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The Detention of Material Witnesses and the Fourth Amendment

Joseph G. Cook

THE DETENTION OF MATERIAL WITNESSES AND THE FOURTH AMENDMENT*

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INTRODUCTION

In June 2005, Human Rights Watch and the American Civil Liberties Union published a lengthy report entitled *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*.[1] The report began:

> Since the attacks on September 11, 2001, at least seventy men living in the United States–all Muslim but one–have been thrust into a Kafkaesque world of indefinite detention without charges, secret evidence, and baseless accusations of terrorist links. They have found themselves not at Guantánamo Bay or Abu Ghraib but in America's own federal prison system, victims of the misuse of the federal material witness law in the U.S. government's fight against terrorism.[2]

The law referred to is the federal material witness statute,[3] which authorizes the arrest and detention of an individu-

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[1] Human Rights Watch, Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11 (2005), *available at* http://hrw.org/reports/2005/us0605/us0605.pdf [hereinafter WITNESS TO ABUSE].

[2] *Id.* at 1.

[3] 18 U.S.C. § 3144 (2000).

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it

al whose testimony is material in a criminal proceeding.[4] The statute is not a part of the U.S. Patriot Act, and that fact has probably prevented it from garnering too much attention. Quite to the contrary, it has been around, with but minor changes, for over two hundred years, first appearing in the Judiciary Act of 1789.[5] Its ostensible purpose is to assure the availability of testimony of witnesses who might otherwise elude a subpoena.

The unique feature of this statute is that it authorizes the arrest and detention of individuals who have not and are not even suspected of committing any crime. And yet, the statute provides that once arrested, they are to be treated "in accordance with the provisions of section 3142."[6] Section 3142 is entitled, "Release or detention of a defendant pending trial."[7] If we incorporate the standards for the release of defendants pending trial into the material witness statute, then it would seem to follow that a material witness should be detained only so long as may be necessary to set bail or other conditions. If the witness is unable to satisfy the conditions set for release, then a deposition should be taken forthwith, followed by the

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> may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such a witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Id.

[4] Material witness statutes are also found in almost all states. They are, in the main, comparable to the federal statute, though they vary in detail. In some instances, detention is authorized only so long as may be necessary to take a deposition. *See, e.g.*, COLO. CONST. art II, § 17; MONT. CONST. art. II, § 23; S.D. CODIFIED LAW § 23A-12-1 (1979); N.D. R. CRIM. P. 15 (detention not to exceed six hours). Some place strict limits on the length of the detention. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4803 (1978) (maximum of three days); FLA. STAT. ANN. § 902.17 (West 2001) (same); MD. CODE ANN., CTS. & JUD. PROC. § 9-203 (West 1974) (seven days unless a judge authorizes additional period).

[5] Ch. 20, §§ 30, 33, 1 Stat. 73, 88-91.

[6] 18 U.S.C. § 3144 (2000).

[7] 18 U.S.C. § 3142 (2000).

release.

In reality, however, today the law is used primarily for a different purpose, to wit: "to secure the indefinite incarceration of those [the Department of Justice] has wanted to investigate as possible terrorist suspects."[8] Certainly it is open to question whether such use is even authorized by the statute. In any case, the use of the law has been accompanied by a broad range of constitutional abuses which have been cataloged by courts and commentators.

What has been neglected is the underlying assumption of the law, and that will be the focus of my remarks. That is, is the very act of arresting and detaining individuals who are not themselves charged with any criminal activity irreconcilable with the protection of the Fourth Amendment?

One might think that, given a two hundred year window of opportunity, questions regarding the constitutionality of the statute would have been fully explored and its validity beyond peradventure. This seems to be a common assumption. Upon close scrutiny, however, the assumption does not appear to be warranted.

The constitutionality of the practice has never been addressed by the Supreme Court, though many courts and commentators appear to think that it has. No lower court has ever elected to grapple with the question, or perhaps no litigants have ever forced any to do so.[9] If we subject the practice of detaining material witnesses to a traditional Fourth Amendment analysis, there is little to be found in the way of supporting precedent. And if, being at a loss for viable precedent, we resort to a device occasionally used by the Supreme Court in cases of first impression—that is, determining those investiga-

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[8] WITNESS TO ABUSE, *supra* note 1, at 1.

