

# **University of Maryland School of Law**

**Public Law and Legal Theory**

**Accepted and Working Research Paper Series No. 2004-01**

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## **Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment**

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INDEFINITE MATERIAL WITNESS DETENTION WITHOUT PROBABLE CAUSE:  
THINKING OUTSIDE THE FOURTH AMENDMENT

I. Michael Greenberger\*©

INTRODUCTION

*Every day I tell the staff at the Justice Department: "Think anew. The world is changing. What are the ways we can safeguard the American people against attack?" ... I say, "Think outside the box," but I always say, "think inside the Constitution."*

**Attorney General John Ashcroft, speaking to the Associated Press<sup>1</sup>**

The media,<sup>2</sup> legal academics,<sup>3</sup> and the organized bar<sup>4</sup> have quite rightly focused considerable attention on an array of extraordinary law enforcement actions by the Bush Administration in waging its "War on Terrorism." As of this writing at the beginning of January 2004, these high profile issues are now being considered by, *inter alia*, by the various United States Courts of Appeals and by the United States Supreme Court on petitions for certiorari and on the merits. They include: (1) whether a U.S. citizen unilaterally declared by the Executive Branch to be an "enemy combatant," has a right to consult counsel and to judicial review of his status;<sup>5</sup> (2) whether aliens detained indefinitely by the Department of Defense outside the United States as "unlawful enemy combatants" (and thus without the humanitarian protections afforded "prisoners of war" under the Geneva Convention) are forever barred from exercising their treaty right to challenge that punitive status in the United States or elsewhere;<sup>6</sup> (3) whether the Freedom of Information Act obliges the Department of Justice to identify resident aliens secretly arrested and detained in the United States in post-September 11 dragnets;<sup>7</sup> (4) whether the Department of Justice may, by general order, require the otherwise open deportation hearings of such secretly arrested aliens to be held in secret;<sup>8</sup> and (5) whether the President, acting pursuant to, *inter alia*, his Article I War Powers, may deprive a defendant, accused in a federal court of

capital terrorism crimes, access to exculpatory evidence to which he would otherwise be entitled under the Sixth Amendment.<sup>9</sup>

There is yet another important constitutional issue recently addressed by the U.S. Court of Appeals for the Second Circuit which has not received the widespread attention of the cases identified above. It arises out of Attorney General Ashcroft's announcement shortly after the terrorist attacks of September 11, 2001 that the "aggressive detention of material witnesses [was] vital to preventing, disrupting or delaying new attacks."<sup>10</sup> Since that time, the Department of Justice has used the federal material witness statute<sup>11</sup> to arrest numerous individuals and detain them indefinitely in the general prison population for the ostensible purpose of securing future grand jury testimony. These individuals, while held pursuant to the statute, are not charged with any crime; nor, upon their detention, is there any probable cause that they have committed a crime.<sup>12</sup> While the Justice Department's aggressive use of the federal material witness statute may reflect the Attorney General's directive to "think outside the box," the "box" at issue may very well be the Constitution of the United States. Described immediately below are the factual findings, which were uncontested on appeal, in one of the two leading federal district court cases addressing the Justice Department's material witness detention activities. These facts serve to illustrate the constitutionally questionable nature of this practice.

## I. GRAND JURY MATERIAL WITNESS DETENTION

### A. *The Detention of Osama Awadallah*

The following factual findings surrounding Osama Awadallah's initial detention and interrogation were made by Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York.<sup>13</sup> On September 20, 2001 Awadallah — a Jordanian citizen, lawful permanent resident of the United States, and Muslim<sup>14</sup> — woke up and made his way to class at

Grossmont College in San Diego, California.<sup>15</sup> In 1999, he had come to the United States at age 18 to be near his father, three brothers, and stepmother.<sup>16</sup> Since his arrival, he had held many part-time jobs and attended classes.<sup>17</sup> He planned to become a United States citizen like his father and oldest brother.<sup>18</sup>

In the wake of the September 11 terrorist attacks on the World Trade Center and the Pentagon, FBI agents had found the name “Osama” and a phone number written on a slip of paper in the car of one of the hijackers, which was parked in a Dulles Airport parking lot in Northern Virginia.<sup>19</sup> Through a search of phone listings, the FBI matched the number to Osama Awadallah.<sup>20</sup> Awadallah had not used that phone number in over a year.<sup>21</sup> Nevertheless, no less than eight FBI agents arrived at Awadallah’s San Diego apartment on September 20, 2001 to question him regarding his knowledge of the attacks.<sup>22</sup>

When the FBI arrived at Awadallah’s apartment around 10:15 a.m., no one was home.<sup>23</sup> A little over an hour later, Awadallah’s roommate returned.<sup>24</sup> FBI agents approached his roommate and asked if they could question him and search the apartment. He consented to both requests.<sup>25</sup> At about 2:00 p.m., Awadallah arrived home from class to rest and to pray and was greeted by two FBI agents.<sup>26</sup> They asked him if they could question him briefly.<sup>27</sup> He agreed, but when he tried to enter his apartment, the agents prevented him from doing so.<sup>28</sup> Awadallah insisted upon obtaining access to his apartment bathroom “because, as a devout Muslim, he prays five times a day including once at midday ...” and “[b]efore each prayer, [he] washes his mouth, nose, face, head, hands, and feet.”<sup>29</sup> After consulting with each other and checking the apartment first, the FBI agents relented and permitted Awadallah to enter.<sup>30</sup>

Upon entering, “Awadallah realized for the first time that his roommate ... was being interviewed.”<sup>31</sup> Awadallah then tried to use the bathroom in his apartment, but FBI agents

“ordered him to leave [the door] open” while they watched him urinate and wash before prayer.<sup>32</sup> Awadallah and his roommate, also a Muslim, managed to pray, but under the watchful eye of the FBI agents.<sup>33</sup> After Awadallah and his roommate finished praying, the FBI agents asked him to sign a consent form giving the FBI the ability to search his apartment and car.<sup>34</sup> The agents told Awadallah that if he did not sign the consent form, they would get a warrant and would “tear up the home.”<sup>35</sup>

Although Awadallah asked if the agents could interview him in his apartment, the agents insisted that he go to the FBI San Diego office in an FBI vehicle.<sup>36</sup> Awadallah got into the FBI vehicle, but quickly realized he had left his watch in the apartment.<sup>37</sup> He tried to get out of the vehicle, but found the doors were locked.<sup>38</sup> Seeing this, he decided not to ask the agents if he could retrieve his watch.<sup>39</sup>

The agents told him that the questioning would take about a half hour and assured him that they would “do their best” to get him back in time for his 6:00 p.m. class.<sup>40</sup> He “repeatedly expressed that he did not want to miss his computer class.”<sup>41</sup> In spite of their assurances, FBI agents kept him in a locked room at their offices from 3:10 p.m. until 11:00 p.m., questioning him for over six of those hours.<sup>42</sup> Awadallah was “very, very cooperative,” and answered all their questions.<sup>43</sup> The agents told him that “they believed him,” but “to clear the table,” they wanted him to take a lie detector [polygraph] test,” which he agreed to do the next morning.<sup>44</sup> The FBI agents then drove him home.<sup>45</sup>

Sometime after 11:00 p.m., he went to the mosque where he told his brothers what had happened.<sup>46</sup> His brothers advised him not to return for a polygraph test until they had secured a lawyer for him.<sup>47</sup> The next morning, Awadallah called the FBI and told them that he wanted to wait to take the polygraph test until he had a lawyer.<sup>48</sup> The FBI agent, however, persuaded

Awadallah to go through with the test, advising Awadallah that “there [was] no need for anybody to come with [him].”<sup>49</sup> They also told him they “would not bother him anymore” after he took the test.<sup>50</sup> After Awadallah agreed to take the test, FBI agents returned to his apartment and transported him to their offices.<sup>51</sup>

The FBI questioned Awadallah for approximately an hour and a half to two hours, during which they were in communication (outside of Awadallah’s presence) with their legal counsel, an Assistant United States Attorney in New York.<sup>52</sup> After questioning Awadallah during the polygraph test on his knowledge of the September 11th hijackers, the FBI agents accused Awadallah of lying.<sup>53</sup> When Awadallah tried to leave, the FBI agents ordered him not to move.<sup>54</sup> Awadallah requested a lawyer, but the agents refused this request and continued questioning him, stating that they were going to take him to New York and “detain him ‘for one year’ so that they could ‘find out’ more about him.”<sup>55</sup> Awadallah again demanded a lawyer, but the agents responded, “Here you don’t have rights. When you go [to the San Diego Metropolitan Correctional Center] or you go to New York, then you [can] ask whatever you want.”<sup>56</sup> After his questioning, he was arrested as a material witness pending a grand jury investigation of the September 11th terrorist attacks.<sup>57</sup> He was not informed of any constitutional rights at this time.<sup>58</sup>

Awadallah was then sent to the San Diego Metropolitan Correctional Center (“SDMCC”).<sup>59</sup> Because Awadallah’s allegations of abuse during his incarceration, *i.e.*, post-September 21, 2001, were “not material to the issues before the court,” Judge Scheindlin did not make factual findings on disputed matters regarding his confinement.<sup>60</sup> However, she noted that “many” of his allegations regarding treatment during detention were uncontested.<sup>61</sup> Furthermore, a series of widely-publicized United States Department of Justice - Office of the

Inspector General reports issued in 2003 fully corroborated allegations of abuse by September 11 detainees in a nearby detention facilities quite similar to the one in which Awadallah was imprisoned.<sup>62</sup> Even reading Awadallah's claims regarding the conditions of his confinement in a light most favorable to the Government, Judge Scheindlin wrote, "Awadallah bore the full weight of a prison system designed to punish convicted criminals," when he was only a material witness.<sup>63</sup>

Upon his detention in SDMCC, Awadallah's family hired a lawyer, Randall Hamud, who went to the SDMCC on September 21 to speak with his client.<sup>64</sup> The lawyer was denied access to Awadallah, and Awadallah was never informed that his lawyer was at the prison.<sup>65</sup> His lawyer was not able to see Awadallah until the next day.<sup>66</sup> While at the SDMCC, Awadallah was kept in solitary confinement; denied the use of the showers for four days; and was refused soap and toilet paper for two days.<sup>67</sup> When the toilet in his cell backed up and flooded his cell floor, "[t]he correctional facility did not fix the problem for at least two days."<sup>68</sup> Awadallah could not eat while at SDMCC, because "the correctional facility only served him non-*halal* meals," *i.e.*, food that does not comply with Muslim dietary law.<sup>69</sup>

On September 27, Awadallah was transferred to the San Bernardino County Jail ("SBCJ") for one day.<sup>70</sup> While at the SBCJ, Awadallah was forced to strip naked before a female officer.<sup>71</sup> A guard "twisted his arm, forced him to bow and pushed his face to the floor."<sup>72</sup> The SBCJ provided him with only one meal, and it did not satisfy his dietary requirements; thus, Awadallah "only ate an apple the entire day" he was detained at the SBCJ.<sup>73</sup> The next day, September 28th, the government transferred Awadallah to a federal facility in Oklahoma City.<sup>74</sup> There, "a guard threw shoes at his head and face, cursed at him and made insulting remarks about [Islam]."<sup>75</sup>

On October 1, 2001, United States marshals transported Awadallah, shackled in leg irons, to New York City.<sup>76</sup> While in transit, the “marshals threatened to get Awadallah’s brother and cursed ‘the Arabs.’”<sup>77</sup> Once at the Metropolitan Correctional Center in New York (“NYMCC”), he was placed in a room “so cold that his body turned blue.”<sup>78</sup> After a doctor examined him, a guard “push[ed] him into a door and a wall while he was handcuffed, kicked his leg shackles and pulled him by the hair to force him to face an American flag.”<sup>79</sup> This man-handling caused Awadallah’s hand to bleed.<sup>80</sup> When the marshals transported Awadallah, whose hands were cuffed behind his back and bound to his feet, to court the next day, they grabbed his upper arms so hard they bruised.<sup>81</sup> The marshals kicked his left foot until it bled, and “the supervising marshal threatened to kill him.”<sup>82</sup> In the NYMCC, he was “kept in solitary confinement and shackled and strip-searched whenever he left his cell.”<sup>83</sup> He was never assured that his food complied with his dietary needs for the first few weeks of his confinement; therefore, he “refrained from eating any meat, or any food that touched the meat” which resulted in eating little or no food all day.<sup>84</sup> As he was not permitted to use the phone or receive family visitors either at the Oklahoma facility or the NYMCC, Awadallah’s attorney, Hamud, did not know where his client was located until October 1.<sup>85</sup>

