73, 73–74.

176. The 1925 version read as follows:

> Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and

phrase might initially appear to support *Bacon*'s historical analysis, perhaps suggesting that Congress empowered judges to require more than just a witness's personal recognizance and to jail them if they could not comply. Worse, the language could suggest that the power to require a recognizance with sureties existed all along, although it was not stated expressly in 1789.

However, two cases construing the phrase "with or without sureties" confirm that it did not authorize judges to require a surety from a witness who was helpless to comply. A judge's discretion to require sureties was limited by the proviso that only a witness who "neglects or refuses to give recognizance" could be committed to jail. This meant that a judge could require the surety only of a witness who was able to provide it. Inability to comply would not result in imprisonment for the same reason given in *Bickley*—it would not constitute a contempt of court. Thus case law confirms that the change in language in the 1846 and 1925 material witness statutes did not empower judges to imprison a witness who was unable to provide a surety.

The petitioner in *United States v. Lloyd*[177] complained that he was being held in custody as a witness because he could not pay the five thousand dollar bail set at the request of the federal prosecutor. Observing that the "oppressive power" to incarcerate witnesses "is not always exercised with the most prudent precaution," the court held that the petitioner should be released on his own recognizance, subject to a one thousand dollar penalty *if he failed to appear*.[178] The court also noted that the "extraordinary security" of five thousand dollars bail had been imposed because the government claimed that the witness had fled the country to avoid service of process[179]—a crucial fact in the case and one distinguishing it from *Bacon*, in which the petitioner had made no attempt to evade process. Finding that the government failed to meet its burden of proving that the witness tried to evade process or that the witness could afford bail, the court held that *only* the witness's recognizance could be required:

---

bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.

28 U.S.C. § 659 (repealed 1948).

177. 26 F. Cas. 984 (C.C.S.D.N.Y. 1860) (No. 15,614).

178. *Id.* at 985.

179. *Id.*

> The witness, by his affidavit, now produced, swears . . . that he is ready to attend court and testify in the cause, and has never been absent for the purpose of avoiding doing so; and that, on the contrary, he immediately returned here, for the purpose of being present as such witness, on learning from his wife that there was a report here that he designed keeping away from being a witness on the trial. He further avers, that his business and family relations are all in this country and that he intends to remain here, subject to any subpoena in the cause. The government furnishes no testimony directly contradicting any of these statements, and *does not prove that the petitioner is able to give bail for his appearance*, or that there is any fact justifying a presumption that he will not be amenable to a subpoena, whenever he may be required as a witness, or that such a personal recognizance in the case *as would be ordinarily required* of a householder and resident here, would not be ample security to secure his personal attendance at court.
>
> Under these circumstances, I shall order the petitioner to be discharged from imprisonment on his executing his own recognizance in $1,000 penalty, to appear and testify in court on the trial of the indictments, when notified to do so on the part of the United States, at any time during the term.[180]

Lloyd's reasoning is exactly in accord with that of *Bickley*, which did not permit a judge to jail a witness who failed to provide sureties, not because of neglect or refusal (either of which would amount to a contempt of court), but rather because of inability to pay. This interpretation of the statute also squares with Judge Griffith's observation in 1801 that courts did not have the power to impose conditions for the release of a witness that the witness could not meet:

> It is contrary to the first principles of natural justice, to imprison men who are innocent, merely because they are too poor and friendless to find bail for their appearances as witnesses. If the United States may imprison witnesses, so may the party accused, and a whole ship's crew might lay in gaol for six months or a year.[181]

Thus, sureties or other security could be required only of witnesses who were able to meet such conditions for their release—and the government had the burden of showing that ability.

Relying on *Lloyd*, the Supreme Court of Minnesota expressly held in *Minnesota ex rel. Howard v. Grace*[182] that a judge had no power to detain a witness for inability to meet conditions of release under that state's almost identical material witness statute. The court reasoned that, although the state statute (like its federal counterpart) seemed to grant a judge complete discretion to require sureties of a witness, it was an abuse of discretion to require sureties of a witness who was unable to provide them:

> In construing the law now before us we do not overlook the fact that, literally taken, its language is tantamount to leaving it to the discretion of the judge, whether or not to bind the witness over. This, indeed, is expressly so in the U. S. statute above referred to, provided it be first satisfactorily proved that the witness is material and necessary; . . . .

---

180. *Id.* (emphasis added).

181. United States v. Moore, 26 F. Cas. 1308, 1309 (C.C.D. Pa. 1801) (No. 15, 805) (opinion of Griffith, C.J.).

182. 18 Minn. 398 (1872).

> But though the witness may be required to recognize in the discretion of the court, the discretion (or judgment) here spoken of must, as in all other like cases, be intended to be a sound legal discretion. The judgment of the court cannot be capriciously exercised. It cannot legally abuse its discretion, nor, indeed, is it to be presumed that it will. If for instance, it would be unjust or oppressive, and against common law and common right, as it certainly would be, to commit such material witness in default of bail, without any proof that he had any intention of not appearing and testifying when duly subpoenaed, but who is too poor to render his recognizance of any value, or too friendless to be able to give bail, in what sense could it be said, that in the exercise of a sound legal discretion, the court would be warranted in so doing; or what interest of the state requires the incarceration of such a person? Certainly none.[183]

Accordingly, the court held that only a witness who was willfully in contempt for refusing to give a recognizance that he was capable of paying could be imprisoned. The court stated, "Refuse or neglect, as used in this act, mean in our opinion, nothing more than 'refuse,' in the Gen. Statutes both expressions being used in their ordinary technical sense as equivalent to *failure to comply* with the order."[184] This interpretation made it unnecessary for the court to consider the constitutionality of detaining a witness who could not provide sureties: "Since the commitment was not warranted by the act, it is, of course, unnecessary to consider whether or not it is constitutional or warranted by the Fourteenth Amendment to the constitution of the United States, to commit a witness simply because he is unable to find security for his attendance."[185]

Lloyd and *Grace* demonstrate that the *Bacon* court's belief that the detention of witnesses was expressly sanctioned by federal law from 1798 to 1948 has no basis in fact. During that entire 150-year period, the only statutory authority conferred upon the federal courts with respect to "material witnesses" was the authority to summon them to obtain their personal recognizance or promise to appear. After 1846, Congress allowed judges to require sureties of witnesses who were able to provide them, but that provision has apparently never been challenged by anyone able to comply. A witness who was unable to provide sureties to guarantee his or her appearance could still be required to give only his or her personal recognizance.

Lloyd also clarifies the meaning of *Barry v. United States ex rel. Cunningham*,[186] a Supreme Court case that *Bacon* misinterpreted in support of its flawed historical analysis.[187] In *Barry*, the Supreme Court held that the Senate could arrest a witness for the purpose of bringing him before a committee to testify and hold him in custody "to

183. *Id.* at 403–03 (citations omitted).

184. *Id.* at 402 (citation omitted) (emphasis in original).

185. *Id.* at 404.

186. 279 U.S. 597 (1929).