[9] I am not suggesting that no court has ever considered the implications of the Fourth Amendment in the interpretation or application of the statute. But the question has always been concerned with the details. For example, what probable cause showing is required to make an arrest under the statute? Can such an arrest be made without prior judicial authorization? Never, so far as I have been able to determine, has the question been asked, is the practice of detaining material witnesses per se unconstitutional.

tive practices recognized by the common law at the time of the American Revolution and labeling them reasonable by virtue of tradition—that too will fail to vindicate the law.

One is thus led to the anomalous conclusion that the statute is assumed to be constitutional because it has always been so assumed. This brings to mind Professor Felix S. Cohen's observation in 1935 in a landmark article in the *Columbia Law Review*[10] that if a court says something three times, it begins to believe that it is true.[11]

Of course, today many people do not want to hear an argument that if accepted would frustrate the efforts to counteract terrorism. But here, if anywhere, at the National Center for Justice and the Rule of Law, the felt necessities of the times cannot permit the end to justify the means.

There is a memorable scene in Robert Bolt's play, *A Man for All Seasons*, in which Sir Thomas More, Lord Chancellor, is visited by Richard Rich, and the two engage in an exchange that foreshadows More's eventual downfall.[12] When Rich departs, More's friend, William Roper, entreats him to arrest Rich.[13] More responds that Rich has broken no law, and that even if Rich were the Devil himself, he would not be subject to arrest until he broke the law.[14] The dialogue continues:

ROPER: So now you'd give the Devil benefit of law!

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[10] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[11] *Id.* at 820. Cohen quoted "The Hunting of the Snark, Fit the First" by Lewis Carroll:

> "Just the place for a Snark!" the Bellman cried,
> As he landed his crew with care;
> Supporting each man on the top of the tide
> By a finger entwined in his hair.
> "Just the place for a Snark! I have said it twice:
> That alone should encourage the crew.
> "Just the place for a Snark! I have said it thrice:
> What I tell you three times is true."

Id. at 820 n.31.

[12] ROBERT BOLT, A MAN FOR ALL SEASONS 62-65 (Random House 1962).

[13] *Id.* at 65.

[14] *Id.* at 65-66.

> MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
> ROPER: I'd cut down every law in England to do that!
> MORE: . . . Oh? . . . And when the last law was down, and the Devil turned round on you–where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast–man's laws, not God's–and if you cut them down–and you're just the man to do it–d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.[15]

To put the matter before us in the starkest terms, the material witness statute empowers the government to arrest and detain individuals who have not broken the law. The question I address today is whether such a practice should be constitutionally sustained.

THE CASE OF OSAMA AWADALLAH

I turn then to a story for our times.

On the afternoon of September 11, 2001, only hours after the terrorist attacks in New York and Washington, FBI agents located a car in the Dulles Airport parking lot owned by Nawaf Al-Hazmi.[16] Al-Hazmi was believed to have been among the terrorists who crashed Flight 77 into the Pentagon.[17] Inside the car was a scrap of paper upon which had been written "Osama" and a seven digit phone number.[18] The phone number was identified with an address in San Diego and a former resident at that address went by the name Osama Awadallah.[19] Awadallah had not lived there for eighteen months.[20]

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[15] *Id.* at 66.

[16] United States v. Awadallah, (*Awadallah II*), 349 F.3d 42, 45 (2d Cir. 2003) *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

So far as the case indicates, this piece of paper is the only connection between Awadallah and the events under investigation. Moreover, so far as the case indicates, at no time thereafter did authorities garner evidence sufficient to charge or even suspect Awadallah of involvement in any terrorist activity. In fact, no criminal charges were ever brought. Awadallah was detained solely as a material witness.

Nine days later, a group of eight federal agents gathered in the vicinity of Awadallah's San Diego apartment.[21] They received no response at the door, but shortly thereafter an individual recognized by the agents as Awadallah's roommate arrived.[22] The agents accompanied him into the apartment and questioned him for two to three hours.[23]

Meanwhile, Awadallah, who was a student at Grossmont College, was attending a course in "English as a Second Language."[24] Upon his return to the apartment, he was met by seven or eight agents in the parking lot.[25] Agent Rielly told him that they needed to talk for about thirty minutes at the FBI's office and that he could follow them there in his own car.[26] Awadallah asked why the interview could not take place in his apartment.[27] After conferring with another agent, Rielly changed his mind and told Awadallah to leave his car in the parking lot and that he would be driven to the FBI office.[28]

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[21] United States v. Awadallah, (*Awadallah I*), 202 F. Supp. 2d 82, 87 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[22] *Id.*

[23] *Id.* at 87-88.