Nineteen days after he was first detained in San Diego, Awadallah, while shackled to his chair, finally testified before a grand jury in New York on October 10, 2001<sup>86</sup> and October 15, 2001.<sup>87</sup> In his first grand jury testimony, he denied knowledge of the name of one of the hijackers, Khalid Al-Mihdhar.<sup>88</sup> He was then shown one of his college exam booklets where he had written the name “Khalid” in answer to an exam question asking him to describe in English people he had met.<sup>89</sup> During his second grand jury testimony he tried to recant and explain his confusion on October 10.<sup>90</sup> Eight days later—27 days after he was first detained as a material

witness—the United States filed a complaint against him alleging that he committed perjury by falsely testifying at the grand jury that he did not know the name of one of the hijackers.<sup>91</sup> He was “arrested” on the perjury complaint on October 21 and was indicted on October 31, 2001.<sup>92</sup> Awadallah requested bail three times before being granted it on November 21, 2001.<sup>93</sup> He posted bail on December 13, 2001 and was released after spending a total of eighty-three days in jail.<sup>94</sup> Over two years later, with his perjury charges still in effect, Awadallah remains free, and has fully satisfied his release conditions.<sup>95</sup>

*B. Protection of a Legitimate Government Interest or Pretext?*

It is quite clear that the post-September 11 Justice Department detention of individuals under the federal material witness statute, without probable cause of having committed a crime, to secure grand jury testimony, is now widely practiced within the United States.<sup>96</sup>

The Justice Department argues that the plain language of the federal material witness statute, 18 U.S.C. § 3144, authorizes its lengthy detention of material witnesses pending future grand jury testimony. The statute provides, “[i]f ... the testimony of a person is material in a criminal proceeding, and ... it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person ....”<sup>97</sup> The government points in particular to the breadth of the term “criminal proceeding” under section 3144 to argue that the authority extends not only to arresting and imprisoning material witnesses for criminal trials, but also for grand jury investigations. The government justifies the practice as protecting a legitimate and compelling government interest in the investigation, disruption, and prevention of terrorism, and as necessary to assure the presence of important witnesses, who are likely to flee the jurisdiction or even the country.<sup>98</sup>

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.<sup>99</sup> However, the legitimacy of holding an innocent material witness pending trial is tempered by section 3144's provision of two ameliorative options: release of the material witness on bail, or in the absence of granting bail, a prompt deposition in lieu of detention. Section 3144 provides, "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...."<sup>100</sup> Therefore, a material witness detained pending trial may have his or her deposition taken "within a reasonable period of time" pursuant to Federal Rule of Criminal Procedure 15 (hereinafter Rule 15) in exchange for his or her release.<sup>101</sup> The Government, up until the time it reversed its position before the Second Circuit, contended that Rule 15's express terms do not apply to grand jury proceedings,<sup>102</sup> and therefore, a material witness in a grand jury investigation may be held indefinitely pending the convening of a grand jury, if he or she was not afforded bail.<sup>103</sup>

The fundamental purpose of a grand jury is to protect the accused from "hasty, malicious and oppressive persecution" and to ensure that charges are grounded on reason, not malice or ill will.<sup>104</sup> Yet, if the government can obtain material witness warrants to detain and imprison grand jury material witnesses indefinitely, it can easily sidestep the Fourth Amendment's probable cause requirement. It is clear that the Ashcroft Justice Department detains grand jury material witnesses under harsh and coercive conditions.<sup>105</sup> Facts surrounding the recent arrests of other grand jury material witnesses illustrate that these indefinite and often harsh detentions are part of a tactic to coerce incriminating statements.<sup>106</sup>

The case of Abdallah Higazy has become a classic illustration of this technique. Higazy, an Egyptian national, was detained on a material witness warrant, pending the convening of a grand jury.<sup>107</sup> He was an engineering student attending classes at Brooklyn Polytechnic.<sup>108</sup> On September 11, 2001, he was staying at the Millennium Hilton Hotel, across from the World Trade Center (“WTC”) in New York City, when he was forced to evacuate with the other guests soon after the terrorist attacks on the WTC.<sup>109</sup> Several weeks after the attacks, management conducted an inventory of the still vacant hotel.<sup>110</sup> A security guard for the hotel reported finding a radio transceiver together with Higazy’s passport and a copy of the Koran in Higazy’s room.<sup>111</sup> The guard claimed that all of these items were in the room’s safe, which is provided for guests’ valuables.<sup>112</sup> The radio could be used for air-to-air and air-to-ground communication.<sup>113</sup> Consequently, FBI questioned Higazy, when he returned to the hotel on December 17, 2001 to obtain the belongings he left behind.<sup>114</sup> Higazy denied the transceiver was his, but admitted that he was familiar with such radios, because he had previously served in the Egyptian Air Corps.<sup>115</sup> Hearing this, the Government detained Higazy and petitioned for a material witness warrant pending his testimony before a grand jury.<sup>116</sup> The court granted the petition on December 18, 2001 on the basis of the hotel security guard’s assertion that the radio was with Higazy’s possessions left behind at the hotel and ordered that Higazy be held “for up to ten days for the purpose of securing his appearance before the grand jury.”<sup>117</sup>

To clear himself, Higazy offered to take a polygraph test, to which the Government agreed.<sup>118</sup> However, the polygraph test, given on December 27, 2001, quickly metamorphosed into an interrogation without the presence of counsel.<sup>119</sup> The FBI pressured and threatened Higazy to the point that he believed he had no choice but to confess to owning the radio.<sup>120</sup> At a hearing on December 28, 2001 to review the continued detention of Higazy as a material

witness, the Government presented the confession as evidence that continued detention was necessary.<sup>121</sup> The court ordered material witness detention until January 14, 2002.<sup>122</sup> However, the Government never presented Higazy to a grand jury, but charged him with making material false statements on January 11, 2002, presumably based on his polygraph admission.<sup>123</sup> However, the detention order was vacated on January 14, 2002 — the same day an American pilot went to the Millennium Hilton Hotel to claim his belongings of which the transceiver was one.<sup>124</sup> This revelation prompted the FBI to investigate further.<sup>125</sup> Upon finding that the hotel security guard had lied repeatedly, the Government dropped the charges against Higazy and released him on January 16, 2002 after having detained him in the general prison population for 30 days.<sup>126</sup>

### *C. Conflicting District Court Interpretations of Section 3144*

Prior to the Second Circuit's resolution of the meaning and validity of section 3144,<sup>127</sup> two federal district court judges in the Southern District of New York had issued seemingly inconsistent rulings on the Justice Department's use of the federal material witness statute to hold a witness indefinitely for grand jury proceedings: *United States v. Awadallah (Awadallah III)* and *In re the Application of the United States for a Material Witness Warrant*.<sup>128</sup> Because the Second Circuit draws heavily from the two lower court decisions, each is discussed immediately below and in Parts IV and V of this Article.

The facts underlying *Awadallah III* have already been discussed at length above. It is important to note for this Article's discussion, however, that several district court opinions have been issued in this case. In *Awadallah I*, Judge Scheindlin granted bail to Awadallah, subject to certain conditions, after he had been indicted on perjury charges.<sup>129</sup> In *Awadallah II*, Judge Scheindlin denied the Awadallah's motion to dismiss his perjury charge, but granted his request

for an evidentiary hearing on the admissibility of, *inter alia*, his grand jury testimony.<sup>130</sup> In *Awadallah III*, the court held that Awadallah was unlawfully detained pending his grand jury appearance, because the federal material witness statute does not allow for the arrest of material witnesses pending grand jury proceedings, and therefore, his purportedly incriminating grand jury testimony was not admissible as the fruit of the unlawful detention.<sup>131</sup> The court suggested that if the statute permitted indefinite detention of grand jury material witnesses, it would not survive Fourth Amendment scrutiny.<sup>132</sup> In *Awadallah IV*, the court suppressed virtually all of the Government's evidence for use at Awadallah's perjury trial on grounds that it was seized in violation of the Fourth Amendment.<sup>133</sup> Consequently, Awadallah's eighty-three days in jail resulted in the dismissal of the indictment,<sup>134</sup> until the Second Circuit reversed and remanded the trial court's decision.<sup>135</sup> This Article focuses heavily on the legal rationale in *Awadallah III* and its treatment on appeal in the Second Circuit, but some information also is drawn from each of the four *Awadallah* district court cases.

Less than three months after Judge Scheindlin's decisions in *Awadallah III* and *IV*, Chief Judge Michael Mukasey of the Southern District of New York declined to follow his colleague's reasoning in *In Re the Application of the United States for a Material Witness Warrant* ("*In Re Material Witness Warrant*").<sup>136</sup> In denying the defendant's motion for release or in the alternative, for a deposition in lieu of detention, the court held that the federal material witness statute does in fact apply to grand jury witnesses and is otherwise constitutional.<sup>137</sup> Neither party appealed Chief Judge Mukasey's ruling.

## II. HISTORY OF THE FEDERAL MATERIAL WITNESS STATUTE

A material witness is a non-party who has particular information about a crime that could be helpful to the defense or prosecution.<sup>138</sup> At common law and in courts of equity, a person

designated as a witness was viewed as having a duty to appear in court and could be served with process or a subpoena.<sup>139</sup> The philosophy behind material witness detention has its roots in English law, where every citizen owed a duty to his King.<sup>140</sup> That has evolved in the United States as a duty to the courts.<sup>141</sup> Thus, the policy behind these statutes is to ensure the appearance of material witnesses at trial for the swift and fair administration of justice.<sup>142</sup>

The laws that form the basis of the material witness statute are the Judiciary Act of 1789 and the Bail Reform Act. The Judiciary Act<sup>143</sup> formally recognized the duty of witnesses to appear and testify and required recognizance from material witnesses in criminal proceedings.<sup>144</sup> An 1846 amendment to the Judiciary Act of 1789 further clarified the federal courts' authority to arrest and requires assurances that a witness would appear in a trial for "any criminal cause or proceeding."<sup>145</sup> If a material witness failed to give such assurances, he or she could be confined until his or her testimony was given.<sup>146</sup>

Congress enacted the Bail Reform Act of 1966<sup>147</sup> to "modernize the pretrial release system in [the] federal courts."<sup>148</sup> The Act continued to authorize courts to set bail for material witnesses, but with the added caveat that a material witness unable to post bail could not be detained if his or her testimony could be adequately secured by deposition.<sup>149</sup> However, Congress disallowed the detention of material witnesses if their testimony could "adequately be secured" by deposition and "further detention [was] not necessary to prevent a failure of justice."<sup>150</sup> Congress amended the Bail Reform Act again in 1984 to clarify the authority of the courts in making pretrial release decisions.<sup>151</sup> The Federal Rules of Criminal Procedure also were amended in 1966 and 1984 to reflect the Bail Reform Act and subsequent amendments thereto.<sup>152</sup> With the exception of a change that restored the explicit power to arrest material witnesses, the federal material witness statute was virtually unmodified in 1984.<sup>153</sup> In passing

the 1984 amendments to the Bail Reform Act, Congress made it clear that “whenever possible” material witness should not be detained, even those so unreliable that bail could not be granted, if his or her testimony could be secured by deposition.<sup>154</sup>

Although detention of material witnesses has been practiced in the United States since 1789, the federal government engaged in the practice before September 11 primarily for detaining witnesses for criminal trials. In that long history, the federal material witness statute has never been challenged under the Fourth Amendment to the United States Constitution.<sup>155</sup> One critical reason that the statute has escaped a Fourth Amendment unreasonableness analysis may very well be that any arrests and imprisonments made pursuant to the statute have been tempered by the granting of bail, or in lieu of bail, the taking of a prompt deposition to preserve the witness’ testimony for trial.<sup>156</sup> The relatively rare use<sup>157</sup> of the federal material witness statute to detain a witness pending the convening of a grand jury is evidenced by the fact that there is only one pre-September 11 case, *Bacon v. United States*,<sup>158</sup> that meaningfully addresses the constitutionality of imprisoning a grand jury material witness in the absence of probable cause under the Fourth Amendment.