187. Bacon v. United States, 449 F.2d 933, 941 (9th Cir. 1971).

compel such attendance."[188] Using the material witness statute as an analogy for the Senate's power to compel the attendance of witnesses, the Court stated in dicta, that "The constitutionality of this statute apparently has never been doubted."[189] Although the opinion is not entirely clear on the point, it seems that the *Barry* court understood that "recognizance" and "bail" were not interchangeable terms. The Court correctly noted that the material witness statute then in effect authorized the detention of a witness only when that witness failed to give recognizance:

> A statute of the United States (U. S. Code, Title 28, § 659 (28 USCA § 659)) provides that any federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, *or until he gives the recognizance required by said judge.* The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question.[190]

Some of the Court's analysis, specifically its discussion of state-court "material witness" cases,[191] seems to suggest that witnesses who could not afford bail could be detained anyway.[192] However, the opinion ultimately seems to disavow that either federal courts (at least) or the Senate had any such power:

> It fairly may be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. *This is all he could properly demand of a court under similar circumstances.*[193]

Thus the Supreme Court in *Barry* did not, contrary to the *Bacon* court's reading of the case, imply that it was constitutional to imprison Ms. Bacon because she could not afford to post a $100,000 bond.

B. Bacon's *New "Probable Cause"*

Mistakenly believing that federal law had authorized the imprisonment of witnesses since 1789, the *Bacon* court set upon the

---

188. 279 U.S. at 616.

189. *Id.* at 617.

190. *Id.* at 616–17 (emphasis added).

191. These state court cases are not pertinent to the question of whether Section 3144 authorizes detentions that violate the Fourth Amendment because that amendment was not incorporated against the states until 1949. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

192. *Barry*, 279 U.S. at 617–18 (citing Minnesota *ex rel.* Howard v. Grace, 18 Minn. 398 (1872); Ex parte Sheppard, 66 S.W. 304 (1902); Crosby v. Potts, 69 S.E. 582 (1910)).

193. *Id.* at 619–20 (emphasis added).

task of reconciling this supposed practice of the Founding Fathers with the text of the Fourth Amendment. Though it acknowledged that the Constitution requires that "probable cause" be established for every arrest, the *Bacon* court could not apply the usual probable cause standard because Ms. Bacon had not committed any crime. The solution was to gut "probable cause" of its age-old substantive meaning by linguistic sleight of hand and convert it into a mere standard of proof.[194] Former Section 3149 and former Rule 46(b) would provide the new substantive criteria for determining whether the Fourth Amendment was satisfied:

> Rule 46(b) and § 3149 provide specific criteria for probable cause. *Cf. Giordenello v. United States*, 1958, 357 U.S. 480, 485. Before a material witness arrest warrant may issue, the judicial officer must have 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." These requirements are reasonable, and if they are met, an arrest warrant may issue.[195]

Rather than examining whether the statutory provisions authorizing the detention of "material witnesses" could be reconciled with the Fourth Amendment, the *Bacon* court *reconciled the Constitution* with this supposedly time-honored practice. *Bacon*'s *coup de grace* was the court's audacious proclamation that its newly conjured "probable cause" standard "is reasonable." Amazingly, this heretical feat of legerdemain has never been questioned. 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.[196]

"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. This has always been so. As Chief Justice Marshall put it:

---

194. Bacon v. United States, 449 F.2d 933, 941–43 (9th Cir. 1971).

195. *Id.* at 943 (citation omitted).

196. *See, e.g.*, United States v. Awadallah, 349 F.3d 42, 64 (2d Cir. 2003); Arnsberg v. United States, 757 F.2d 971, 976–77 (9th Cir. 1985); United States v. Oliver, 683 F.2d 224, 230 (7th Cir. 1982); *In Re* Grand Jury Material Witness Detention, 271 F. Supp. 2d 1266, 1268–69 (D. Or. 2003); *In re* Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 290–91, 298–300 (S.D.N.Y. 2002); United States v. Awadallah, 202 F. Supp. 2d 82, 96–97 (S.D.N.Y. 2002), *rev'd*, *Awadallah*, 349 F.3d 42; Perkins v. Click, 148 F. Supp. 2d 1177, 1182–83 (D.N.M. 2001); *see also* United States v. McVeigh, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (applying same probable cause standard without citing *Bacon*).

> [T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, *in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.* In this, its legal sense, the Court must understand the term to have been used by Congress.[197]

Indeed, probable cause *must* have a "fixed and well known meaning." Otherwise, anything and anyone would be subject to search and seizure, and the Fourth Amendment would be reduced to a vapid declaration offering no protection whatsoever. The concept cannot be redefined with reference to a statute or rule to suit whatever ends the government wishes to accomplish in any given time or circumstance. That fixed meaning has always been cause to believe the individual to be seized is involved in the commission of a crime. This proposition is so basic and fundamental to Fourth Amendment jurisprudence that citation seems superfluous, but there is no want of authority:

> This Court repeatedly has explained that "probable cause" to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.[198]

In short: "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."[199]

The only case the *Bacon* court cited to support its new "probable cause" standard for an arrest, *Giordenello v. United States*,[200] actually repudiates the idea that "probable cause" can be redefined from case to case. The petitioner in *Giordenello* had been

---

197. Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813) (emphasis added).

198. Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (referencing multiple cases); *accord* Atwater v. City of Lago Vista, 532 U.S. 318, 354–55 (2001) (holding that arrest satisfied the Fourth Amendment because "[t]here is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence"); Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964))); Sibron v. New York, 392 U.S. 40, 75 (1968) (Harlan, J., concurring) ("Probable cause to arrest means evidence that would warrant a prudent and reasonable man (such as a magistrate, actual or hypothetical) in believing that a particular person has committed or is committing a crime." (referencing multiple cases)); Henry v. United States, 361 U.S. 98, 102 (1959) ("Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen." (citations omitted)); Stacey v. Emery, 97 U.S. 642, 645 (1878) ("If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient."); *see also* FED. R. CRIM. P. 5.1(g) (requiring magistrate judge to determine at preliminary examination whether there "is probable cause to believe an offense has been committed and the defendant committed it").

199. Brinegar v. United States, 338 U.S. 160, 175 (1949) (internal quotation marks and citation omitted).

200. 357 U.S. 480 (1958).

convicted of a drug offense. On appeal, he argued *inter alia* that the complaint underlying his arrest warrant lacked sufficient information to enable a judicial officer to determine whether there was probable cause for his arrest. The Supreme Court agreed and reversed the conviction. The Court held that a perfunctory, conclusory complaint did not comport with the Rules of Criminal Procedure because it offered the judicial officer no basis for making the probable cause determination that the Fourth Amendment requires.[201] In the paragraph *Bacon* relied upon, Justice Harlan, writing for the Court, noted that the Rules "must be read in light of the constitutional requirements they implement," meaning that they must be interpreted consistently with the rights that the Fourth Amendment safeguards.[202]

The *Bacon* court inverted Justice Harlan's reasoning and interpreted his opinion to mean that the definition of "probable cause" changes with the circumstances of a given case.[203] In dealing with a material witness arrest, the *Bacon* court concluded, the Fourth Amendment is satisfied whenever the statutory conditions are met because "Rule 46(b) and § 3149 provide specific criteria for probable cause."[204] This holding is dangerously destructive of the Fourth Amendment's guarantee against arbitrary arrests. Its twisted logic would allow Congress to alter the definition of "probable cause" by statute, effectively eliminating any limitations on the arrest power of the federal government. If the meaning of "probable cause" is not "fixed and well known," then anyone can be seized, as Brandon Mayfield's incarceration starkly demonstrates.