[24] *Id.* at 88.

[25] *Id.* Later, Awadallah claimed that there were fifteen to twenty agents in the parking lot, but this testimony was not credited by the district court. *Id.* at 88 n.9.

[26] *Id.* at 88.

[27] *Id.*

[28] *Id.* Agent Rielly testified that the change in plans was made "for safety reasons." *Id.* at 88-89 n.11. He opined that Awadallah "might, on the way to the field office, try to cause an accident, try to harm the agents in some way." *Id.* (citation omitted). No reason was given for considering Awadallah to be dangerous. Indeed, Agent Teixeira testified, "[W]e did not consider him a suspect of

Before they left, Agent Rielly induced Awadallah to sign a consent form agreeing to a search of his apartment and car, noting that if he refused to consent, they would obtain a search warrant and "tear up the home."[29]

At the FBI office, Awadallah was interrogated for six hours.[30] In the end, the agents told him that "he had been cooperative and that they believed him but, in order to 'clean the table,' they wanted him to take a lie detector test" the following morning.[31] FBI Agent Teixeira would later testify that "[a]fter the six-hour interview, 'there was no reason . . . to consider [Awadallah] a suspect.'"[32]

After being driven home, Awadallah discussed the day's events with his three brothers who told him that they were going to retain an attorney to represent him, and that he should not take the lie detector test prior to consulting with his attorney and he agreed.[33]

Early the following morning, Awadallah informed Agent Teixeira of his decision to talk to a lawyer.[34] Teixeira assured him that that would not be necessary, that it would be "a short test," after which he would not be "bother[ed] . . . anymore."[35] When Awadallah resisted, Teixeira said "refusal to take the exam that morning would indicate that [he] was hiding something, and Agent Rielly would 'get a warrant for [his arrest].'"[36] "Believing that he had no choice," Awadallah took the test.[37] When the test was completed, he was told that the polygraph indicated that he had lied in responding to two questions:

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anything so there was no reason for us to consider him a suspect, that he would be a fugitive." *Id.* (alteration in original) (citation omitted).

[29] *Id.* at 89-90 (citation omitted).

[30] *Id.* at 92.

[31] *Id.* at 92 (citation omitted).

[32] *Id.* at 93. (third alteration in original).

[33] *Id.*

[34] *Id.*

[35] *Id.* (citation omitted).

[36] *Id.* (citation omitted). Nothing in the record suggests that the FBI had probable cause to support the issuance of an arrest warrant.

[37] *Id.*

> "(a) Did you know beforehand of any specific plans to destroy any of those U.S. targets, on 9/11/2001? Answer–No. (b) Did you participate in any way in any of those attacks against U.S. targets, on 9/11/2001? Answer–No."[38]

At this point, it became evident that Awadallah would not be permitted to leave. He was "told . . . that he was 'one of the terrorists' and he knew about the September 11th attacks in advance."[39] Awadallah repeatedly requested to attend Friday prayer and eventually was told that he not only would miss Friday prayer, but that he would be flown to New York and detained "for one year . . . [to] "'find out' more about him."[40] When he asserted his right to a lawyer, he was told that he had no rights.[41]

Without seeking judicial authorization, as required by the statute, an Assistant United States Attorney instructed the agents to arrest Awadallah as a material witness.[42] Some two and a half to three hours later, an application for a warrant to arrest Awadallah as a material witness was submitted to a federal judge in the Southern District of New York.[43] It alleged the following: the FBI believed that Nawaf Al-Hazmi was among the terrorists who crashed Flight 77 into the Pentagon on September 11th; a car owned by Al-Hazmi had been found in the Dulles Airport parking lot on the afternoon of September 11th; within the vehicle, agents found a piece of paper which

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[38] *Id.* at 94.

[39] *Id.* (citation omitted).

[40] *Id.* (citation omitted).

[41] *Id.* On appeal, the government did not dispute that Awadallah had been illegally seized on September 20 and September 21. *Awadallah II*, 394 F.3d 42, 71 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006). Because the ultimate subject of the litigation is a charge of perjury in regard to grand jury testimony, the constitutionality of all the events occurring in San Diego becomes irrelevant.

[42] *Awadallah I*, 202 F. Supp. 2d at 94.