### III. BACON V. UNITED STATES

#### *A. Facts and Procedural History*

On April 22, 1971, a United States District Judge for the Western District of Washington issued a material witness arrest warrant for Leslie Bacon solely on the basis of the prosecution’s affidavit that summarily alleged she would not respond to a subpoena to testify before a grand jury and would try to flee the court’s jurisdiction.<sup>159</sup> The warrant set bail for \$100,000.<sup>160</sup> Pursuant to the warrant, FBI agents arrested her and served her with a grand jury subpoena in the District of Columbia on April 27.<sup>161</sup> At the removal hearing before the United States District

Court for the District of Columbia on April 28, she moved to quash the arrest warrant or, in the alternative, to reduce bail.<sup>162</sup> The district court denied her motion and ordered her transfer to the state of Washington.<sup>163</sup> Although she appeared before a grand jury in the state of Washington on April 30, May 1, and May 2, Bacon refused to answer questions, and a contempt order was entered against her.<sup>164</sup> Bacon filed a petition for a writ of habeas corpus on the grounds, *inter alia*, that her arrest and incarceration without probable cause and the imposition of \$100,000 bail were invalid.<sup>165</sup> The court in the Western District of Washington denied the petition, and Bacon appealed to the Ninth Circuit.<sup>166</sup>

### *B. Ninth Circuit's Holding and Reasoning*

*1. Grand Jury Proceedings as Criminal Proceedings.*—After first establishing as a general matter that an uncooperative material witness may be arrested and detained under the then extant federal material witness statute and Rule 46(b) (governing release from custody), the Ninth Circuit addressed the more specific question of whether the statute's and rule's reference to "criminal proceedings" included within their scope grand jury proceedings. The *Bacon* court answered affirmatively by first reasoning that the authorizing legislation for the Federal Rules of Criminal Procedure stated, "[t]he Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice and procedure with respect to *any or all proceedings prior to and including verdict* ... in criminal cases," and therefore, the term "criminal proceedings" must include grand jury proceedings.<sup>167</sup> The court then concluded that, in promulgating the Rules, the Supreme Court expressly exercised its authority to the fullest based on Rule 2, which states, "[t]hese rules are intended to provide for the just determination of *every criminal proceeding*."<sup>168</sup> Finally, the Ninth Circuit noted that other rules expressly apply or have been interpreted to apply to grand jury proceedings.<sup>169</sup> Specifically, Rule 6 "authorizes

the summoning of grand juries and establishes procedures to govern their operation,” and Rule 17 provides for the subpoena power in both criminal trials and grand jury investigations.<sup>170</sup> Accordingly, it concluded that the term “criminal proceedings” as used throughout the Rules must apply to grand jury proceedings.<sup>171</sup>

2. *Constitutionality of Bacon’s Arrest and Detention.*—Ms. Bacon argued that, even if as a general matter the federal material witness provision’s reference to “criminal proceedings” includes grand jury matters, the statute and accompanying rule are unconstitutional on their face, because, *inter alia*, imprisoning a material witness without probable cause violates the Constitution.<sup>172</sup> However, the Ninth Circuit refused to decide the facial attack on these provisions, because Ms. Bacon had not properly briefed the issue.<sup>173</sup>

3. *Validity of the Arrest Warrant and Custody Order.*—Although the Ninth Circuit did not address the facial constitutionality of arresting and detaining material witnesses pursuant to the federal material witness statute or Rule 46(b), it did rule that the issuance of a material witness arrest warrant *on the facts of that case* violated the Fourth Amendment.<sup>174</sup> In so doing, the Ninth Circuit determined that *any* material witness arrest and detention, whether for trial or for grand jury, must be supported by evidence of impracticability, *i.e.*, “sufficient facts must be shown to give the judicial officer probable cause to believe that it may be impracticable to secure the presence of the witness by subpoena. *Mere assertion will not do.*”<sup>175</sup> The court found the summary evidence presented by the Government in its affidavit seeking the arrest of Ms. Bacon was not sufficient to conclude that she would be likely to flee.<sup>176</sup> Thus, the Ninth Circuit held that the warrant and subsequent arrest were unreasonable under the Fourth Amendment, and therefore, invalid *as applied* to the specific circumstances of Bacon’s case.<sup>177</sup>

#### IV. UNITED STATES V. AWADALLAH

*Awadallah III* is the first case since *Bacon* to address whether the federal material witness statute applies to grand jury witnesses. Like the Ninth Circuit, the *Awadallah III* court had to determine whether the term “criminal proceeding” in the statute included grand jury proceedings.<sup>178</sup> Also like the Ninth Circuit, Judge Scheindlin acknowledged that the term on its face created “some uncertainty.”<sup>179</sup> However, unlike the Ninth Circuit, Judge Scheindlin declared that the structure of the statute itself clarifies any ambiguity found in section 3144.<sup>180</sup> She stated, “When construed in context, the phrase ‘criminal proceeding’ in section 3144 could not be clearer,”<sup>181</sup> *i.e.*, it does *not* apply to grand juries.

##### A. *The Bail Reform Act and the Material Witness Statute*

1. *Language and Structure.*—To develop the statutory context upon which she relied, Judge Scheindlin focused on the federal material witness statute’s key words: “If it appears from an affidavit filed by a *party*, that the testimony of a person is *material* in a *criminal proceeding*, and it is shown” that it could be “impracticable” to secure his testimony via subpoena, the witness may be detained according to “the provisions of *section 3142*.”<sup>182</sup> The court initially concentrated on the word “party,” a term which Judge Scheindlin concluded plainly relates to an adversarial process where at least two opposing parties exist.<sup>183</sup> She reasoned further that since grand jury proceedings are investigative in nature and not adversarial, no “party” exists until the grand jury has completed its investigation and returned an indictment.<sup>184</sup> Therefore, Judge Scheindlin concluded that section 3144’s reference to a “party” makes clear that it is not applicable to grand jury proceedings.<sup>185</sup>

She also found section 3144’s applicability to “material” witnesses instructive.<sup>186</sup> She noted that, in a trial context, a court may easily determine “materiality” by examining all the

evidence presented.<sup>187</sup> However, she explained that a “materiality” determination cannot be made in the context of grand jury investigations, because they are secretive in nature.<sup>188</sup> Courts cannot usually make inquiries into such proceedings.<sup>189</sup> Consequently, to determine whether a grand jury witness was “material,” a judge would simply have to rest upon the bald assertions of a government agent, thereby essentially abdicating a judicial responsibility.<sup>190</sup> She therefore found that section 3144’s reference to a “material witness” made it clear that the statute did not address grand jury matters.<sup>191</sup>

Furthermore, Judge Scheindlin noted that section 3144 expressly incorporates section 3142.<sup>192</sup> Section 3142 governs “Release or detention of a defendant *pending trial*.”<sup>193</sup> Indeed, she noted that factors listed in section 3142 to be weighed when making detention determinations do not apply to grand jury witnesses.<sup>194</sup> Section 3142 requires an inquiry into the “nature and circumstances” of the charges; the “weight of the evidence” against the person charged; the accused’s “history and characteristics;” and the type and degree of danger posed if the court released the person charged.<sup>195</sup> She concluded that applying these factors to a grand jury context would be like trying “to fit a square peg into a round hole.”<sup>196</sup> Clearly, the first, second, and fourth factors do not apply to a material witness, because a witness has not been *charged* with any crime—he or she has only *observed* the commission of a crime.<sup>197</sup> Since a judge cannot apply three of the four factors to a material witness in the grand jury context, Judge Scheindlin found yet another interpretive “clue” showing that section 3144 does not apply to grand jury proceedings.<sup>198</sup>

Finally, the judge noted that the federal material witness statute is encompassed within the entire Bail Reform Act,<sup>199</sup> and she found no reference to grand jury proceedings within the entirety of that Act.<sup>200</sup> While examining section 3141, a part of the Bail Reform Act that governs

the release of individuals, the court stated the “only two situations” where a judicial officer could release or detain a person was “pending trial” or “pending sentence or appeal.”<sup>201</sup> The court concluded that neither situation was broad enough to include grand jury proceedings.<sup>202</sup> Section 3146, another pertinent section of the Act, punishes those who fail to appear in court as a defendant or material witness,<sup>203</sup> but the court noted a grand jury has “never been viewed as a ‘court.’”<sup>204</sup> Again, Judge Scheindlin concluded that, when section 3144 was construed as a part of the much larger Bail Reform Act, the federal material witness statute could not apply to grand jury proceedings.

2. *Legislative History.*—Turning to legislative history of the Bail Reform Act, the “bedrock of the current material witness statute,”<sup>205</sup> the *Awadallah III* court recognized that virtually all legislative references to the federal material witness statute focused on how to secure the appearance of material witnesses for trial, not for grand jury proceedings.<sup>206</sup> Judge Scheindlin noted that the only legislative reference to the application of the material witness statute to grand jury proceedings is found in a report submitted to the Senate criticizing the entire federal material witness statute as being unconstitutional.<sup>207</sup> She also noted that the commentaries published on the material witness statute before and after its enactment in 1966 only discussed the practice of detaining material witnesses pending trial, not for grand jury proceedings.<sup>208</sup>

The court was further impressed by the fact that when the Bail Reform Act was amended in 1984, only two changes were made to the federal material witness statute: judicial officers gained the explicit authorization to issue arrest warrants for material witnesses, and they could order the detention of a material witness if no conditions of release would assure the witness’

appearance.<sup>209</sup> Neither change, she concluded, gave the Government authority to apply the federal material witness statute to grand jury witnesses.<sup>210</sup>

### *B. Federal Rules of Criminal Procedure*

The *Awadallah III* court also reviewed the two rules, as they were worded at the time of Awadallah's detention, expressly relating to the federal material witness statute: Rule 15 (governing depositions) and Rule 46 (controlling the release from custody prior to trial).<sup>211</sup> If a deposition is sought by the material witness, and the judge allows it, section 3144 demonstrates a strong bias for the release of a material witness after the government takes the deposition,<sup>212</sup> unless of course, probable cause develops through the deposition to arrest the witness on criminal charges. However, the Government argued before Judge Scheindlin that it was not required to take Mr. Awadallah's deposition under the statute and could detain him indefinitely, because Rule 15 expressly applies to depositions in the pre-trial *and not the grand jury context*.<sup>213</sup> Agreeing with the Government's reading of the plain language of Rule 15,<sup>214</sup> she reasoned that, by applying its deposition reference exclusively to the pre-trial context, Congress could not have intended the material witness statute to apply to grand jury witnesses.<sup>215</sup> She said the differences between grand juries and pretrial proceedings were too "critical" and too "obvious" for Congress to have meant otherwise.<sup>216</sup> As for Rule 46, the court viewed this rule's express reference to "release prior to trial" as further convincing evidence that the statute only applies to witnesses held for trial, not for grand jury proceedings.<sup>217</sup>

### *C. Bacon Distinguished*

The *Awadallah III* court acknowledged that the only interpretive authority for the proposition that the federal material witness statute can be used to detain grand jury material witnesses is the Ninth Circuit's decision in *Bacon*.<sup>218</sup> The court noted, however, that *Bacon*, as a

Ninth Circuit decision, was not binding on the Southern District of New York.<sup>219</sup> Second, the *Awadallah III* court concluded that *Bacon's* discussion about whether the federal material witness statute applies to grand jury witnesses was *dicta*,<sup>220</sup> because it was wholly unnecessary to *Bacon's* ultimate holding that under the circumstances of that case, her arrest was unconstitutional.<sup>221</sup> Furthermore, the *Bacon* court's reliance on the fact that Rules 2, 6, and 17 specifically apply to grand juries necessitates a finding that Rule 46 must also apply to grand juries<sup>222</sup> was "preposterous because it would lead to the conclusion that [every Federal] Rule[] of Criminal Procedure...extend[s] to grand juries."<sup>223</sup> Indeed, she noted that, while making its own contextual argument based on, *inter alia*, Rules 2, 6, and 17, the Ninth Circuit failed to conduct a contextual analysis of critical words within the federal material witness statute itself such as "party" and "material," which strongly suggest it does not apply to grand juries.<sup>224</sup>