Rather than interpreting the Constitution to permit the detention of witnesses, the *Bacon* court should have tested the validity

---

201. *Id.* at 486–87.

202. *Id.* at 485. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Court affirmed that the probable cause requirement of *Giordenello* emanated not from any rule of procedure but from the Fourth Amendment itself. Its holding was therefore applicable to arrests made by state officials:

> In *Giordenello*, although this Court construed the requirement of "probable cause" contained in Rule 4 of the Federal Rules of Criminal Procedure, it did so "in light of the constitutional" requirement of probable cause which that rule implements. . . . The principles announced in *Giordenello* derived, therefore, from the Fourth Amendment, and not from our supervisory power. Accordingly, . . . they may properly guide our determination of "probable cause" under the Fourteenth Amendment.

Id. at 112 n.3 (citations omitted); *see also* Overton v. Ohio, 534 U.S. 982, 984 (2001) (Breyer, J., dissenting from denial of petition for writ of certiorari) (discussing *Aguilar* and *Giordenello*).

203. Given *Giordenello*'s holding that a warrant petition must provide sufficient information for a judicial officer to make an independent probable cause determination, *Bacon*'s reliance on the case in creating a new "probable cause" standard allowing for the incarceration of completely innocent individuals is especially ironic.

204. Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

of former Section 3149 and former Rule 46(b) against the "fixed and well known meaning" meaning of the words in the Constitution. Had the *Bacon* court applied the one and only definition of "probable cause," the practice of detaining witnesses could not have survived constitutional analysis. Of course, the seizure of one innocent of any wrongdoing can never be supported by "probable cause" because "probable cause" for an arrest exists only where there is reason to believe that the prospective arrestee committed a crime.

V. "MATERIAL WITNESS" CASES AFTER SEPTEMBER 11TH

The *Bacon* heresy endures to this day, providing authority to detain innocent individuals without real probable cause—*i.e.* reason to think they are involved in a crime. Not only did Congress, as evidenced by the legislative history of Section 3144, unquestioningly follow *Bacon*, but so have the federal courts. Before September 11th, courts and litigants accepted *Bacon*'s version of history and contrived "probable cause" formulation without question.[205] After September 11th, *Bacon*'s flawed reasoning has provided justification for the secret arrest and incarceration of an unknown number of individuals based on little or no evidence of any wrongdoing (much less involvement in terrorism). Despite the fact that such arrests are exactly the sort that the Fourth Amendment was meant to forbid, *Bacon*'s bizarre approval of the tactic has gone unquestioned. This makes it possible for the government to continue to arrest and hold innocent individuals—like

205. *See, e.g., In re* De Jesus Berrios, 706 F.2d 355, 357–58 (1st Cir. 1983) (rejecting witness's challenge to arrest on grounds that material witnesses cannot be arrested to give hair samples or appear in lineups and that warrant was not supported by sufficient quantum of evidence; no constitutional challenge raised); United States v. Oliver, 683 F.2d 224, 230–31 (7th Cir. 1982) (noting that the witness did not challenge the power of the court to arrest material witnesses but challenged *Bacon* only with respect to the quantum of evidence required to support a warrant); United States *ex rel.* Gibbs v. Zelker, 496 F.2d 991, 992–93 (2d Cir. 1974) (dismissing habeas petition for failure to exhaust state court remedies of state prisoner challenging constitutionality of arrest pursuant to state material witness arrest statute without reacbing constitutional issues); United States v. Coldwell, 496 F. Supp. 305, 307 (E.D. Okla. 1979) (ordering issuance of material witness arrest warrant in proceeding to which target of warrant was not a party; no constitutional challenge raised); United States v. Feingold, 416 F. Supp. 627, 628–29 (E.D.N.Y. 1976) (denying witness's motion to quash arrest warrant based on grounds that witness was not material and that warrant was not supported by sufficient showing; no constitutional challenge raised); *cf.* Application of Cochran, 434 F. Supp. 1207, 1215–16 (D. Neb. 1977) (sustaining due process challenge to confinement pursuant to Nebraska's material witness statute; adopting *Bacon* "probable cause" standard *arguendo* and holding it was not met). *Bacon* had gone unchallenged in state courts as well. *See, e.g.*, State v. Brady, 388 N.W.2d 151, (1986) (citing *Bacon's* probable cause analysis in assessing the validity of a material witness arrest warrant).

Brandon Mayfield and Mohammed Bellahouel—at the discretion of federal law enforcement officers.

There have been published decisions in only two cases involving a challenge to a "material witness" detention in connection with the September 11th investigation. Both have focused on the statute's scope and applicability to grand jury investigations rather than on its constitutionality. The one judge to hold the arrest of a "material witness" illegal did so on statutory grounds, while implying that such arrests would be constitutional in other circumstances not before the court.[206] The Second Circuit Court of Appeals reversed that judgment and accepted *Bacon*'s flawed statutory and constitutional analysis without any real explanation or analysis.[207]

A. The Awadallah *Litigation*

Ten days after September 11, 2001, federal agents in San Diego arrested Osama Awadallah, a twenty-one-year-old Jordanian legal resident of the United States. Three hours later, the government sought a material witness warrant from a judge in New York City. An FBI agent's affidavit filed in support of the warrant request stated that a piece of paper with Mr. Awadallah's name and telephone number was found in a car that hijacker Nawaf Alhazmi abandoned at Dulles International Airport. The agent also stated that Mr. Awadallah's substantial family ties in Jordan made Mr. Awadallah a flight risk.[208]

The affidavit failed to inform the judge of several relevant facts, not the least of which was that Mr. Awadallah had been arrested and booked into federal prison in San Diego hours *before* the warrant petition was filed.[209] The FBI agent also did not mention that the phone number found in the car used by the hijackers was assigned to an apartment where Mr. Awadallah had not lived for eighteen months—a fact that undermined any connection between Mr. Awadallah and the terrorist plot. The affidavit failed to state that

206. *See* United States v. Awadallah (Awadallah III), 202 F. Supp. 2d 55, 73–76 (S.D.N.Y. 2002) ("Given its poor reasoning, Bacon's conclusion that Rule 46 allows courts to detain witnesses for grand jury investigations deserves no respect. Indeed, its conclusion is particularly troubling because the court never mentioned section 3149, the statute under which Bacon was arrested."), *rev'd by* United States v. Awadallah (Awadallah V), 349 F.3d 142 (2d Cir. 2003).

207. *Awadallah V*, 349 F.3d 42, 52–64 (2d Cir. 2003).

208. United States v. Awadallah (Awadallah IV), 202 F. Supp. 2d 82, 95 (S.D.N.Y. 2002), *rev'd by Awadallah V*, 349 F.3d 42. Although the government professed disagreement with the facts as found by the district court, it did not challenge those facts on appeal. *Awadallah V*, 349 F.3d at 45.