[43] *Id.* at 95. The New York judge was not informed of the earlier arrest in San Diego. *Id.*

bore the inscription "Osama 589-5316;" a telephone database search had revealed that this was Osama Awadallah's telephone number; and Awadallah had acknowledged that he knew Al-Hazmi but claimed few contacts and "'expressed surprise' that his name and phone number were found" on a slip of paper in the car.[44] Beyond this, the affidavit referred to the discovery in searches of Awadallah's cars and apartment, of "two videotapes concerning the 1993 war in Bosnia, . . . another videotape about the Koran, . . . 'a box-cutter, and several computer-generated photographs of Usama [sic] bin Laden.'"[45]

As to the need to place him under arrest, the affidavit continued,

> "it may become impracticable to secure the presence" of Awadallah because "he continues to maintain substantial family ties in Jordan and elsewhere overseas," which "make him a risk of flight while his admitted connection to the highjackers [sic] is under investigation. In addition, given Awadallah's connections to one or more of the hijackers who committed the terrorist attacks . . . Awadallah may have an incentive to avoid appearing before the grand jury. Awadallah may also be concerned that his prior conduct, as set out above, may provide a basis for law enforcement authorities to investigate and possibly prosecute him."[46]

On its face, this did not present a compelling case for issuing an arrest warrant. But Federal District Judge Scheindlin thought that the omission of a number of salient facts from the affidavit made the case even weaker. For example, the agents knew that Al-Hazmi had not lived in San Diego for over a year and more significantly that the telephone number found in the car had not been Awadallah's for longer than that.[47] As for the "box-cutter," the court noted that it was more properly described as "a push-up razor," which Awadallah said had been

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[44] *Id.* (citation omitted).
[45] *Id.* (citations omitted).
[46] *Id.* (alteration in original) (citations omitted) (capitalization omitted).
[47] *Id.* at 96.

used as a carpet cutter to install carpet in his apartment.[48] There were witnesses who provided some support for this explanation.[49]

To authorize a detention under the statute, the court said that two explicit requirements must be satisfied: (1) that the testimony of the party be material, and (2) that securing the presence of the party by subpoena is impracticable.[50]

As to the question of materiality, the district court cited a 1971 decision from the Court of Appeals for the Ninth Circuit, *Bacon v. United States*,[51] wherein the court said that, "[i]n the case of a grand jury proceeding, we think that a mere statement by a responsible official, such as a United States Attorney, is sufficient to satisfy [the requirement]."[52] This, according to the *Bacon* court, would be the equivalent of probable cause for an arrest. But the analogy hardly rings true. At least as early as 1964, in *Aguilar v.Texas*,[53] the Supreme Court held that the mere conclusion of an officer as to the existence of probable cause would not support the issuance of an arrest warrant.[54] And while *Aguilar* and its progeny[55] were later repudiated by the Supreme Court[56] for promulgating an overly formalistic standard for evaluating affidavits for arrests and searches, the Court has never deviated from its view that the determination of probable cause must be made by a judicial officer, and in that role the judicial officer is not to act as a rubber stamp. Nevertheless, the Human Rights Watch report stated, "We are not aware of a single case in which a court rejected a request for a material witness arrest warrant in a terrorism-related case since September 11."[57]

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[48] *Id.* at 96 & n.24 (citation omitted).

[49] *Id.* at 96 n.24.

[50] *Id.* at 96.

[51] 449 F.2d 933 (9th Cir. 1971).

[52] *Id.* at 943.

[53] 378 U.S. 108 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983).

[54] *Id.* at 113-14.

[55] *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969).

[56] *See* Illinois v. Gates, 462 U.S. 213 (1983).

[57] WITNESS TO ABUSE, *supra* note 1, at 5. "Indeed, our research suggests the courts rarely even probed the government's grounds for believing a witness would

In any event, even using this relaxed standard for materiality, the district court found that the affidavit failed because the agent seeking the judicial order had no knowledge of the substance of the grand jury's investigation and hence had no basis for assessing materiality.[58] It concluded that "[t]he only officials who may be able to make an informed decision about a witness's materiality to the grand jury's investigation are '[a]ttorneys for the government . . . [who] may be present while the grand jury is in session.'"[59] But the court of appeals disagreed, concluding that "an FBI agent who works closely with a prosecutor in a grand jury investigation may satisfy the 'personal knowledge' requirement."[60]

The district court also found the argument favoring detention, as opposed to the use of a subpoena, to be weak. While the affidavit alleged that Awadallah had substantial ties to Jordan, it failed to mention that he also "had substantial ties to San Diego" in the form of three brothers, one of whom was an American citizen.[61] Second, there was no allegation of any basis for prosecuting Awadallah for "'prior conduct.'"[62] Third, Awadallah had consistently cooperated with the agents by consenting to searches of his home and vehicles, accompanying