#### *D. Constitutional Considerations*

The *Awadallah III* court held that even if a possible reading of the federal material witness statute suggested applying it to grand jury witnesses, the dubious constitutional result would preclude the court from that interpretation.<sup>225</sup> Noting that the test for reasonableness of a seizure under the Fourth Amendment requires balancing the nature and quality of the intrusion against the importance of the governmental interest at stake,<sup>226</sup> the *Awadallah III* court pointed out that a grand jury witness who is detained loses the right to liberty in order to aid an *ex parte* investigation of criminal activity, which could be triggered by mere "tips" or "rumors."<sup>227</sup> In the context of arresting and detaining a material witness prior to criminal trial, the court explained that the statute is objectively reasonable, because in the absence of bail, the deposition provision in the federal material witness statute achieves a reasonable balance between society's interest in enforcing the law, the defendant's Sixth Amendment right to confront witnesses against him, and

the material witness' liberty interest.<sup>228</sup> That is, the government can detain a witness who might otherwise flee long enough to conduct a prompt deposition, as long as the deposition will adequately capture the material witness' testimony, and release would not cause a "failure of justice."<sup>229</sup> However, this balance is eviscerated when the material witness statute is applied to grand jury witnesses.<sup>230</sup> Because she agreed with the Government that Rule 15, as it existed at the time of Awadallah's arrest,<sup>231</sup> did not afford a grand jury material witness the right to a deposition in lieu of incarceration, she concluded that there is no counterbalancing factor.<sup>232</sup> Under *Bacon*'s reading, grand jury witnesses can be held indefinitely like regular prisoners on the basis of a "tip" or "rumor."<sup>233</sup> The court determined that this lack of a reasonable balance would make the federal material witness statute unconstitutional if applied to grand jury witnesses.<sup>234</sup>

The court emphasized that the unreasonableness of the seizure was aggravated by the harsh nature of the detention in *Awadallah III*.<sup>235</sup> Judge Scheindlin focused on the Supreme Court's explanation in *Terry v. Ohio*<sup>236</sup> that the government has an interest in "effective crime prevention and detection" that may justify temporary seizure, but a detention must be "reasonably related in scope to the circumstances which justified the interference in the first place."<sup>237</sup> In *Awadallah III*, she found that Awadallah's austere imprisonment as a high-security inmate was well outside the scope of the necessities of the investigation.<sup>238</sup> The court further observed that "[i]n our society liberty is the norm and detention without trial is the carefully limited exception" but interpreting section 3144 to apply to grand jury witnesses would make "detention the norm and liberty the exception."<sup>239</sup>

## V. IN RE MATERIAL WITNESS WARRANT

Chief Judge Mukasey of the Southern District of New York parted company with Judge Scheindlin in *In re Material Witness Warrant* by holding that the federal material witness statute does apply to grand jury witnesses.<sup>240</sup> In analyzing Chief Judge Mukasey's decision, it must be noted that the facts were not as well developed as those in *Awadallah III*. The record in *In re Material Witness Warrant* was sealed pursuant to Rule 6(e), which provides for secrecy of grand jury proceedings.<sup>241</sup> However, Judge Mukasey revealed that the material witness in his case was already being held by the Immigration and Naturalization Service on a deportation order when the federal prosecutors obtained a material witness warrant and took custody of him.<sup>242</sup> Thus, unlike *Awadallah*, the material witness before Chief Judge Mukasey had not been removed from his regular civilian routine to be incarcerated pending the convening of a grand jury.<sup>243</sup> Citing the recent ruling in *Awadallah III*, the material witness sought to quash his warrant before Chief Judge Mukasey and enforce his deportation order principally by arguing that section 3144 does not apply to grand jury witnesses.<sup>244</sup> In the alternative, the material witness requested that his deposition be taken pursuant to section 3144 and Rule 15 in lieu of incarceration pending the convening of a grand jury.<sup>245</sup>

### A. Bacon Analysis

In finding that the federal material witness statute applies to grand jury proceedings, Chief Judge Mukasey disagreed with the *Awadallah III* court's assessment that *Bacon's* discussion of the scope of the federal material witness statute was merely *dictum*.<sup>246</sup> He ruled that the Ninth Circuit's application of the federal material witness statute applied to grand juries was a critical step in its ultimate finding that the Government failed to make a sufficient showing of impracticability to support the warrant for grand jury testimony.<sup>247</sup> Chief Judge Mukasey reasoned:

If the statute did not authorize issuance of a warrant for the arrest of a grand jury witness, there would have been no occasion for the *Bacon* Court to consider whether the government had made the required showing that it was impracticable to secure petitioner's attendance before the grand jury without such a warrant.<sup>248</sup>

In the Bail Reform Act Amendments' legislative history, Chief Judge Mukasey also found what he believed to be dispositive evidence that the federal material witness statute applied to grand jury proceedings.<sup>249</sup> He noted that the *Awadallah III* court had overlooked a footnote in a Senate Judiciary Committee report for the enactment of the Bail Reform Act Amendments in 1984 that expressly cited *Bacon* for the proposition that the statute applies to grand jury proceedings.<sup>250</sup> The court stated, "[g]enerally, when Congress enacts a statute that has been interpreted by the courts, it is 'presumed to be aware of ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'"<sup>251</sup> The court found this legislative footnote to be conclusive evidence of Congress' intent to extend the federal material witness statute to grand jury witnesses.<sup>252</sup>

#### *B. Plain Meaning of Section 3144*

Having concluded that *Bacon*'s ruling, and the congressional reference to it, was dispositive, Chief Judge Mukasey went on to attack the notion that the statute's reference to the term "criminal proceeding" was ambiguous.<sup>253</sup> He read the term "criminal proceeding" as self-evidently comprehensive enough to include grand jury proceedings.<sup>254</sup> To support this conclusion, he cited the fact that the federal material witness statute appears in Title 18 of the United States Code, which also contains the statutory provisions governing grand jury proceedings.<sup>255</sup> The court also found dispositive (as had the Ninth Circuit in *Bacon*) that Rule 2 provides "the rules are 'intended to provide for the just determination of every criminal proceeding.'"<sup>256</sup> Finally, based on a plain reading of the statute, Chief Judge Mukasey concluded that the reach of Rule 46, which expressly refers to section 3144, is not limited to trial

witnesses only.<sup>257</sup> The court also supported its broad reading of the term "criminal proceeding" by noting that other similar criminal statutes using that term have been read to include grand jury proceedings.<sup>258</sup> The court noted that cases reaching the opposite result involved statutes wholly different from the federal material witness statute.<sup>259</sup>

Chief Judge Mukasey also challenged *Awadallah III*'s reading of the terms "party" and "material" within section 3144 to find "criminal proceedings" do not include grand jury proceedings.<sup>260</sup> He argued that the word "party" in the federal material witness statute can apply self-evidently to "any party of interest," not just a party to an adversarial proceeding.<sup>261</sup> The court took further issue with the *Awadallah III* court's conclusion that a materiality determination cannot be made by a judge exclusively on the basis of the prosecution's description of the secret grand jury proceeding.<sup>262</sup> He cited three decisions determining that evidence or a witness' testimony were material based on the representation of the prosecutor alone.<sup>263</sup> He also noted that judges commonly make materiality evaluations when deciding whether to issue subpoenas based on one party's representation.<sup>264</sup>

### *C. The Federal Rules of Criminal Procedure*

Most important for resolving the constitutional conundrum raised by arresting and indefinitely detaining material witnesses without probable cause pending a grand jury proceeding is Chief Judge Mukasey's handling of the question whether such a witness is entitled to a prompt deposition in lieu of incarceration. Again, section 3144 expressly provides that a deposition pursuant to Rule 15 is available to a material witness whose appearance at the "criminal proceeding" may otherwise be "impractical."<sup>265</sup> As shown above, Judge Scheindlin agreed with the Government's argument before her and found that Rule 15's express terms make it applicable

only to a pre-trial (and not a grand jury) setting.<sup>266</sup> Chief Judge Mukasey equivocates on this issue, finding that the language in Rule 15 points in both directions:

[The] text [of Rule 15], referring as it does to taking a deposition to preserve testimony “for use at trial,” to a “written motion of the witness . . . upon notice to the parties,” to the defendant’s attendance, and to “examination and cross-examination” shows that those who drafted the rule contemplated use of the deposition at a trial or in some hearing attended by both parties. *On the other hand, just as section 3144 refers to section 3142 as the standard for setting bail for material witnesses, even though several of the provisions of section 3142 plainly apply only to criminal defendants, it is not inconceivable that a deposition in aid of a grand jury proceedings might be taken pursuant to Rule 15, using those provisions of the Rule that would apply.*<sup>267</sup>

Indeed, elsewhere in the opinion, Chief Judge Mukasey reasons that the very rule dealing with bail eligibility—Rule 46(g)—applies to grand jury witnesses subject to arrest, and it therefore “suggests that the remedy of testimony by deposition might be available to a grand jury witness when, for example, the grand jury before whom the witness is to testify cannot convene promptly.”<sup>268</sup>

Despite his tantalizing suggestions that Rule 15 may be read to afford a grand jury witness the right to a deposition in lieu of incarceration, Chief Judge Mukasey, for a whole host of reasons, concluded, “I need not decide whether Rule 15 is elastic enough to authorize a deposition in aid of a grand jury investigation.”<sup>269</sup> Perhaps the most convincing of those reasons was that the material witness in his case had never sought to be released on bail, thereby not squarely raising the issue whether his detention could be shortened by taking his deposition.<sup>270</sup> The failure to seek any release is wholly understandable, because the material witness before Chief Judge Mukasey was otherwise properly being detained subject to his deportation.

#### *D. Constitutional Analysis*

Unlike the *Awadallah III* court, Chief Judge Mukasey perceived no serious constitutional impediments with the federal material witness statute as applied to grand jury witnesses.<sup>271</sup> He

found two flaws in the *Awadallah III* court's Fourth Amendment analysis of the statute as applied to grand jury witnesses. First, he reasoned that the *Awadallah III* court's Fourth Amendment concerns about the reasonableness of detaining grand jury witnesses under the material witness statute would not disappear if grand jury witnesses were excluded from the reach of the statute, *i.e.*, material witnesses held for trial without probable cause would still have a Fourth Amendment claim.<sup>272</sup> However, this analysis fails to recognize that in a criminal trial setting, the material witness has the clear option of being deposed in lieu of detention, whereas in a grand jury investigation, the Government's position at that time was that a material witness may did not have this option. Again, in the history of the federal material witness statute, there has been no occasion to review lengthy material witness incarcerations pending the convening of a grand jury under the Fourth Amendment, probably because of the "safety valve" of affording a prompt deposition of the material witness to secure their trial testimony. As noted above, Judge Scheindlin found that the deposition option was not open to a grand jury material witness, and so her constitutional analysis confronted the constitutionality of a lengthy material witness incarceration in its starkest form.<sup>273</sup> Indeed, Chief Judge Mukasey's ruling that the deposition issue as applied to grand jury witnesses was not properly before him meant that he issued his Fourth Amendment ruling in the context of a detainee who, for all intents and purposes, had not challenged his incarceration. Under these circumstances, it was easier to find no Fourth Amendment violation.

Second, Chief Judge Mukasey's supported his reading of section 3144 as being consistent with the Fourth Amendment by citing case law supporting the reasonableness of detaining a witness to secure his or her testimony.<sup>274</sup> Citing Supreme Court precedent, he stressed the importance placed on grand jury testimony in federal jurisprudence and noted the duty of every

citizen “to disclose knowledge of crime.”<sup>275</sup> He also pointed out that the Second, Sixth, Eighth and Ninth Circuits have not found a constitutional problem with the detention of grand jury witnesses.<sup>276</sup> Yet, none of these cases squarely address the constitutionality of the federal material witness statute under the Fourth Amendment. Chief Judge Mukasey noted that several decisions have applied the federal material witness statute to grand jury witnesses.<sup>277</sup> The problem with these cases is that they do not squarely address the issue of whether section 3144 applies to grand jury witnesses nor do they address Fourth Amendment concerns under these circumstances. Because *In re Material Witness* was not appealed, a division remained within the Second Circuit until that appellate court decided Awadallah’s appeal.