209. *Awadallah IV*, 202 F. Supp. 2d at 94–95; *Awadallah V*, 349 F.3d at 47.

three of Mr. Awadallah's brothers, one of whom had been a United States citizen for fifteen years, lived in San Diego, giving Mr. Awadallah substantial family connections to the United States and arguably making him less of a flight risk.[210] Also not mentioned was the fact that Mr. Awadallah had been questioned for six hours the day before and had been by all accounts extremely cooperative.[211] He had consented to a search of his apartment and cars, though he later tried in vain to revoke his consent to search one of his cars.[212] After interrogating him, FBI agents drove Mr. Awadallah back to his house at 11:00 p.m. and told him to return the next morning for a follow-up polygraph examination. Even though he was not kept under surveillance, Mr. Awadallah returned to the FBI's office, only to be arrested before the government applied for the warrant.[213]

On the basis of the misleading affidavit, Chief Judge Michael Mukasey of the Southern District of New York signed a "material witness" warrant.[214] On that authority, Mr. Awadallah remained imprisoned in solitary confinement at San Diego Metropolitan Correctional Center as a high-security inmate. Because of this classification, whenever he left his cell, which occurred several times a day, he was strip-searched. After six days there, he was moved through a series of federal prisons until he arrived at New York Metropolitan Correctional Center on October 1, 2001. There he remained designated a high-security prisoner and was kept in solitary confinement. He could not use the telephone or have visitors. While incarcerated, Mr. Awadallah acquired multiple unexplained bruises.[215]

On October 10, 2001, Mr. Awadallah testified without immunity before a New York grand jury investigating the September 11th attacks. Mr. Awadallah answered hundreds of questions, telling the grand jury exactly what he had told the FBI the day before his arrest when he was, according to the agents, "'very, very cooperative.'"[216] He admitted to knowing two of the September 11th hijackers and to having last seen them a year earlier. After Mr. Awadallah testified before the grand jury, the government charged him with perjury and continued holding him in custody. Specifically, the government charged Mr. Awadallah with falsely denying that he

210. *Awadallah IV*, 202 F. Supp. 2d at 97.

211. *Id.* at 92–93, 97–98.

212. *Id.* at 90–91. The search of the car had been completed by the time the agents searching it received word of the revocation of consent. *Id.*

213. *Id.* at 93.

214. *Awadallah V*, 349 F.3d at 47.

215. *Awadallah III*, 202 F. Supp. 2d 55, 61 (S.D.N.Y. 2002).

216. *Awadallah IV*, 202 F. Supp. 2d at 92 (quoting agent's testimony).

knew that one of the hijackers he had met was named "Khalid".[217] He was not released on bail until December 13, 2001, after spending eighty-three days in prison.[218] The government has never alleged that Mr. Awadallah had any knowledge of or connection to the September 11th attacks or any other terrorist plot.

Mr. Awadallah moved to dismiss the indictment and to suppress all evidence against him on several grounds.[219] Following a four-day evidentiary hearing detailing the events surrounding the arrest and detention, Judge Shira Scheindlin of the Southern District of New York issued two orders. In the first order, *Awadallah III*, the judge held that the material witness statute could not be used to arrest individuals to appear before a grand jury. She held that a grand jury investigation was not a "criminal proceeding" within the meaning of that phrase in the statute.[220] Mr. Awadallah, however, had not made this argument. To avoid having to decide the statute's constitutionality, the district court reached the issue *sua sponte* and, according to the government, without briefing or argument.[221]

While criticizing the *Bacon* court for having "brushed aside" the constitutional issue,[222] *Awadallah III* accepted *Bacon*'s improvised "probable cause" formulation without analysis. Incredibly, the opinion states that Congress can override the Bill of Rights: "In enacting [the material witness statute], Congress carved out a carefully limited exception to the general rule that an individual's liberty may not be encroached upon unless there is probable cause to believe that he or she has committed a crime."[223] The court focused exclusively on whether it was reasonable to apply the statute in a grand jury proceeding.[224] The opinion explains that "a serious constitutional question under the Fourth Amendment" would be raised *only if* the statute applied to grand jury proceedings. If so, the government's interest in investigating a possible crime would likely not outweigh the witness's liberty interest. The seizure would therefore not be reasonable under the Fourth Amendment. That issue, however, would for some unexplained reason not arise in the case of a witness

217. When initially questioned by the FBI, Mr. Awadallah admitted knowing hijacker Al-Hazmi and another man (presumably Khalid Al-Mihdhar) but denied knowing the other man's name. *Id.* at 108–09. He testified consistently before the grand jury. *Awadallah III*, 202 F. Supp. 2d at 58–59.

218. *Awadallah III*, 202 F. Supp. 2d at 58–59.

219. *Id.* at 59.

220. *Id.* at 76.

221. *Awadallah V*, 349 F.3d 42, 49 & n.4 (2d Cir. 2003).

222. *Awadallah III*, 202 F. Supp. 2d at 76.

223. *Id.* at 58.

224. *Id.* at 76–79.

detained to testify at trial, presumably because this would somehow tip the reasonableness balance in the government's favor.[225]

In the simultaneously-issued *Awadallah IV*, Judge Scheindlin further confused the analysis by treating "probable cause" as a mere standard of proof rather than as a substantive legal notion, just as the *Bacon* court had. *Awadallah IV* held that, even if Section 3144 applied to grand jury proceedings, the indictment against Mr. Awadallah had to be dismissed on the alternative ground that the glaring omissions in the FBI agent's affidavit amounted to a deliberate attempt to deceive the court. The court additionally held that all the evidence against Mr. Awadallah had to be suppressed as the fruit of his illegal arrest.[226]

To determine whether the warrant was illegally obtained, the court adopted the *Bacon* "probable cause" formulation *arguendo*, questioning only whether *that quantum of evidence*—that "standard"—was the correct one:

> Section 3144 is silent as to what standard a court should use to decide whether "the testimony of the person is material" and whether "it may become impracticable to secure the presence of the person by subpoena." One federal court has suggested that the standard should be "probable cause to believe" that these conditions are met. Probable cause, of course, is generally used in the context of authorizing the arrest of a suspected criminal or authorizing a search to obtain evidence of criminal conduct. Whether the same standard should be used to arrest a material witness is open to debate. In any event, for the limited purpose of determining whether the arrest warrant was improvidently issued, I shall apply the probable cause standard.[227]

Thus, having accepted the *Bacon* heresy that the meaning of "probable cause" can change and that "probable cause" describes merely the *weight* of evidence needed, the court held that the warrant was invalid because it was procured by deceit:[228] "[H]ad there been full disclosure, a neutral judicial officer would not have found probable cause to believe that 'it may become impracticable to secure Awadallah's presence by subpoena.'"[229]

In the second part of the decision, which held that all the evidence against Mr. Awadallah was tainted by his illegal seizure, the court abandoned without explanation *Bacon*'s formulation and used the correct Fourth Amendment probable cause analysis:

> In this case, the government does not contend that the agents had probable cause, or even reasonable suspicion, to believe that *Awadallah had committed a crime*. Therefore,

225. *Id.* at 77–78.

226. *Awadallah IV*, 202 F. Supp. 2d 82, 106–07 (S.D.N.Y. 2002).

227. *Id.* at 96–97 (citing *Bacon* and 18 U.S.C. § 3144).

228. *Id.* at 100.

229. *Id.* at 99 (internal brackets and ellipsis omitted).

> the sole question is whether he was seized. If so, the agents violated Awadallah's Fourth Amendment rights.[230]

The court concluded that, under the totality of the circumstances, Mr. Awadallah could not have felt free to ignore the FBI agents and go about his business, and that therefore he was illegally seized.[231]

The court's confused *Awadallah IV* opinion seems to suggest that, while federal agents can arrest an individual with a "material witness" arrest warrant, evidence obtained from a "material witness" seized without such a warrant is subject to suppression under the usual Fourth Amendment analysis.[232] Again, the court failed to appreciate that the meaning of "probable cause" in the Fourth Amendment cannot shift this way without eviscerating the protection from arrests based on mere suspicion that it is meant to guarantee.