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not comply with a subpoena to testify." *Id.*

[58] *Awadallah I*, 202 F. Supp. 2d 82, 97 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006). The affidavit read in part:

> "As part of the investigation in this matter, *I have* debriefed other agents and law enforcement officers who have been involved in this investigation, and *I have* reviewed relevant reports, documents and records in this investigation. Because the limited purpose of this affidavit is to support the issuance of the requested warrant, *I have* not set forth all the facts known to me, or to other agents or law enforcement personnel concerning this nationwide investigation. *I believe* the testimony of Osama Awadallah would be material to the grand jury's investigation."

Id. at 97 n.25 (capitalization omitted) (quoting Affidavit of Plunkett).

[59] *Id.* at 97 (quoting FED. R. CRIM. P. 6(d)(1)).

[60] *Awadallah II*, 349 F.3d 42, 66 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006),

[61] *Awadallah I*, 202 F. Supp. 2d at 97.

[62] *Id.*

them to their office for an interview, and acquiescing in "a polygraph examination without the presence of an attorney."[63] Fourth, "the agents failed to inform the court that the phone number found in the hijacker's car had not been used by Awadallah for eighteen months and was last used at a prior residence."[64] The district court concluded that "[i]f the misleading information had been removed and the omitted information disclosed, it is overwhelmingly likely that the court would have found that Awadallah's presence at the grand jury could have been secured by a subpoena."[65]

Again, the court of appeals was not persuaded. Affidavits for arrest and search warrants are traditionally evaluated as pleadings. That is, if the affidavit contains a prima facie statement of probable cause for the arrest or search requested, a reviewing court is unlikely to question its accuracy.[66] Only in cases in which the affiant is guilty "of deliberate falsehood or of reckless disregard for the truth" will a warrant be challengeable on these grounds.[67] In the present case, the court concluded, there was no basis for finding that the agent "intentionally misled the court or recklessly disregarded the truth."[68]

Following his arrest pursuant to the material witness warrant, Awadallah was incarcerated in four prisons, ending up in the New York correctional center.[69] In the course of the FBI interrogations, Awadallah was questioned in regard to two hijackers: Nawaf Al-Hazmi, the owner of the car found at Dulles Airport, and Khalid Al-Mihdhar.[70] Awadallah never denied that he knew Al-Hazmi.[71] He acknowledged that there

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[63] *Id.* at 97-98.

[64] *Id.* at 98.

[65] *Id.*

[66] *See* JOSEPH G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:38 (3d ed. 1996).

[67] Franks v. Delaware, 438 U.S. 154, 171 (1978).

[68] *Awadallah II*, 349 F.3d 42, 66 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[69] *Id.* at 47.

[70] *Id.* at 47-48.

[71] *Id.* at 48.

had been a second individual, but denied knowing anyone named "Khalid."[72] The agents believed this to be a lie and were prepared to prove it.

District Judge Scheindlin said:

> The government knew that calling Awadallah before the grand jury placed him in an impossible position. If he testified in a manner consistent with his four prior statements to federal officials, as was to be expected, he would be indicted for perjury. If, on the other hand, he now admitted knowing Al-Mihdhar's *name* (as opposed to knowing *him*, which he repeatedly admitted), he could be indicted for having previously lied to federal officials.[73]

Either way he responded, Judge Scheindlin observed, "would have little, if any, impact on the pending investigation."[74] The government would, however, finally have a criminal charge against Awadallah, to wit, perjury, which appeared to be its only motivation.[75]

Twenty days after his arrest, on October 10, Awadallah testified before the grand jury in the Southern District of New York.[76] He acknowledged that he had met two of the hijackers at work and in his mosque, but stated that he had seen neither for a year prior to the attacks.[77] As expected, Awadallah denied knowing anyone named Khalid.[78] The prosecutor thereupon showed him an examination booklet obtained from his English teacher in San Diego, which included a sentence referring to an acquaintance named Khalid.[79] Awadallah denied that

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[72] *Id.*

[73] *Awadallah I*, 202 F. Supp. 2d 82, 109 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[74] *Id.*

[75] *Id.* In an earlier opinion, Judge Scheindlin had raised the possibility that Awadallah had been caught in a "perjury trap." He now reluctantly conceded that "courts have repeatedly held that such a situation does not constitute a 'perjury trap.'" *Id.*

[76] *Awadallah II*, 349 F.3d at 48.