#### VI. SUMMARY AND ANALYSIS OF “CONFLICTING” DISTRICT COURT OPINIONS

It is tempting to conclude, as have many commentators, that Judge Scheindlin’s decision in *Awadallah III* and Chief Judge Mukasey’s decision in *In re Material Witness Warrant* are irreconcilably in conflict and that the Second Circuit would have to choose the approach in one of these cases over the other.<sup>278</sup> After all, Judge Scheindlin found that the federal material witness statute does not apply to grand jury proceedings.<sup>279</sup> Chief Judge Mukasey found that it did.<sup>280</sup>

Judge Scheindlin also found the Ninth Circuit’s *Bacon* ruling that the federal material witness statute applied to grand jury proceedings to be unpersuasive, because it was *dictum*, *i.e.*, unnecessary to *Bacon*’s ultimate holding that the grand jury material witness arrest warrant did not show with requisite constitutional specificity the likely unavailability of the witness in that case.<sup>281</sup> Chief Judge Mukasey, on the other hand, found *Bacon*’s pronouncement that the federal material witness statute applied to grand jury proceedings to be vital to the Ninth Circuit’s holding that the grand jury material witness warrant there lacked constitutional specificity.<sup>282</sup> He

further found *Bacon* to be in some significant sense “controlling” because, even though decided by the Ninth Circuit, it was later cited approvingly by a Senate Judiciary Committee report during the 1984 amendment to the very statute at issue.<sup>283</sup>

Judge Scheindlin further concluded, if the federal material witness statute were to apply to grand jury proceedings, it would violate the Fourth Amendment, because it would allow lengthy incarceration without a showing of probable cause that a crime has been committed.<sup>284</sup> In so doing, she determined, in agreement with the Government’s argument before her, that the statute’s ameliorative reference to a deposition in lieu of incarceration did not apply to the investigative *ex parte* grand jury process.<sup>285</sup> Chief Judge Mukasey found no such constitutional problem, but was considerably aided in that result, *inter alia*, by not closing the door on the prospect of considerably shortening the detention of an otherwise innocent grand jury witness through a deposition.<sup>286</sup> He thought that Rule 15 could plausibly be read, especially in light of Rule 46(g), to afford a grand jury material witness the right to a deposition tailored to the peculiar nature of the grand jury context.<sup>287</sup> However, he avoided a determination on the issue by stating that it had not been properly raised in his case.<sup>288</sup>

Yet, if Chief Judge Mukasey was right about the availability of a prompt, court-ordered deposition under Rule 15 to ameliorate an otherwise lengthy and possibly coercive detention of a grand jury material witness, that would resolve an otherwise seemingly irreconcilable conundrum between the legitimate interests of the material witness and of the government. On the one hand, the lengthy imprisonment of what might very well be otherwise innocent persons pending the convening of a grand jury raises, as Judge Scheindlin found on the facts of *Awadallah III*, serious Fourth Amendment questions. Conversely, the government’s concern that a grand jury material witness might flee the jurisdiction (or the country) before the grand jury

testimony can be secured is also worthy of consideration. These conflicting tensions could be resolved in the context of holding a material witness without probable cause for purposes of a grand jury by the express availability of securing that testimony by a prompt deposition appropriately tailored to the peculiarities of grand jury proceedings under Rule 15.

If a prompt deposition had been available to Awadallah, the prospect of his lengthy and almost certainly coercive imprisonment as a material witness would have been eliminated. Leaving to the side the strength of his perjury charge, if Awadallah had testified at a prompt deposition in the same allegedly untruthful manner he testified before the grand jury, the Government could have criminally charged and detained him on the basis of his deposition testimony. Moreover, the deposition testimony would not have been tainted by a highly questionable incarceration, which in the final analysis was the principal basis for Judge Scheindlin's suppression of the evidence of, *inter alia*, perjury that the Government wished to use against him.

The question of whether the federal material witness statute's reference to "criminal proceedings" includes grand jury proceedings is doubtless one of substantial ambiguity. The attempts of the *Bacon*, *Awadallah III*, and *In re Material Witness Warrant* courts to resolve that ambiguity by reference to statutory "context" and legislative history was based on well established rules of statutory construction, but the use of those rules were clearly wielded in a highly result-oriented fashion. In terms of "real world" practicalities, Judge Scheindlin's decision is doubtlessly correct on the abhorrent facts of that case, but it does not, as a general matter, accommodate what may be a legitimate and compelling governmental concern: that a grand jury material witness may flee the jurisdiction or the country if his or her testimony is not secured. Under her holding that section 3144 never applies to grand jury proceedings, the

government can never secure the testimony of a witness whose appearance at the grand jury proceeding is questionable. If Rule 15, however, allows for a pre-grand jury deposition, as Chief Judge Mukasey suggested, then “fear of flight” can be accommodated by the taking of a deposition.

In resolving whether a material witness may be deposed to secure testimony for a grand jury under Rule 15, two points should be dispositive. First, if as Chief Judge Mukasey argued, legislative reports underlying the federal material witness statute are to be given great weight,<sup>289</sup> the emphatic language in the relevant Senate Committee Report that the availability of deposition in lieu of incarceration is a central component of that statute should be controlling. Second, if the statute is otherwise somehow ambiguous on this point, even Chief Judge Mukasey contended that Rule 15 can reasonably be read to provide “the remedy of testimony by deposition . . . to a grand jury witness when, for example, the grand jury before which the witness is to testify cannot convene promptly.”<sup>290</sup> It is well settled that an ambiguous statute must be given a reading that avoids constitutional difficulties. The Supreme Court has stated, “If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ [courts] are obliged to construe the statute to avoid such problems.”<sup>291</sup> As Chief Judge Mukasey contends, there is at the very least a “fairly plausible” reading of Rule 15 that would provide a material witness deposition tailored to the pre-grand jury setting. Otherwise, the stark constitutional issue Judge Scheindlin confronted concerning indefinite incarceration without the availability of a deposition would raise the specter of a Fourth Amendment violation.

On appeal to the Second Circuit, one would have hoped that the *Awadallah* court would have followed what appears to have been the logical extension of Chief Judge Mukasey’s

reasoning and would have held that detaining a material witness for twenty days without bail or a deposition violates section 3144 or constitutes an illegal seizure under the Fourth Amendment. The Second Circuit traveled part way down that path by finding that section 3144 and Rule 15 do make depositions available in the grand jury context.<sup>292</sup> It also noted, “[I]t would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.”<sup>293</sup> However, the Second Circuit surprisingly concluded that even though a deposition is available for grand jury material witnesses under section 3144, a deposition need not be taken if the detainee is offered a bail hearing, even if bail is denied.<sup>294</sup> Therefore, rather than properly balancing both parties’ competing interests, the Second Circuit’s rationale abandoned the best parts of Judge Scheindlin and Chief Judge Mukasey’s opinions and reached a result that implicitly endorsed the Government’s indefinite and coercive detentions of grand jury material witnesses. Nowhere did the Second Circuit explain how such an indefinite detention without probable cause of having committed a crime would not run afoul of its warning, in *dictum*, that the federal material witness statute should not be abused by making arrests without probable cause.

## VII. AWADALLAH ON APPEAL TO THE SECOND CIRCUIT

On appeal to the Second Circuit, the Government did not challenge Judge Scheindlin’s factual findings, and the Second Circuit approved and adopted them in all but one limited circumstance.<sup>295</sup> With regard to the abusive and coercive conditions of Awadallah’s confinement, the Second Circuit said that those allegations were immaterial to the issues before the district court,<sup>296</sup> a conclusion which obviously aided the appellate court in ultimately finding that Awadallah’s confinement did not violate the Fourth Amendment. By largely ignoring his conditions of confinement, the Second Circuit also was able to avoid mentioning that “many” of

Awadallah's allegations regarding treatment during his harsh detention were uncontested by the Government.<sup>297</sup> Furthermore, the Second Circuit failed to take judicial notice of a widely-publicized, contemporaneous United States Department of Justice - Office of the Inspector General report criticizing the abusive conditions of confinement faced by September 11 detainees in similar New York detention facilities.<sup>298</sup>

*A. The Reach of Section 3144*

The Second Circuit reviewed Judge Scheindlin and Chief Judge Mukasey's decisions as they pertained to the question of whether grand jury proceedings were included within the term "criminal proceeding" in section 3144. In so doing, it looked at the plain language of the statute, interpretations of "proceeding" or "criminal proceeding" in other contexts, and the statutory context of section 3144 itself.<sup>299</sup> The court agreed with Judge Scheindlin and disagreed with Chief Judge Mukasey regarding the textual clarity of section 3144.<sup>300</sup> It found the plain language of section 3144 to be highly ambiguous, and concluded that "we must look beyond the text of § 3144 to discern the meaning of 'criminal proceeding.'"<sup>301</sup>

In that regard, the court examined section 3144's legislative history for an interpretive clue.<sup>302</sup> The Second Circuit fully endorsed Chief Judge Mukasey's reliance on the footnote of a Senate Judiciary Committee report accompanying the Bail Reform Act of 1984,<sup>303</sup> which cited *Bacon* to support the committee's summary statement that the term "criminal proceeding" in section 3144 includes grand jury proceedings.<sup>304</sup> The appellate court found the Senate Judiciary Committee's express ratification of *Bacon* dispositive on the question of the drafters' intent, and concluded, "[A] grand jury proceeding is a 'criminal proceeding' for purposes of § 3144."<sup>305</sup>

In order to fully support the conclusion that section 3144 applied to grand juries, the Second Circuit still had to contend with Judge Scheindlin's ruling that Rule 15 (governing

depositions) did not apply in the grand jury context. Her finding in this regard was consistent with the Government's reading of the rule at the time.<sup>306</sup> Obviously recognizing that its assertion before the district court undercut the argument that section 3144 (which references Rule 15) does apply to those bodies, the Government switched its position on appeal and argued that a grand jury material witness can receive a deposition in lieu of detention under Rule 15 and section 3144.<sup>307</sup> The Government explained this awkward reversal by stating it was now persuaded by the expansive reading of Rule 15 suggested by Chief Judge Mukasey.<sup>308</sup> While openly troubled by this "change of heart" on appeal, the Second Circuit reluctantly accepted the Government's justification and agreed that Rule 15 is flexible enough to allow the testimony of grand jury material witnesses to be secured by deposition.<sup>309</sup> However, the switch in the Government's position forced the Second Circuit to face the much more difficult question of whether the Fourth Amendment allowed the Government to imprison Awadallah for as long as it did without probable cause of having committed a crime and without affording him either of section 3144's two ameliorative options for release: bail or a deposition in lieu of continued detention.