While the government appealed Judge Scheindlin's decision, Chief Judge Mukasey, who had issued the warrant for Mr. Awadallah's arrest,[233] severely criticized *Awadallah III* in another case challenging a "material witness" arrest.[234] Pointing out that Judge Scheindlin's interpretation did not resolve any constitutional doubts, he held that Section 3144 applies to grand jury proceedings and that the statute's constitutionality has long been established:

> [T]he *Awadallah* Court appears to have found at least a serious possibility that it is inherently unreasonable to detain a witness for appearance before a grand jury.
>
> There are at least two major flaws in that reasoning. First, . . . construing the statute to exclude grand jury proceedings does not avoid the constitutional problem presented by imprisoning someone who is merely a witness and is not accused of a crime, if indeed doing so presents a constitutional problem. Second, there is a substantial body of case law, including but not limited to Supreme Court case law . . . showing that the constitutional problem discerned by the *Awadallah* court does not exist.[235]

Strikingly, Judge Mukasey's opinion does not so much as mention "probable cause."

On the government's appeal from the *Awadallah* decision, the Second Circuit reversed all of Judge Scheindlin's rulings and approved Judge Mukasey's decision (even though that case was not before the

---

230. *Id.* at 102 (emphasis added).

231. *See id.* at 107.

232. *See id.* ("Because the government does not contend that the agents had *probable cause to believe that Awadallah had committed any crimes*, the seizure of Awadallah was unlawful.") (emphasis added).

233. *Awadallah V*, 349 F.3d 42, 47 (2d Cir. 2003).

234. *In re* Application for U.S. Material Witness Warrant, 213 F. Supp. 2d 287, 289–300 (S.D.N.Y. 2002).

235. *Id.* at 298.

court).[236] On the constitutional question, the Court of Appeals ruled that "the detention of material witnesses for the purpose of securing grand jury testimony has withstood constitutional challenge."[237]

B. Authorities Examined

The *Bacon* heresy's influence is evident in the *Awadallah* litigation as well as in Judge Mukasey's opinion, as *Bacon* is cited in all of these cases.[238] Judge Mukasey and the Second Circuit further suggest that the constitutionality of incarcerating witnesses is supported by certain Supreme Court decisions. In fact, none of the Supreme Court cases on which Judge Mukasey and the Second Circuit relied holds or even suggests that the prolonged detention of a witness in the manner authorized by Section 3144 is constitutional. To the contrary, these cases make clear that the Court has never decided the question and suggest that the practice in fact is unconstitutional.

Both Judge Mukasey and the Second Circuit heavily relied on *Blair v. United States*[239] and *Stein v. New York*.[240] *Blair* merely restated the settled rule that a witness who refuses to give a recognizance may be imprisoned:

> And sections 879 and 881, Rev. Stat. (Comp. St. §§ 1490, 1492), contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison *in default of such recognizance.*
>
> In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide.[241]

Blair, therefore, lends no support to the idea that detaining witnesses innocent of contempt of court is constitutional.

Stein made nothing more than an ambiguous passing reference to material witnesses and was later repudiated and overruled. The petitioners in *Stein* were convicted of felony murder in New York state

---

236. *See Awadallah V*, 349 F.3d at 45 (finding that 18 U.S.C. § 3144 can be applied to a grand jury witness and reinstating the indictment against Awadallah for perjury).

237. *Id.* at 56.

238. *Id.* at 64; *Material Witness Warrant*, 213 F. Supp.2d at 290–91, 298–300; *Awadallah IV*, 202 F. Supp. 2d 82, 96–97 (S.D.N.Y. 2002); *Awadallah III*, 202 F. Supp. 2d 55, 75–76 (S.D.N.Y. 2002).

239. 250 U.S. 273 (1919).

240. 346 U.S. 156 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964).

241. *Blair*, 250 U.S. at 281–82 (emphasis added); *see also* Hurtado v. United States, 410 U.S. 578, 588–89 & n.10 (1973) (holding that incarcerating a material witness, and providing him with nominal compensation, does not violate the Fifth Amendment because the public has an obligation to the government to provide evidence).

court. Claiming their confessions were obtained through physical and psychological coercion, they sought a writ of *habeas corpus* on the ground that the New York courts' procedure for excluding coerced confessions was unfair.[242] In rejecting their contention of psychological coercion, the Court noted in dicta:

> Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness. This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.[243]

Judge Mukasey as well as the Second Circuit interpreted this vague and desultory reference as an unqualified endorsement by the Supreme Court of the arrest and indefinite detention of material witnesses. But that is neither the only possible reading—nor the best reading—of the quoted passage. By stating that a witness could be detained "in the absence of bail," the Court could have meant either that a witness could be detained with no bail being set or that a witness could be detained if the witness neglected or refused to post bail that the witness could afford. The idea that the Court was casually asserting the former proposition is unlikely given the extensive attention the Court later gave the question of whether defendants charged with the most serious crimes could be held with no provision for bail.

In *United States v. Salerno*,[244] a divided Court approved pretrial detentions of criminal defendants under the Bail Reform Act of 1984 only because such detentions were (supposedly) carefully circumscribed:

> The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. *See* 18 U.S.C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.*, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.[245]

If the idea of holding witnesses in pretrial detention without any provision for bail could be blithely asserted in 1953, then the Court's

---

242. *See Stein*, 346 U.S. at 170–76 (arguing, *inter alia*, that the court's jury instructions regarding the requirements of a voluntary confession did not meet the requirements demanded under the Fourteenth Amendment).

243. *Id.* at 184.

244. 481 U.S. 739 (1987).

245. *Id.* at 747 (footnote omitted).

protracted discussion of detaining individuals accused of extremely serious crimes hardly would have been necessary twenty-four years later.[246] It is much more likely therefore that the *Stein* court was referring to the practice of detaining witnesses who committed a contempt of court.

Even if *Stein* had intimated that a witness who could not afford bail could be detained, the suggestion would not have been a decision of the Court. *Stein* did not involve material witnesses in any way. Thus, the one sentence that refers to material witnesses provides no support for the notion that material witnesses can be arrested and detained.[247] Moreover, *Stein* itself was overruled eleven years after it was decided and its reasoning completely repudiated when the Court held that the New York procedures for excluding coerced confessions from trial in fact did not satisfy due process.[248]

Most illuminating on the meaning of *Stein* is the fact that the Supreme Court itself certainly did not believe that *Stein* made the broad pronouncement that Judge Mukasey and the Second Circuit ascribed to it. Just six years after *Stein*, the Court expressly stated in *New York v. O'Neill*[249] that the issue of whether material witnesses could be held without bail had never been decided, and the Court then declined to rule on it. The respondent in *O'Neill* challenged his extradition from Florida to New York to testify as a witness before a grand jury. Florida and New York were among the states that had enacted the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, legislation for the

246. *Stein*, 346 U.S. at 184 & n.26. It is not clear that the detention of witnesses was any more permissible under New York law than under federal law. *See* People *ex rel.* Troy v. Pettit, 19 Misc. 280, 282 (N.Y. Sup. Ct. 1897) ("[H]ad the relator offered to enter into a written undertaking . . . without sureties, it would have been the duty of the magistrate to have accepted the same without committing him to the county jail."). Thus, the *Stein* court's citation to both the New York material witness statute and the former Federal Rule of Criminal Procedure 46(b) is further evidence that the Court was merely making the noncontroversial statement that a witness who refuses to post bail can be incarcerated.

247. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, 937 F.2d 1572, 1581 (Fed. Cir. 1991) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises.").

248. *See* Jackson v. Denno, 378 U.S. 368, 390–91 (1964) (holding that procedures for excluding coerced confessions must be "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession").

249. 359 U.S. 1, 8 (1959).

reciprocal extradition of witnesses.[250] That statute provided that, upon presentation of a certificate from a judge in the requesting state, a judge in the requested state could do one of two things:

> He could have notified the prospective witness of a hearing to determine whether or not the witness should be subpoenaed to testify before the grand jury in New York. On the other hand, in view of the recommendation that the witness be taken into custody, the judge could have directed that the witness be immediately brought before him and then, if the judge was "satisfied of the desirability" that the witness should be placed in custody and delivered to an officer of the State of New York, he could have followed that procedure instead of issuing a subpoena.[251]

Unlike Mr. Awadallah, Mr. O'Neill was never jailed.[252] He was initially released on bond pending a hearing. After the hearing, the Florida Circuit Court judge concluded that the law was unconstitutional for three reasons: 1) it violated the right of ingress and egress across state lines, 2) it required the Florida court to issue an extraterritorial subpoena, and 3) it failed to provide for bail.[253] The Florida Circuit Court characterized the failure to provide bail as "the most serious objection to the constitutionality" of the statute, noting with some alarm that the statute "attempts to authorize any court of record to order a citizen to be arrested, seized and held without bail . . . ."[254] The court found the part of the statute authorizing the detention of witnesses "clearly unconstitutional and void."[255]

On appeal, neither the Florida Supreme Court nor the United States Supreme Court considered whether the failure to provide bail rendered the statute unconstitutional. Rather, both courts considered only the first ground on which the statute was invalidated—*i.e.*, whether the statute discriminated against citizens of states traveling to Florida in violation of the Privileges and Immunities Clause.[256] The U.S. Supreme Court made clear that, if a witness were confined without any provision for bail he or she could meet, the statute might very well violate the Fourteenth Amendment's Due Process Clause (which incorporated the Fourth Amendment's prohibition on unreasonable seizures):

---

250. *See id.* at 3–4 (reversing the Circuit Court's decisions and holding that the statute was unconstitutional); New York v. O'Neill, 100 So.2d 149, 153 (Fla. 1958) (describing the Florida statute).

251. *O'Neill*, 100 So.2d at 153.

252. Also unlike Mr. Awadallah, Mr. O'Neill had been asked to appear voluntarily in New York to testify and had refused. *Id.* at 151.

253. *Id.* at 154–55.

254. *In re* O'Neill, 9 Fla. Supp. 153, 161 (Fla. Cir. Ct. 1956).

255. *Id.* at 162.

256. New York v. O'Neill, 359 U.S. 1, 6–7 (1959); *O'Neill*, 100 So.2d at 154–55.

> The more relevant challenge to the statute invalidated by the Supreme Court of Florida is that it denies due process of law in violation of the Fourteenth Amendment. . . . The Circuit Court of Dade County ruled that the absence of any provision for bail in the procedure of apprehension and delivery violated due process of law. *Since the Supreme Court of Florida expressly refrained from ruling whether the failure of the statute to provide for bail for persons attached and delivered violated either the Florida Constitution or the Fourteenth Amendment, and since silence on bail is not tantamount to proscription of bail, the claim that this silence of the statute is a violation of the Fourteenth Amendment is a hypothetical question which need not now be considered.* We may add that the sole claim before us, as it was the sole claim dealt with by the Supreme Court of Florida, is that the statute is unconstitutional on its face. No claim is before us that the administration of the statute in the particular circumstances of this case violates due process.[257]

O'Neill thus made it clear that the Court was not deciding and had never decided the constitutionality of incarcerating "material witnesses" with no provision for bail that they could afford.[258] Indeed, if the Court had decided that material witness detentions were constitutional, there would have been no reason for it to emphasize in *Hurtado* that "the petitioners do not attack the constitutionality of incarcerating material witnesses . . . ."[259] The Second Circuit was wrong therefore to assert in *Awadallah* that "the detention of material witnesses for the purpose of securing grand jury testimony has withstood constitutional challenge."[260]

Lest any doubt remain, Justice Douglas's dissent in *O'Neill* cements the notion that the Court did not consider the legality of detaining a witness without provision for bail. Focusing, like the majority, mainly on the right of ingress and egress from states, Justice Douglas tellingly wrote:

> The harshness of this procedure is emphasized by a feature of this extradition law on which the Florida Supreme Court has not yet passed. The New York statute gives the witness who is extradited only $5 a day for his maintenance in New York, a sum plainly inadequate in light of today's cost of living.[261]

---

257. *O'Neill*, 359 U.S. at 8 (emphasis added) (citation omitted); *see also O'Neill*, 100 So.2d at 153 ("In the circumstances it seems to be our obligation to decide the constitutionality of Sec. 942.02 . . . whether the procedure be to seize and deliver a witness or to place him under subpoena.").

258. To the contrary, courts have interpreted *O'Neill* as requiring that witnesses be given a hearing to contest their obligation to appear in another state. *See, e.g.*, *In re* Rhode Island Grand Jury Subpoena, 605 N.E.2d 840, 848 (Mass. 1993) (emphasizing witness's right to a "full hearing" guaranteed by *O'Neill*); Vermont v. Emrick, 282 A.2d 821 (Vt. 1971) (stating that extradition of witness is a "drastic procedure" and due process must be satisfied per *O'Neill*). Section 3144 does not provide any analogous safeguard.

259. Hurtado v. United States, 410 U.S. 578, 588 (1973).

260. *Awadallah V*, 349 F.3d 42, 56 (2d Cir. 2003). Interestingly, the *Bacon* court did not mention *O'Neill*. If *O'Neill* in fact held what the Second Circuit claimed it held in *Awadallah V*, the Ninth Circuit would have been expected to cite to it in *Bacon*.

261. *O'Neill*, 359 U.S. at 18 n.6 (Douglas, J., dissenting) (citation omitted).

The cost of living would obviously not have been a consideration had it been suggested to Justice Douglas that Mr. O'Neill would be staying in a prison while in New York. Justice Douglas, like the majority, considered only whether Mr. O'Neill could be legally required to travel to New York. The issue of detaining Mr. O'Neill in a prison—as Mr. Awadallah was—was neither contemplated nor decided.