[77] *Awadallah I*, 202 F. Supp. 2d at 95.

[78] *Awadallah II*, 349 F.3d at 48.

[79] *Id.*

the reference to Khalid was in his handwriting.[80]

Five days later, he again appeared before the grand jury and "stated that his recollection of Khalid's name had been refreshed by his October 10 testimony and that the disputed writing in the exam booklet was in fact his own."[81] He was thereupon charged with two counts of making false statements to the grand jury: (1) "falsely denying that he knew Khalid," and (2) "falsely denying that the handwriting in the exam booklet was his."[82] These two charges of perjury are the only charges that have ever been brought against Osama Awadallah.

Of course, the opportunity for Awadallah to commit perjury only arose because he was arrested and while in custody subjected to interrogation without the benefit of constitutional protections, which produced the statements that eventually were the bases for the charges. It is true that courts have held that witness testimony is not tainted by prior illegalities, such as an illegal arrest.[83] But to allow this principle to prevail in a case in which the only basis of a criminal charge is the testimony itself would appear to be the ultimate in prosecutorial bootstrapping.

WHAT LITTLE THE SUPREME COURT HAS SAID

Earlier I noted that surprisingly the Supreme Court has never been called upon to consider the constitutionality of the material witness statute. The Court has, however, made isolated statements in two cases which have led some to conclude that it has spoken on the matter.[84]

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[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See* 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 12:4 (3d ed. 1996).

[84] *See* Stein v. New York, 346 U.S. 156 (1953); Barry v. United States *ex. rel.* Cunningham, 279 U.S. 597 (1929). There is a third case, *New York v. O'Neill*, 359 U.S. 1 (1959), in which the only issue before the Court was whether the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, FLA. STAT. ANN. §§ 941.01-942.06 (West 2006); N.Y. CODE

The first case is *Barry v. United States ex rel. Cunningham*[85] decided in 1929, which concerned a Senate investigation of the validity of the election of a Senator from Pennsylvania. Cunningham had been a member of an organization that supported the candidate in a primary election.[86] He had been a court clerk for twenty-one years and earned eight $8,000 annually.[87] In testimony before the investigating committee he acknowledged giving the chair of the campaign organization $50,000 in cash but refused to identify its source, insisting that it was his money.[88] The President of the Senate issued a warrant, directing the sergeant-at-arms to take Cunningham into custody and to hold him pending further instructions from the Senate.[89] The district court ruled that the order was not one for contempt but merely compelled Cunningham "to answer questions pertinent to the matter under inquiry."[90] The court of appeals reversed, holding that the arrest was for contempt, but that it was void, because the information sought by the investigating committee was not pertinent to the authorized inquiry.[91]

The Supreme Court concluded that the district court had it right, and that (1) the Senate was engaged in an inquiry within its constitutional power;[92] (2) the Senate was empowered to issue a warrant of arrest;[93] and (3) it was not essential that a subpoena first be issued, served and disobeyed before the arrest

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CRIM. PROC. § 620.20 (McKinney 1995), violated the Privileges and Immunities Clause. U.S. CONT. art 4, § 2. The court held that it did not. *O'Neill*, 359 U.S. at 11-12.

[85] 279 U.S. 597 (1929).

[86] *Id.* at 609.

[87] *Id.*

[88] *Id.* William S. Vare, the elected Senator at issue, had expended a sum in excess of $785,000 in the primary election. "Expenditure of such a large sum of money was declared to be contrary to sound public policy; and the special committee was directed to inquire into the claim of Vare to a seat in the Senate . . . ." *Id.* at 610.

[89] *Id.* at 611.

[90] *Id.* at 612.

[91] *Id.*

[92] *Id.* at 613-14.

[93] *Id.* at 616.

warrant was issued.[94] By analogy, the Court cited the contemporary version of the material witness provision in the federal code[95] with the observation, "[t]he constitutionality of this statute apparently has never been doubted."[96] That is the only thing the Court said pertinent to the present discussion.

Now, to say that the constitutionality of the statute has never been doubted is not tantamount to saying that its constitutionality has been sustained. Perhaps the reason the constitutionality had never been doubted is because no one had ever asked the question. The *Cunningham* Court cited only one case, *United States v. Lloyd*,[97] an 1860 district court decision, and said that in *that* case, "[t]he validity of the statute was not doubted."[98] This is true; indeed, if one reads the *Lloyd* decision, she will discover that the constitutionality of the statute was not doubted; the statute was not even mentioned. Nor was there occasion for the witness in the *Cunningham* case to raise doubts about the statute because it was not relied upon by the Senate in ordering his arrest.[99] At most, the *Cunningham* decision presumes the constitutionality of the statute, albeit in dicta.