#### *B. Constitutional Analysis*

In setting the stage for its determination that section 3144 survived constitutional analysis, even as applied to Awadallah's predicament, the Second Circuit explored the canon of constitutional avoidance by which a court refrains from reading an ambiguous statute to be unconstitutional if a plausible, constitutionally-satisfactory interpretation exists.<sup>310</sup> The court explained that the canon comes into play only if the statute is ambiguous and "there are serious concerns about the statute's constitutionality."<sup>311</sup>

The Second Circuit found that Awadallah's twenty day detention as a material witness prior to his grand jury testimony did not raise "serious concerns" by surprisingly and

inexplicably concluding that Awadallah's two failed bail hearings while he was incarcerated made his detention reasonable.<sup>312</sup> In this regard, the Second Circuit offered findings from the unsuccessful bail hearings that concluded Awadallah was a flight risk and that his detention was "reasonable under the circumstances."<sup>313</sup> In so ruling, the appellate court failed to address the text of section 3144 which expressly states that except where it would cause a "failure of justice," a deposition was to be afforded to an arrested material witness who could not make bail. The appellate court also completely ignored the entire tenor of the Senate Judiciary Committee report accompanying section 3144 which stated, "[T]he committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody."<sup>314</sup> It also ignored that report's emphatic instruction to the judiciary that when material witnesses cannot meet the conditions of bail, "the judicial officer is *required* to order the witness' release after the taking of the deposition if this will not result in a failure of justice."<sup>315</sup> Finally, the Second Circuit ignored the fact that section 3144 was originally derived from an integral part of the Bail Reform Act of 1966 – an Act whose entire purpose was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."<sup>316</sup> Disregarding these fundamental mandates from the legislative history was especially surprising given the Second Circuit's dispositive deference to a single *footnote* within the Senate Judiciary Committee report summarily stating that section 3144 applied to grand juries.<sup>317</sup>

The Second Circuit also defended its finding that no serious constitutional concerns exist by citing several supposedly supportive decisions,<sup>318</sup> all of which were inapposite. First and foremost, none of the cases construed the constitutionality of section 3144, or its predecessor

section 3149. Other decisions relied on by the Second Circuit in *Awadallah* did not contain constitutional challenges to any material witness statute. The musings over material witness statutes in those cases were irrelevant to the holdings, *i.e.*, they were *dicta*.<sup>319</sup> A separate case did uphold the constitutionality of a state material witness statute under the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, but *not* the Fourth Amendment.<sup>320</sup>

Although two of the cited cases, *United States ex rel. Glinton v. Denno (Glinton II)* and *United States ex rel. Allen v. La Vallee* – both decided in the 1960s – did involve Fourth Amendment challenges, they concerned a New York state material witness statute significantly different than section 3144. In those two cases, the New York statute *required* that material witnesses be released or given conditions of bail, and it did not prohibit the use of a deposition as one of those conditions.<sup>321</sup> The defendants in those cases could not satisfy their respective bail requirements.<sup>322</sup> *Awadallah* had been flatly denied bail and the chance to offer his testimony via deposition.<sup>323</sup> Ironically, of course, he was ultimately afforded bail after being charged, and his reliability as a material witness is evidenced by the fact that, even as of this writing (over two years after his initial arrest), he is still free on bail, satisfying the conditions of his release, and awaiting trial.<sup>324</sup>

Furthermore, the 1969 *Allen* decision acknowledged that the then-recent expansion of Fourth and Fifth Amendment rights may have dictated a different result in *Allen*, if recent precedent could be applied retroactively to the facts of that case.<sup>325</sup> The clear implication of *Allen* was that, in future cases, the circumstances faced by *Allen* and *Glinton* would be found unconstitutional. As additional evidence of the statute's questionable nature, the New York legislature added further procedural protections to that state's material witness statute in the year

following *Allen*.<sup>326</sup> Because of the expansion of constitutional rights since the mid-1960s, the Second Circuit's reliance in *Awadallah* upon opinions over 35 years old to support the continuing validity of indefinitely detaining a federal grand jury material witness without probable cause is, at the very least, highly questionable.

### *C. The Impact of the Second Circuit's Ruling for Awadallah*

In the end, the Second Circuit reversed and remanded *Awadallah* to the district court with instructions to reinstate the perjury charges,<sup>327</sup> even though Awadallah had been coercively detained in prison for twenty days as a material witness, in a prison designed for convicted criminals, without probable cause of having committed a crime, or the opportunity to free himself through bail or a deposition in lieu of further detention. This holding represents nothing less than a wholehearted endorsement of the Justice Department's material witness policies put in place after September 11, 2001. Moreover, recent press reports indicate that the Justice Department has taken the Second Circuit's authorization of its detention practices to heart, and it has continued its secretive and coercive material witness incarcerations.<sup>328</sup>

## VIII. ANALYSIS AND CONCLUSION

In *In re Material Witness Warrant*, Chief Judge Mukasey strongly hinted at a result that should have satisfied both parties before the Second Circuit: Rule 15 together with section 3144 might be malleable enough to require a material witness' deposition in lieu of bail or continued incarceration.<sup>329</sup> His suggestion accommodated the interests of all parties. It allowed the Government to obtain grand jury testimony, but minimized the intrusion on the material witness' liberty interests by affording them their freedom via bail or a deposition. It is also important to emphasize that were the Government required to depose grand jury witnesses who cannot be released on bail, it would not be without weapons to deal with suspected "bad actors" for whom

it has no probable cause to detain on a long term basis. For example, if a material witness has been involved in as yet undetected criminal wrongdoing, that information is just as likely to be developed in a prompt, post-detention deposition. If Awadallah did in fact perjure himself before the grand jury, as the Government alleges, he likely would have testified to the same effect in a deposition.

The Second Circuit, in principle, adopted Chief Judge Mukasey's position and found that prompt depositions were available in the way that he had proposed.<sup>330</sup> However, when one considers the Second Circuit's opinion in tandem with the lengthy detentions of Awadallah and Abdallah Higazy,<sup>331</sup> not to mention the Justice Department's report detailing the abusive conditions endured by September 11 detainees,<sup>332</sup> the court effectively read the deposition alternative out of section 3144. Without providing guidelines to educate the Government about the conditions under which depositions are proper for grand jury material witnesses, or when their release on bail would cause a "failure of justice," the Second Circuit gave the Government license to detain material witnesses for lengthy periods of time, in highly coercive circumstances, without probable cause of having committed a crime.

It is quite possible that the Second Circuit was, in fact, concerned that Awadallah's testimony would not be adequately captured in a deposition or that his release would cause a "failure of justice," as that term is used in section 3144. The attacks on the World Trade Center and the Pentagon were still very fresh in Americans' minds when Awadallah was first arrested as a material witness to those attacks. Perhaps the need to discover the person or persons responsible for these unprecedented attacks on American soil, or the need to interrupt other imminent attacks might at least be an arguable basis for justifying Awadallah's continued detention. Indeed, it may be plausibly argued that the days and weeks following September 11

were extraordinary times that may have required exceptional and extraordinary means to preserve our country's safety. However, the Second Circuit nowhere limited its ruling in this way. Moreover, while stating in *dictum* that "it would be improper for the government to use § 3144 for...the detention of persons suspected of criminal activity for which probable cause has not yet been established,"<sup>333</sup> the appellate court astonishingly failed to distinguish Awadallah's detention from that very same circumstance – using section 3144 to arrest without probable cause.

As a practical matter, this may not be the end of Awadallah's litigation. As of this writing in early January 2004, one could foresee, for example, Awadallah petitioning the United States Supreme Court for a writ of certiorari. Because the government is continuing its practice of coercively detaining grand jury material witnesses for lengthy amounts of time, those that have been denied bail or deposition in lieu of detention, may be able to challenge detentions occurring in other federal circuits. Therefore, a circuit split on this issue might be created, attracting the attention of the U.S. Supreme Court, if it does not ultimately consider *Awadallah* itself.

However, if the bewildering nature of the *Bacon*, *Awadallah*, and *In re Material Witness* litigation suggests anything, it is that section 3144 as presently written is highly confusing and ambiguous. Resolving lengthy federal material witness detentions also calls into play complicated constitutional analysis. The far better approach would be to strive for immediate congressional clarification of the federal material witness statute.

To avoid further judicial wrangling, Congress should promptly revisit section 3144 and clearly rewrite it in a way that accommodates the government's need to secure grand jury testimony, while avoiding what amounts to unjustifiable and coercive detentions of material

witnesses. It should provide that: (1) “criminal proceeding” includes grand jury proceedings; and (2) except in highly exigent circumstances, the deposition alternative is available for federal material witnesses who are not eligible for, or cannot meet, conditions of bail.

It cannot be under civilized principles of constitutional jurisprudence that the government can hold a material witness, as it did Awadallah, without probable cause, in prison under highly coercive circumstances, for an indefinite period (or, under the most generous count to the Government, twenty days in the case of Awadallah). The constitutional rule announced by the Second Circuit in Awadallah amounts to nothing less than sanctioning the practice of holding detainees in highly coercive circumstances to obtain unreliable, incriminating testimony in the absence of probable cause. A halt must be put to this punitive, suspect, and wholly unnecessary practice.

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<sup>1</sup> CBS News, *Ashcroft Evaluates the War on Terror* (Feb. 13, 2003), at <http://www.cbsnews.com/stories/2003/02/13/attack/printable540422.shtml> (last visited Oct. 13, 2003).

<sup>2</sup> See, e.g., Karen Branch-Brioso, *Fight Over Rights Rages On*, ST. LOUIS POST DISPATCH, Sept. 8, 2002, at B1 (discussing various tactics the Justice Department has used in “War on Terror”).

<sup>3</sup> See, e.g., THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM (Richard C. Leone & Greg Angrig, Jr. eds., 2003).

<sup>4</sup> See AMERICAN BAR ASSOCIATION, RECOMMENDATION ON MILITARY COMMISSIONS (Jan. 2002), available at <http://www.abanet.org/leadership/military.pdf> (last visited Oct. 13, 2003); AMERICAN BAR ASSOCIATION, RECOMMENDATIONS ON THE TREATMENT OF ENEMY COMBATANTS (Feb. 2003), available at <http://www.abanet.org/leadership/recommendations03/109.pdf> (last visited Oct. 13, 2003); AMERICAN BAR ASSOCIATION, RECOMMENDATION ON CIVILIAN DEFENSE COUNSEL (Aug. 2003), available at <http://www.abanet.org/media/aug03/ABACivilianDefenseCounselCorrectedFinalReportRecommendation08031.pdf> (last visited Oct. 13, 2003).

<sup>5</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), cert. granted, \_\_\_ U.S.L.W. \_\_\_\_ (U.S. Jan. 9, 2004) (No. 03-6696); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), motion for reconsideration granted and adhered sub nom. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), rev’d in part and aff’d in part, No. 03-2235, 2003 WL 22965085 (2d Cir. Dec. 18, 2003).

<sup>6</sup> *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-343).

<sup>7</sup> *Ctr. for Nat’l Sec. Studies v. United States Dep’t. of Justice*, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, \_\_\_ U.S.L.W. \_\_\_\_ (U.S. Jan. 12, 2004) (No. 03-472).

<sup>8</sup> *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 123 S. Ct. 2215 (2003); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

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<sup>9</sup> United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003), *notice of appeal filed* (4th Cir. Oct. 7, 2003) (No. 03-4792), *argued* Dec. 3, 2003.

<sup>10</sup> Phil Hirschhorn, *Feds Appeal Ruling on Post-Sept. 11 Tactics*, CNN (May 5, 2002), at <http://www.cnn.com/2002/LAW/05/03/material.witnesses> (last visited Oct. 13, 2003).

<sup>11</sup> Bail Reform Act of 1984 § 102, 18 U.S.C. § 3144 (2003) (amending 18 U.S.C. § 3149).

<sup>12</sup> *See, e.g.*, Adam Liptak et al., *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, § 1, at 1 (discussing the circumstances surrounding detentions of material witnesses).

<sup>13</sup> United States v. Awadallah, 202 F. Supp. 2d 82, 89-96 (S.D.N.Y. 2002) [hereinafter *Awadallah IV*], *rev'd*, 349 F.3d 42 (2d Cir. 2003).

<sup>14</sup> United States v. Awadallah, 202 F. Supp. 2d 17, 21 (S.D.N.Y. 2002) [hereinafter *Awadallah II*]; *Awadallah IV*, 202 F. Supp. 2d at 89.

<sup>15</sup> *Awadallah IV*, 202 F. Supp. 2d at 88 n.8.

<sup>16</sup> *Awadallah II*, 202 F. Supp. 2d at 22; United States v. Awadallah, 173 F. Supp. 2d 186, 188-89 n.7 (S.D.N.Y. 2001) [hereinafter *Awadallah I*].

<sup>17</sup> *Awadallah II*, 202 F. Supp. 2d at 21.

<sup>18</sup> *Id.* at 21 n.2.

<sup>19</sup> *Awadallah IV*, 202 F. Supp. 2d at 86.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 87.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 87-88.

<sup>26</sup> *Id.* at 88.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 89.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 89-90.

<sup>36</sup> *Id.* at 88.

<sup>37</sup> *Id.* at 90.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 88, 90.

<sup>41</sup> *Id.* at 90, 92.

<sup>42</sup> *Id.* at 90-93.

<sup>43</sup> *Id.* (quoting FBI agents).

<sup>44</sup> *Id.* at 92-93 (quoting FBI agents).

<sup>45</sup> *Id.* at 93.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 93-94.