Fourteen years later, when Justice Douglas confronted a case in which material witnesses were imprisoned without provision for bail, he made it clear that he believed it was unconstitutional to secure the attendance of witnesses with anything more than their personal recognizances. Despite the fact that the issue was not before the Court, Justice Douglas proceeded in *Hurtado*, the case brought by detained Mexican immigrants seeking to recover witness fees, to examine the constitutionality of detaining material witnesses. He determined that the detention of the Mexicans as "material witnesses" violated due process and equal protection:[262]

> It is possible to read former Rule 46(b) as permitting release on personal recognizance. But experience has shown that judges have not so read it. The result, as I indicate in this opinion, is that former Rule 46(b) has borne down heavily on indigents who would be good risks but could not put up the money to buy a bail bond. Former Rule 46(b) as so construed—and as applied in the present case—is therefore *plainly unconstitutional*.[263]

Justice Douglas forcefully concluded that the Court should enjoin the further detention of the petitioners:

> "[N]o man should be denied release (pending trial or judicial review) because of indigence." This principle seems ever clearer and more forceful to me in circumstances where the imprisoned have not been charged with or convicted of a crime. We cannot allow the Government's insistent reference to these Mexican citizens as "deportable aliens" to obscure the fact that they come before us as innocent persons who have not been charged with a crime or incarcerated in anticipation of a criminal prosecution. It is true, of course, that petitioners do not challenge the constitutionality of confining a material witness. But, in their prayer for relief, they seek to enjoin the Government "from any further incarceration of any person under such rule under the present interpretation of 28 U.S.C. § 1821 at one dollar ($1.00) per day total payment." I

---

262. To buttress his argument that the constitutionality of Section 3144 is beyond question, Judge Mukasey added this notation to his opinion:

> Even Justice Brennan's dissent in *Hurtado*, based in part on constitutional considerations, did not question the propriety of imprisoning material witnesses, but maintained that they should be compensated under the statute providing for compensation of witnesses, and that a failure to do so denied those witnesses due process.

In re Application for U.S. Material Witness Warrant, 213 F. Supp. 2d 287, 299 n.6 (S.D.N.Y. 2002). Judge Mukasey apparently did not read the *other* dissenting opinion in the case.

263. *Hurtado*, 410 U.S. at 601 n.2 (Douglas, J., dissenting) (emphasis added). Interestingly, almost a century earlier, the Supreme Court of Minnesota had avoided the constitutional issue by interpreting its state material witness statute in just this way. *See supra* text accompanying notes 182–185.

> conclude that petitioners are entitled to this relief unless they are released on their personal recognizance.[264]

There is no support in any Supreme Court case for the prolonged or indefinite detention of "material witnesses" under Section 3144. On the contrary, Supreme Court case law suggests that the practice is unconstitutional.

The Second Circuit in *Awadallah* also relied on several of its own decisions interpreting the New York state material witness statute. None of these decisions is relevant to the constitutionality of Section 3144 because the New York statute in effect when those cases were decided differed from Section 3144 in two constitutionally significant respects. First, like the early federal material witness statutes, the New York law allowed the jailing of a witness only "upon his neglect or refusal. . . to enter a written undertaking, with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court."[265] This meant that only a witness who committed a contempt of court by refusing to give recognizance or post a bond that he could afford could be imprisoned. Second, the New York statute gave the witness a right to a hearing to contest his or her status as a "material witness."[266] The courts of New York repeatedly expressed doubts as to the constitutionality of detaining a witness who could not afford the bail set and insisted on strict compliance with the statute to prevent suspects from being held as "witnesses":

> Whether constitutional or not, about which we express no opinion, the statute is harsh, and carries interference with personal liberty to an extreme limit. Strict compliance with its provisions should be exacted. Its use for purposes plainly beyond its scope should not be permitted.[267]

Cases since September 11th in which material-witness detainees have challenged the federal government's authority to imprison them have not carefully analyzed the constitutionality of the practice. The courts simply asserted that the constitutionality of the

---

264. *Id.* at 604 (Douglas, J., dissenting) (citation omitted).

265. N.Y. CODE CRIM. PROC. § 618-b (Thompson 1958).

266. The statute provided that the judge could act with respect to a witness only "after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto." N.Y. CODE CRIM. PROC. § 618-b (Thompson 1958).

267. *In re* Prestigiacomo, 255 N.Y.S. 289, 290 (N.Y. Sup. Ct. 1932) (citations omitted); *see also* New York *ex rel.* Fusco (Galgano) v. Ryan, 124 N.Y.S.2d 690, 694 (N.Y. Sup. Ct. 1953) (holding that a witness must be provided counsel for pre-commitment hearing if he so requests and arguing that "in consonance with and in protection of our democratic way of life, we must not permit ourselves to be beguiled into acceptance of the guiding thesis of the cynical totalitarian that 'the end justifies the means' . . . ."); New York *ex rel.* Maloney v. Sheriff of Kings County, 192 N.Y.S. 553, 555 (N.Y. Supp. Ct. 1921) (declaring statute unconstitutional because as amended in 1915 it allowed for sureties to be required even when there was no indication that witness would not honor recognizance).

practice has long been settled. However, none of the authorities these courts invoked in approving these detentions supports the government's claimed power to detain these individuals. On the contrary, the Supreme Court expressly stated as late as 1959 that the question had never been decided, and Justice Douglas would have found it unconstitutional in 1973 had the Court reached the issue.

VI. FOURTH AMENDMENT ANALYSIS

Since September 11th, the Department of Justice has exercised the purported authority to detain individuals for extended and indefinite periods without probable cause to believe they committed a crime. DOJ has repeatedly asserted for itself the power to jail purportedly suspicious people on scant evidence under severe conditions until law enforcement agents were satisfied of their innocence. The federal courts have acquiesced in the practice of jailing "material witnesses" because of the misconception that it has long been permissible. This is not a situation in which the government is merely being heavy-handed; it is a radical and fundamental violation of the Fourth Amendment's most basic protections.

Section 3144 is facially unconstitutional because "no set of circumstances exists under which" it is legitimate to arrest someone who has not committed and is not committing a crime.[268] The Supreme Court has long interpreted the Fourth Amendment as prohibiting arrests not supported by probable cause to believe the arrestee committed or imminently will commit a crime.[269] Accordingly, the

268. United States v. Salerno, 481 U.S. 739, 745 (1987). *Salerno* suggests three arguments independent of the Fourth Amendment that Section 3144 is facially unconstitutional. *Id.* The statute violates procedural due process because it authorizes the government to deprive innocent individuals of their liberty based on arbitrary criteria lacking any relationship to the ends the statute is meant to achieve. *Id.* It violates substantive due process because it requires that those arrested be enjoined from committing any future violation of law, effectively depriving them of the presumption of innocence with respect to any alleged future crimes. *Id.* Finally, it violates the Eighth Amendment Bail Clause because it authorizes conditions of release or detention that are not narrowly tailored to achieve the statute's purpose. *Id.* These arguments are not developed in this Article only because the government's use of the statute for investigatory purposes after September 11th is such an archetypical Fourth Amendment violation.

269. *See* Dunaway v. New York, 442 U.S. 200, 213 (1979) (noting that the "requirement of probabl[e] cause has roots that are deep in our history"); Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (stating that "[t]his Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances show, that the suspect has committed, is committing, or is about to commit an offense"); Gerstein v. Pugh, 420 U.S. 103, 111–14 (1975) (stating that the "Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest"); Johnson v. United States, 333 U.S. 10, 15–17 (1948) (noting that the arrest could only

general rule is that seizures not based on probable cause to believe that the arrestee committed a crime are unreasonable under the Fourth Amendment.[270] While there are some exceptions to that general rule, none of them justifies the detention of innocent witnesses in a criminal case prosecuted by civilian authorities.