The other case, *Stein v. New York*,[100] decided in 1953,

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[94] *Id.* at 616-17. "[U]ndoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also, a court has the power in the exercise of sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming." *Id.* at 616.

[95] 28 U.S.C. § 659 (1940) (repealed 1948). This statute was a "forebear [18 U.S.C.] § 3144." *Awadallah II*, 349 F.3d 42, 57 (2d Cir. 2003), *rev'g* 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[96] *Barry*, 279 U.S. at 617.

[97] 4 Blatchf. 427, F. Cas. 984 (C.C.S.D.N.Y. 1860) (No. 15,614).

[98] *Barry*, 279 U.S. at 617.

[99] The Court also cited three state decisions in which similar statutes "have been enforced without question." *Id.* at 617-18 (citing State *ex rel.* Howard v. Grace, 18 Minn. 398 (1872); Crosby v. Potts, 69 S.E. 582 (Ga. Ct. App. 1910); *Ex parte* Sheppard, 66 S.W. 304 (Tex. Crim. App. 1902)). For present purposes, it is sufficient to note that these cases all were decided long before the protection of the Fourth Amendment had been extended to state proceedings. Neither this nor any other federal constitutional argument was before the respective courts.

[100] 346 U.S. 156 (1953).

contains the passage frequently cited by lower courts as resolving the question. The *Stein* Court said this:

> The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.[101]

Well, that appears pretty conclusive does it not? And it is, at least if you excise those two sentences from the context in which they appear. But on closer examination, there is less here than meets the eye. In support of this sentence, the Court only cites rules of criminal procedure in the federal courts and the state of New York. So the statement is merely descriptive of what governments do; it is not prescriptive of what they can do constitutionally. Not a single case is cited sustaining the practice, not even the Court's own *Cunningham* decision.[102]

Moreover, it turns out that this passage is even weaker dicta than that in *Cunningham*. In that case, it was at least possible that the courier with $50,000 was a material witness to some skullduggery. But in *Stein* there is not a material witness in sight. *Stein* is a straight-forward criminal case in which two defendants had been convicted of felony murder and sentenced to death. Their challenge to the admissibility of their confessions made a sweeping argument that interrogation was inherently coercive. The two quoted sentences are imbedded in a paragraph in which the Court extols the benefits of interrogation to the accused as well as to the government. The full paragraph reads as follows: "[b]y their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime."[103] And then come the two telling sentences: *"[t]he duty to disclose knowledge of crime rests upon all citizens.*

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[101] *Id.* at 184 (citation omitted).

[102] Nevertheless, *Stein* has been cited as controlling authority for the power to detain material witnesses. *See In re* Application for a Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for John Doe, 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

[103] *Stein*, 346 U.S. at 184.

It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."[104] And then comes the point relevant to the defendants: "[t]his Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive."[105] Hence, for purposes of the case before the Court, the Court is maintaining that if individuals innocent of all wrongdoing can be compelled to divulge information regarding crimes, surely individuals such as you, charged with a capital offense, may be subjected to non-coercive interrogation.[106] But the critical point is that there are no material witnesses asserting rights in the case. In short, in the only cases to have reached the Supreme Court in which reference is made to the constitutionality of the statute, the matter is irrelevant to both the parties and the issues before the Court.[107]

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[104] *Id.* (emphasis added) (citation omitted).

[105] *Id.*

[106] The *Stein* case predates the application of the privilege against self-incrimination and the right to counsel during interrogation.

[107] There is one additional decision worthy of mention. *Zadvydas v. Davis*, 533 U.S. 678 (2001), concerned resident aliens against whom a final order of removal had been entered. During the statutory ninety-day "'removal period,'" the alien was normally held in custody. *Id.* at 682. Should the alien not be removed during this period, a statute authorized unlimited detention thereafter. *Id.* (citing 8 U.S.C. § 1231(a)(6)). The Court held that there was an implicit reasonableness limit on post-removal period detentions, stating:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment–from government custody, detention, or other forms of physical restraint–lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individuals' constitutionally protected interest in avoiding physical restraint."

Id. at 690 (alteration in original) (citations omitted).