<sup>53</sup> *Id.* at 94.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (quoting FBI agents).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

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<sup>58</sup> *Id.*

<sup>59</sup> Awadallah II, 202 F. Supp. 2d 17, 23 (S.D.N.Y. 2002).

<sup>60</sup> United States v. Awadallah, 202 F. Supp. 2d 55, 60 n.4 (S.D.N.Y. 2002) [hereinafter *Awadallah III*], *rev'd*, 349 F.3d 42 (2d Cir. 2003).

<sup>61</sup> *Id.* at 60.

<sup>62</sup> *See generally*, U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003); U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, 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 (2003).

<sup>63</sup> *Awadallah III*, 202 F. Supp. 2d at 59-60.

<sup>64</sup> *Awadallah II*, 202 F. Supp. 2d at 23.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 24.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 24-25; *see also supra* note 62 (providing reports that detail the abusive conditions in nearby detention facilities).

<sup>79</sup> *Id.* at 25.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Awadallah III, 202 F. Supp. 2d 55, 58 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

<sup>84</sup> *Id.* at 61.

<sup>85</sup> *Id.* at 60.

<sup>86</sup> *Id.* at 58.

<sup>87</sup> *Awadallah II*, 202 F. Supp. 2d at 35.

<sup>88</sup> *Awadallah III*, 202 F. Supp. 2d at 59.

<sup>89</sup> *Id.*

<sup>90</sup> *Awadallah II*, 202 F. Supp. 2d at 35-36.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Awadallah I, 173 F. Supp. 2d 186, 188 (S.D.N.Y. 2001).

<sup>94</sup> *Awadallah III*, 202 F. Supp. 2d at 59.

<sup>95</sup> Pam Louwagie, *Man Arrested in Minneapolis for Terrorism Investigation Faces Many Possible Outcomes*, MINNEAPOLIS STAR TRIBUNE, at <http://www.startribune.com/stories/462/4300773.html> (last visited Jan. 6, 2004).

<sup>96</sup> *See* United States v. Al-Marri, 230 F. Supp. 2d 535, 537 (S.D.N.Y. 2002); *In re* Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002); *see also* Louwagie, *supra* note 95, at <http://www.startribune.com/stories/462/4300773.html> (last visited Jan. 6, 2004); John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo*, N.Y. NEWSDAY, Sept. 18, 2002, at A6; Rachel L. Swarns, *Oregon Muslims Protest Month-long Detention Without a Charge*, N.Y. TIMES, Apr. 20, 2003, at A16.

<sup>97</sup> 18 U.S.C. § 3144 (2003).

<sup>98</sup> *See* United States v. Salerno, 481 U.S. 739, 748-50 (1987); Terry v. Ohio, 392 U.S. 1, 22 (1968); Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1559-60 (1994).

<sup>99</sup> *See* Hurtado v. United States, 410 U.S. 578, 589-90 (1973) (holding that confinement of material witnesses was not unconstitutional under the Fifth or Thirteenth Amendments); Stein v. New York, 346 U.S. 156, 184 (1953)

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(stating that one may be detained without bail as a material witness because “[t]he duty to disclose knowledge of crime rests upon all citizens”).

<sup>100</sup> 18 U.S.C. § 3144.

<sup>101</sup> *Id.*

<sup>102</sup> Awadallah III, 202 F. Supp. 2d 55, 65 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

<sup>103</sup> See Riley, *supra* note 96. (providing examples of material witnesses being held without charge for long periods of time). A grand jury can be in session for 18 months with the possibility of an extension of up to 6 months. FED. R. CRIM. P. 6(g).

<sup>104</sup> Branzburg v. Hayes, 408 U.S. 665, 687 n.23 (1972).

<sup>105</sup> Swarns, *supra* note 96.

<sup>106</sup> See Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003) (noting that the government admitted, in a declaration by Defense Intelligence Agency Director Lowell E. Jacoby, that allowing Padilla access to counsel could confound the government’s attempt “to bring psychological pressure to bear upon Padilla, and could compromise the government’s interrogation techniques”), *aff’d in part and rev’d in part*, No. 03-2235, 2003 WL 22965085 (2d Cir. Dec. 18, 2003); Swarns, *supra* note 96.

<sup>107</sup> *In re Application of the United States for Material Witness Warrant*, Material Witness No. 38, 214 F. Supp. 2d 356 (S.D.N.Y. 2002).

<sup>108</sup> Jane Fritsch, *Grateful Egyptian is Freed as U.S. Terror Case Fizzles*, N.Y. TIMES, Jan. 18, 2002, at A1.

<sup>109</sup> *In re Application of the United States for Material Witness Warrant*, Material Witness No. 38, 214 F. Supp. 2d at 358.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 358-59.

<sup>118</sup> *Id.* at 358.

<sup>119</sup> Riley, *supra* note 96.

<sup>120</sup> *Id.* The FBI agent told Higazy that if he did not change his story, he would never pass the polygraph test and that the FBI would make his family’s life “hell.” *Id.*; see also *In re Application of the United States for Material Witness Warrant*, Material Witness No. 38, 214 F. Supp. 2d at 360 (noting that the polygraph tester had used threats to elicit a confession from Higazy).

<sup>121</sup> *In re Application of the United States for Material Witness Warrant*, Material Witness No. 38, 214 F. Supp. 2d at 359.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See *infra* notes 299-326 and accompanying text.

<sup>128</sup> 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

<sup>129</sup> Awadallah I, 173 F. Supp. 2d 186, 192 (S.D.N.Y. 2001).

<sup>130</sup> Awadallah II, 202 F. Supp. 2d 17, 55 (S.D.N.Y. 2002).

<sup>131</sup> Awadallah III, 202 F. Supp. 2d 55, 82 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

<sup>132</sup> *Id.* at 80 n.30.

<sup>133</sup> Awadallah IV, 202 F. Supp. 2d 82, 109 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42.

<sup>134</sup> *Id.*

<sup>135</sup> Awadallah, 349 F.3d at 75.

<sup>136</sup> 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

<sup>137</sup> *Id.* at 300.

<sup>138</sup> 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, 485 (2002).

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- <sup>139</sup> *Id.* at 487-489; *see also* Laurie L. Levinson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L. A. L. REV. 1217, 1222 (2002) (discussing the evolution of material witness detentions).
- <sup>140</sup> Studnicki, *supra* note 98, at 1542-44.
- <sup>141</sup> *Id.* at 1543-44.
- <sup>142</sup> JAMES W. MOORE ET AL., 8B MOORE'S FEDERAL PRACTICE, ¶ 46.11 (1978). This is not the only policy behind such statutes. Often material witnesses in criminal proceedings face physical danger from the accused, and their detention is for their protection. Studnicki, *supra* note 98, at 1544.
- <sup>143</sup> Judiciary Act of 1789, ch. 20 § 33, 1 Stat. 91 (1st Cong., 1st Sess. 1789).
- <sup>144</sup> Studnicki, *supra* note 98, at 1536-37.
- <sup>145</sup> The Judiciary Act of August 8, 1846, ch. 98, § 7, 9 Stat. 73 (29th Cong., 1st Sess., 1846).
- <sup>146</sup> *Id.* In 1925, the Judiciary Act, as amended in 1846, was codified in 28 U.S.C. §§ 657 and 659. In 1946, sections 657 and 659 of the United States Code were incorporated into Federal Rule of Criminal Procedure 46(b). The rule was intended to be a restatement of existing law at the time, namely 18 U.S.C. §§ 657, 659 (1946). Advisory Committee on Rules of Criminal Procedure, Notes to the Rules of Criminal Procedure for the District Courts of the United States (March 1945) at 275. Rule 46(b) originally 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 . . . may require him to give bail for his appearance . . . . If the person fails to give bail the court . . . may commit him to the custody of the marshal . . ." FED. R. CRIM. P. 46(b) (1946). After their incorporation into Rule 46(b), Congress repealed sections 657 and 659 in 1948. Studnicki & Apol, *supra* note 138, at 490. In so doing, Congress destroyed the only explicit authority for courts to arrest and detain material witnesses. *Id.* However, Congress corrected this in 1984 when it passed amendments to the Bail Reform Act. *Id.* at 492.
- <sup>147</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, 3(a), 80 Stat. 214, 216 (codified as amended in scattered sections of 18 U.S.C.). This Act created 18 U.S.C. § 3149 to govern material witness detentions, which was later repealed and amended by 18 U.S.C. § 3144 (1984).
- <sup>148</sup> *Federal Bail Reform: Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 15-16 (1965).
- <sup>149</sup> 18 U.S.C. § 3149 (1966).
- <sup>150</sup> Bail Reform Act of 1966 § 3(a), 80 Stat. at 216.
- <sup>151</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976, 1984, 18 U.S.C. § 3144 (1984).
- <sup>152</sup> Studnicki & Apol, *supra* note 138, at 494.
- <sup>153</sup> S. REP. NO. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211.
- <sup>154</sup> *See id.* ("[T]he committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.").
- <sup>155</sup> *See supra* note 99 (listing cases that have challenged the practice but on grounds other than the Fourth Amendment).
- <sup>156</sup> *See* Studnicki & Apol, *supra* note 138, at 510 (noting the absence of litigation on the issue).
- <sup>157</sup> *See* Riley, *supra* note 96 (noting that after September 11, the Justice Department began to use section 3144 more frequently in grand jury investigations).
- <sup>158</sup> 449 F.2d 933 (9th Cir. 1971).
- <sup>159</sup> *Id.* at 934.
- <sup>160</sup> *Id.* at 935.
- <sup>161</sup> *Id.*
- <sup>162</sup> *Id.*
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.*
- <sup>165</sup> *Id.*
- <sup>166</sup> *Id.*
- <sup>167</sup> *Id.* at 939 (quoting 18 U.S.C. 3771 (repealed 1988)).
- <sup>168</sup> *Id.* at 940 (quoting FED. R. CRIM. P. 2 (1971)) (alteration in original).
- <sup>169</sup> *Id.*
- <sup>170</sup> *Id.* (citing FED. R. CRIM. P. 20 advisory committee's note (renumbered 17), FED. R. CRIM. P., Preliminary Draft 107 (1943)).
- <sup>171</sup> *Id.*
- <sup>172</sup> *Id.* at 941.
- <sup>173</sup> *Id.*

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<sup>174</sup> *Id.* at 941-42.  
<sup>175</sup> *Id.* at 943 (emphasis added).  
<sup>176</sup> *Id.*  
<sup>177</sup> *Id.* at 944-45.  
<sup>178</sup> Awadallah III, 202 F. Supp. 2d 55, 62 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).  
<sup>179</sup> *Id.*  
<sup>180</sup> *Id.* (citing *Castillo v. United States*, 530 U.S. 120, 124 (2000)).  
<sup>181</sup> *Id.* at 76.  
<sup>182</sup> 18 U.S.C. § 3144 (2003) (emphasis added).  
<sup>183</sup> *Awadallah III*, 202 F. Supp. 2d at 62.  
<sup>184</sup> *Id.*  
<sup>185</sup> *Id.* at 63.  
<sup>186</sup> *Id.*  
<sup>187</sup> *Id.*  
<sup>188</sup> *Id.* (citing FED. R. CRIM. P. 6(e)(2)).  
<sup>189</sup> *Id.*  
<sup>190</sup> *Id.*  
<sup>191</sup> *See id.* at 63-64.  
<sup>192</sup> *Id.* at 63 (citing 18 U.S.C. § 3142(2002)).  
<sup>193</sup> 18 U.S.C. § 3142 (emphasis added).  
<sup>194</sup> *Awadallah III*, 202 F. Supp. 2d at 63-64.  
<sup>195</sup> 18 U.S.C. § 3142(g)(1)-(4).  
<sup>196</sup> *Awadallah III*, 202 F. Supp. 2d at 64.  
<sup>197</sup> *Id.*  
<sup>198</sup> *See id.* at 64-65.  
<sup>199</sup> *Id.* at 66. The Bail Reform Act of 1984 is found at 18 U.S.C. §§ 3141-56.  
<sup>200</sup> *Id.*  
<sup>201</sup> *Id.* (citing 18 U.S.C. § 3141(a) – (b) (2002)).  
<sup>202</sup> *Id.* at 66-67.  
<sup>203</sup> 18 U.S.C. § 3146 (2002).  
<sup>204</sup> *Awadallah III*, 202 F. Supp. 2d at 67.  
<sup>205</sup> *Id.*  
<sup>206</sup> *Id.* at 68.  
<sup>207</sup> *Id.* at 69 (citing *The Treatment of a Material Witness in Criminal Proceedings: Hearings Before the Subcomm. on Improvements in the Judiciary and the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 1-322 (1965) (statement of Peter T. Blake et al.) [hereinafter *Senate Hearings*]). In regard to material witnesses, the report observed, “It is strange that a system of laws such as ours which exalts personal right and individual liberties should even permit the incarceration . . . of one who is not even suspected of having violated those laws.” *Senate Hearings, supra* at 300.  
<sup>208</sup> *Awadallah III*, 202 F. Supp. 2d at 69-70.  
<sup>209</sup> *Id.* at 71.  
<sup>210</sup> *Id.*  
<sup>211</sup> *Id.* at 65 (citing FED. R. CRIM. P. 15; FED. R. CRIM. P. 46). Rule 46 addresses release prior to and during trial and specifically references 18 U.S.C. §§ 3142 and 3144. *See* FED. R. CRIM. P. 46.  
<sup>212</sup> 18 U.S.C. § 3144.  
<sup>213</sup> *Awadallah III*, 202 F. Supp. 2d at 65.  
<sup>214</sup> *Id.*  
<sup>215</sup> *Id.*  
<sup>216</sup> *Id.*  
<sup>217</sup> *Id.* at 65-66.  
<sup>218</sup> *Id.* at 71 (citing 449 F.2d 933 (9th Cir. 1971)).  
<sup>219</sup> *Id.*  
<sup>220</sup> *Id.*  
<sup>221</sup> *Id.* (quoting *United States v. Henderson*, 961 F.2d 880, 882 (9th Cir. 1992)).  
<sup>222</sup> *Id.* at 74 (citing *Bacon*, 449 F.2d at 940).