Even in those cases in which the Supreme Court has approved seizures on a showing of less than probable cause, it has nearly always required a showing of individualized suspicion of involvement in criminal activity. *Terry v. Ohio*,[271] the first case to permit a seizure on less than probable cause, emphasized the fact that the officer who stopped and frisked the defendant had an objective basis to believe the defendant was about to commit a robbery and might well be armed:

> [T]he story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately hy a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.[272]

The Court also emphasized that *Terry* should not provide an occasion to disregard the usual probable cause standard in cases not justified by similar facts.[273] Thus, even taking *Terry* stops into consideration, the general rule remains that seizures not justified by objective suspicion that the person seized is involved in the commission of a crime are unreasonable under the Fourth Amendment.[274]

In a few cases, the Supreme Court has allowed very brief seizures without individualized suspicion for purposes unrelated to criminal law enforcement. For example, the Court has approved highway checkpoints to intercept illegal aliens[275] and drunk drivers.[276]

---

be lawful if a crime was committed in the presence of the arresting officer or if the officer had reasonable cause to believe the defendant was guilty of a crime).

270. *See* Michigan v. Summers, 452 U.S. 692, 700 (1981) (stating that "every arrest, and every seizure having the attributes of a formal arrest, is unreasonable unless it is supported by probable cause").

271. 392 U.S. 1 (1968).

272. *Id.* at 23.

273. *Id.* at 20 ("[T]he notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context.").

274. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (stating that "a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing").

275. *See* United States v. Martinez–Fuerte, 428 U.S. 543, 566 (1976) (holding that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment").

However, the outcome in those cases depended upon the very brief and minimally intrusive nature of the stop and the idea that automobiles are accorded less protection under the Fourth Amendment than houses or people.[277] These cases in no way support either the arrest or prolonged detention of a "material witness." In fact, the Court has emphasized that even brief, suspicionless stops of automobiles are not permitted "to detect evidence of ordinary criminal wrongdoing."[278] Additionally, the Court has categorically held that individuals cannot be held longer than forty-eight hours without a judicial determination of probable cause that they were involved in a crime.[279] And an individual may never be detained for *any* period of time "for the purpose of gathering additional evidence to justify the arrest," a constitutional ruling that DOJ has circumvented with "material witness" warrants.[280]

The Supreme Court has sanctioned extended deprivations of liberty without probable cause only in a few extreme and controversial circumstances—illustrating how extraordinary the power the government claims under the material witness statute is. Most infamously, the Court approved the relocation during World War II of all persons of Japanese ancestry from their homes on the West Coast to camps pursuant to the President's and Congress's war powers.[281] The *Korematsu* Court reasoned that an individualized inquiry into the loyalty of each Japanese person on the West Coast was not possible and the internment therefore was justified by military necessity.[282] Similarly, in *Ludecke v. Watkins*, the Court held that the petitioner, an "enemy alien," could be arrested and removed from the country without judicial inquiry during a state of war.[283] The Court reasoned

276. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (holding that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*").

277. *See Sitz*, 496 U.S. at 451 (noting that "the measure of intrusion on motorists stopped briefly at checkpoints" is minimal); *Martinez-Fuerte*, 428 U.S. at 557–58 (noting the stop intrudes on rights only "to a limited extent" and "involves only a brief detention").

278. *City of Indianapolis*, 531 U.S. at 41.

279. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) (stating that if an individual does not get a probable cause hearing in forty-eight hours, the government must demonstrate the existence of a bona fide emergency).

280. *Id.* at 56.

281. *See* Korematsu v. United States, 323 U.S. 214, 220 (1944) (noting that under the conditions of modern warfare "the power to protect must be commensurate with the threatened danger").

282. *Id.* at 218–19.

283. 335 U.S. 160, 164, 170 (1948).

that judicial review of the President's wartime powers under the Alien Enemy Act of 1789[284] was barred.[285]

Both *Korematsu* and *Ludecke* were predicated upon the latitude accorded to the Executive Branch in the conduct of war in dealing with potentially dangerous aliens. Section 3144, in contrast, is not a wartime measure that targets dangerous aliens, notwithstanding the fact that DOJ has used the statute to further the investigation of horrific terrorist attacks. Unlike the orders to relocate the Japanese on the West Coast and to remove a German citizen from the United States, "material witness" warrants issued under Section 3144 are ordinary warrants issued by federal district courts. Enacted in 1984, the statute is not a wartime measure but an ordinary statute applicable to all criminal proceedings and reaching American citizens, like Brandon Mayfield and Maher Hawash, as well as aliens, like Mohammed Bellahouel.

Whatever vitality the *Korematsu* and *Ludecke* decisions may have in the context of the war on terrorism, they do not support the prolonged or indefinite detention of witnesses under Section 3144. The pretextual detention of individuals on the basis that they may have information relevant to an investigation but are not themselves dangerous has no basis or precedent.[286] Moreover, in the context of the present war on terrorism, the Court recently retreated from *Korematsu* and held that due process requires that an American citizen held as an "enemy combatant" be given meaningful opportunity to contest that designation.[287] The *Hamdi* Court cited to Justice Murphy's dissenting opinion in *Korematsu* for the proposition that even military claims of the need to detain an individual must be subjected to judicial scrutiny.[288]

VII. CONCLUSION

No federal court, no prosecutor, no agent has the authority to imprison a witness who promises to discharge his or her duty to testify. The prevailing assumption both before and after the terrorist attacks of September 11th that witnesses can be held in prison

284. 50 U.S.C.A. § 21 (2005).

285. *Ludecke*, 335 U.S. at 164, 170.

286. *Cf.* Addington v. Texas, 441 U.S. 418 (1979) (affirming states' power to institutionalize dangerous mentally ill people both to provide care and to protect the community).

287. *See* Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2635 (2004) (considering the constitutional procedures that are owed to an American citizen who is detained on U.S. soil and labeled an "enemy combatant").

288. *Id.* at 2649–50.

without provision of bail they can meet has no legal foundation. It is based on an interpretation of historical practice and of the Constitution's text that is fundamentally and demonstrably flawed. Nonetheless, it has provided the Department of Justice with a means of imprisoning people it deems suspicious as "material witnesses" while it investigates their supposed terrorist ties. Not surprisingly, the information that has surfaced despite DOJ's obsessive efforts to keep the detentions secret indicates that the tactic has been largely ineffective. Nearly all of the "material witness" detainees have been found, like Brandon Mayfield, to have no terrorist ties.

These arrests, which commentators have decried as "abuses" of the material witness statute, are much worse than ill-advised or heavy-handed excesses. They are the very arrests that the Fourth Amendment is meant to bar. Moreover, Section 3144 is a generally applicable criminal statute. So, as long as the misconception of its constitutionality persists, there is nothing to stop DOJ from arresting innocent individuals as "material witnesses" in investigations outside of the terrorism context. Indeed, if DOJ has already done that, there may be no way to know.

At least as disquieting as the government's roundup of innocents is the inadequacy of judicial scrutiny and skepticism that has met the dragnet. The few published accounts of "material witness" detentions since September 11th reveal not only an overreaching Executive, but also a dangerously credulous Judiciary. Unlike prior detentions without individualized probable cause findings, like the internment camps sustained in *Korematsu*, the power to incarcerate that courts are allowing the government under Section 3144 will not be confined by time or circumstance. The prevailing and erroneous belief that so-called "material witnesses" can be detained without bail on the same terms as criminal defendants is a potentially perpetual threat to the Fourth Amendment's most fundamental guarantee.