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<sup>223</sup> *Id.* (quoting FED. R. CRIM. P. 54) (internal citations omitted).  
<sup>224</sup> *Id.*  
<sup>225</sup> *Id.* at 76-77.  
<sup>226</sup> *Id.* at 77 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).  
<sup>227</sup> *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)).  
<sup>228</sup> *Id.* at 78.  
<sup>229</sup> 18 U.S.C. § 3144.  
<sup>230</sup> *Awadallah III*, 202 F. Supp. 2d at 78.  
<sup>231</sup> The language of Rule 15(a) was changed in 2002 for “stylistic” purposes only as part of an overall rewording of the Federal Rules of Criminal Procedure “to make them more easily understood and to make style and terminology consistent throughout the rules.” FED. R. CRIM. P. 15 (2002) advisory committee’s note.  
<sup>232</sup> *Awadallah III*, 202 F. Supp. 2d at 78.  
<sup>233</sup> *Id.* at 77.  
<sup>234</sup> *Id.*  
<sup>235</sup> *Id.* at 78-79.  
<sup>236</sup> 392 U.S. 1 (1968).  
<sup>237</sup> *Awadallah III*, 202 F. Supp. 2d at 78 (quoting *Terry*, 392 U.S. at 20, 22).  
<sup>238</sup> *Id.* at 79.  
<sup>239</sup> *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).  
<sup>240</sup> 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002).  
<sup>241</sup> *Id.* at 288.  
<sup>242</sup> *Id.*  
<sup>243</sup> *Id.*  
<sup>244</sup> *Id.*  
<sup>245</sup> *Id.*  
<sup>246</sup> *Id.* at 291.  
<sup>247</sup> *Id.*  
<sup>248</sup> *Id.*  
<sup>249</sup> *Id.* at 297.  
<sup>250</sup> *See id.* at 292-93, 297.  
<sup>251</sup> *Id.* at 292 (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).  
<sup>252</sup> *Id.*  
<sup>253</sup> *Id.* at 290.  
<sup>254</sup> *Id.* at 293.  
<sup>255</sup> *Id.* (citing 18 U.S.C. §§ 3321-34 (2000)).  
<sup>256</sup> *Id.* (emphasis added).  
<sup>257</sup> *Id.* at 296.  
<sup>258</sup> *Id.* at 293 (citing *Post v. United States*, 161 U.S. 583, 585 (1896); *Thompson v. United States*, 319 F.2d 665 (2d Cir. 1963)).  
<sup>259</sup> *Id.* at 293.  
<sup>260</sup> *Id.* at 292.  
<sup>261</sup> *Id.* at 294.  
<sup>262</sup> *Id.*  
<sup>263</sup> *Id.* (citing *In re De Jesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971)).  
<sup>264</sup> *Id.*  
<sup>265</sup> 18 U.S.C. § 3144.  
<sup>266</sup> *See supra* notes 213-215 and accompanying text.  
<sup>267</sup> *In re Material Witness Warrant*, 213 F. Supp. 2d at 301-02 (emphasis added) (internal citations omitted).  
<sup>268</sup> *Id.* at 296 (emphasis added).  
<sup>269</sup> *Id.* at 302.  
<sup>270</sup> *Id.*  
<sup>271</sup> *Id.* at 298.  
<sup>272</sup> *Id.*  
<sup>273</sup> *See supra* note 232 and accompanying text (discussing *Awadallah III*’s analysis of Rule 15).

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- <sup>274</sup> *In re Material Witness Warrant*, 213 F. Supp. 2d at 298-99.
- <sup>275</sup> *Id.* (quoting *Stein v. New York*, 346 U.S. 156 (1953) (internal quotation marks omitted)).
- <sup>276</sup> *Id.* at 299 (citing *Allen v. Nix*, 55 F.3d 414, 415 (8th Cir. 1995); *United States ex rel. Allen v. LaVallee*, 411 F.2d 241, 243 (2d Cir. 1969); *United States ex rel. Glinton v. Denno*, 339 F.2d 872 (2d Cir. 1964); *Stone v. Holzberger*, 807 F. Supp. 1325, 1336-37 (S.D. Ohio 1992), *aff'd*, 23 F.3d 408, (6th Cir. 1994)).
- <sup>277</sup> *Id.* at 300 (citing *Arnsberg v. United States*, 757 F.2d 971, 976-77 (9th Cir. 1985); *In re Grand Jury Subpoena United States, Koecher*, 755 F.2d 1022, 1024 n.2 (2d Cir. 1985); *In re De Jesus Berrios*, 706 F.2d 355, 357-58 (1st Cir. 1983); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. McVeigh*, 940 F. Supp. 1541, 1562 (D. Colo. 1996)).
- <sup>278</sup> See Rachel V. Stevens, *United States Department of Justice v. Center for National Security Studies: Keeping the USA PATRIOT Act in Check One Material Witness at a Time*, 81 N.C. L. REV. 2157, 2173 n.85 (2003) (noting the conflict between *Awadallah III* and *In re Material Witness Warrant*).
- <sup>279</sup> *Awadallah III*, 202 F. Supp. 2d 55, 76 (S.D.N.Y. 2002).
- <sup>280</sup> *In re Material Witness Warrant*, 213 F. Supp. 2d at 300.
- <sup>281</sup> *Awadallah III*, 202 F. Supp. 2d at 72.
- <sup>282</sup> *In re Material Witness Warrant*, 213 F. Supp. 2d at 291.
- <sup>283</sup> *Id.* at 297. Chief Judge Mukasey's reliance on legislative history in this case belies his typical reluctance to use such history as an interpretive tool. See *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884, 891 (S.D.N.Y. 1998).
- <sup>284</sup> *Awadallah III*, 202 F. Supp. 2d at 77.
- <sup>285</sup> *Id.*
- <sup>286</sup> See *In re Material Witness Warrant*, 213 F. Supp. 2d at 301-02.
- <sup>287</sup> *Id.* at 297.
- <sup>288</sup> *Id.* at 302.
- <sup>289</sup> See *In re Material Witness Warrant*, 213 F. Supp. 2d at 297.
- <sup>290</sup> *Id.* at 296.
- <sup>291</sup> *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that this canon of construction has been used by the courts for so long it is "beyond debate").
- <sup>292</sup> *United States v. Awadallah*, 349 F.3d 42, 55, 60 (2d Cir. 2003).
- <sup>293</sup> *Id.* at 59.
- <sup>294</sup> *Id.* at 64.
- <sup>295</sup> *Id.* at 45, 47-48.
- <sup>296</sup> *Id.* at 48 (citing *Awadallah III*, 202 F. Supp. 2d 55, 59 n.4 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42).
- <sup>297</sup> *Awadallah III*, 202 F. Supp. 2d at 60.
- <sup>298</sup> See *supra* note 62.
- <sup>299</sup> *Awadallah*, 349 F.3d at 52-53.
- <sup>300</sup> See *id.*
- <sup>301</sup> *Id.* at 53.
- <sup>302</sup> *Id.*
- <sup>303</sup> *Id.* at 54-55.
- <sup>304</sup> *Id.* at 54 (citing S. REP. NO. 98-225, at 28 n.98 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211).
- <sup>305</sup> *Id.* at 54-55.
- <sup>306</sup> *Awadallah III*, 202 F. Supp. 2d 55, 78 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42.
- <sup>307</sup> *Awadallah*, 349 F.3d at 59.
- <sup>308</sup> *Id.* at 59-60.
- <sup>309</sup> *Id.*
- <sup>310</sup> *Id.* at 55.
- <sup>311</sup> *Id.* (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002)).
- <sup>312</sup> *Id.* at 64.
- <sup>313</sup> *Id.* at 63.
- <sup>314</sup> S. REP. NO. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211.
- <sup>315</sup> *Id.* (emphasis added).
- <sup>316</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214, 214.
- <sup>317</sup> *Awadallah*, 349 F.3d at 53-55

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<sup>318</sup> *Id.* at 56-58 (citing *New York v. O'Neill*, 359 U.S. 1 (1959); *Stein v. New York*, 346 U.S. 156 (1953), *overruled in part on other grounds*, *Jackson v. Denno*, 378 U.S. 368 (1964); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929); *United States ex rel. Allen v. La Vallee*, 411 F.2d 241 (2d Cir. 1969); *United States ex rel. Glinton v. Denno*, 309 F.2d 543 (2d Cir. 1962) [hereinafter *Glinton I*]; *United States ex rel. Glinton v. Denno*, 339 F.2d 872 (2d Cir. 1964) [hereinafter *Glinton II*]).

<sup>319</sup> *See Stein*, 346 U.S. 156 (upholding the voluntariness of a confession obtained during a custodial interrogation); *Barry*, 279 U.S. 597 (finding that a Senate committee has the power to issue a warrant of attachment to compel testimony before the Senate without first issuing a subpoena to testify).

<sup>320</sup> *See O'Neill*, 359 U.S. at 6-7.

<sup>321</sup> *Awadallah*, 349 F.3d at 57 n.11.

<sup>322</sup> *Glinton II*, 339 F.2d at 874; *United States ex rel. Allen v. Murphy*, 295 F.2d 385, 386 (2d Cir. 1961); *Allen*, 411 F.2d at 242-43.

<sup>323</sup> *Awadallah*, 349 F.3d at 47-48.

<sup>324</sup> Louwagie, *supra* note 95, at <http://www.startribune.com/stories/462/4300773.html> (last visited Jan. 6, 2004).

<sup>325</sup> *Allen*, 411 F.2d at 244 (citing *People v. Perez*, 90 N.E.2d 40 (N.Y. 1949)).

<sup>326</sup> *Awadallah*, 349 F.3d at 57 n.10.

<sup>327</sup> *Id.* at 75.

<sup>328</sup> *See Louwagie*, *supra* note 95, at <http://www.startribune.com/stories/462/4300773.html> (last visited Jan. 6, 2004).

<sup>329</sup> *In re Material Witness Warrant*, 213 F. Supp. 2d 287, 301-02 (S.D.N.Y. 2002).

<sup>330</sup> *Awadallah*, 349 F.3d at 59-62.

<sup>331</sup> *See supra* notes 107-126 and accompanying text (summarizing the facts of Higazy's detention).

<sup>332</sup> *See supra* note 62.

<sup>333</sup> *Awadallah*, 349 F.3d at 59.