THE FOURTH AMENDMENT ANALYSIS

Lacking a definitive answer from the Supreme Court–or for that matter, from any other court–how then might this question be analyzed in light of the existing body of Fourth Amendment jurisprudence?

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[108] It can scarcely be gainsaid that individuals who have been taken into custody and involuntarily detained ostensibly for the purpose of giving testimony, have been arrested. But to support an arrest, as opposed to something less than an arrest, the official making the arrest must have probable cause. Probable cause for an arrest was defined in *Beck v. Ohio*[109] as "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[110] Similar language has been used by the Supreme Court in numerous cases before and after *Beck*.[111] While the presence or absence of probable cause has frequently been a difficult decision, never has it been doubted that to make an arrest there must be reason to believe that the subject *had committed or was committing an offense*. When a material witness is taken into custody, by definition that is not the case. Indeed, one federal court[112] has observed that "individuals detained as material witnesses are rarely charged with crimes"[113] and described the plight of the detained material witness thus:

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[108] U.S. CONST., amend. IV.

[109] 379 U.S. 89 (1964).

[110] *Id.* at 91 (citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Henry v. United States, 361 U.S, 98, 102 (1959)).

[111] *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 37 (1979).

[112] *In re* Class Action Application for Habeas Corpus *ex rel.* All Material Witnesses in the W. Dist. of Tex., 612 F. Supp. 940 (W.D. Tex. 1985).

[113] *Id.* at 944.

> With no charges lodged against them, material witnesses are held in custody for periods ranging from several weeks to several months. If the material witness were charged with a crime, he would be entitled to appointment of counsel if he was financially unable to afford one. The material witness is deprived of liberty without an opportunity to consult with counsel or to have his interests represented because he is not charged with a crime. Consequently, individuals that are incarcerated without being charged with criminal activity are afforded less protection than individuals charged with criminal activity.[114]

Recall again the case of Osama Awadallah. At no time, from the beginning until the end of his story, and even thereafter, did the authorities have probable cause to arrest him for anything. In fact, they conceded as much. Had they arrested him at his apartment, they could have taken him into custody, carried out a search incident to the arrest, and searched his cars if there was probable cause to believe they contained anything seizable. But in fact, they had nothing on him at all. Presumably, that is why they finagled him into consenting to the various searches and attempted to create the impression that his trips to the FBI office were all at his own volition. Had they attempted to justify any of these tactics as incident to his arrest, they undoubtedly would have lost.

Of course, the Supreme Court has recognized circumstances short of probable cause which will support a detention. A less demanding standard was articulated by the Supreme Court in *Terry v. Ohio*[115] for field detentions. In such cases, only a reasonable suspicion is required. But this line of precedent is equally unavailing. First, the *Terry* decision merely adapted the language previously used by the Court in defining probable cause to arrest so as to apply to field detentions. Therefore the power to detain also only applies to individuals suspected of criminal activity, and such has been the case

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[114] *Id.* at 944-45.

[115] 392 U.S. 1 (1968).

whenever the Court has applied *Terry*. Second, even if it be assumed that individuals such as Osama Awadallah are suspected of criminal activity, an additional problem in applying the *Terry* rationale is that it only supports field detentions. The *Terry* decision and later decisions by the Supreme Court have held without exception that the detainee cannot be taken against his will to the stationhouse.[116] Only if probable cause legitimately arises during the course of a field detention may an arrest and possibly an incident search occur. In short, the most fundamental Fourth Amendment principles will not support taking into custody an individual for whom there is no probable cause to arrest or even articulable suspicion of criminal activity.

Of course, the response to this analysis may be that the problem being addressed is *sui generis*, that the existing precedents are simply inapplicable. We might first observe that the Supreme Court has shown little patience with attempts to define away Fourth Amendment issues. For example, the majority opinion in *Terry* began by rejecting the suggestion that field detentions are of too low visibility to warrant constitutional scrutiny.[117] And in *Camara v. Municipal Court*,[118] the Court held that the routine activities of building inspectors were nonetheless searches within the contemplation of the Fourth Amendment, even though they were not engaged in criminal investigation.[119] It would seem, therefore, that the question raised with respect to material witness detentions cannot simply be ignored.

When confronted with questions of first impression in interpreting the Fourth Amendment, the Supreme Court has on occasion examined the prevailing practices at the time of the ratification of the United States Constitution. The idea here is that the Fourth Amendment enjoins only those searches and

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[116] *See* Kaupp v. Texas, 538 U.S. 626 (2003); Hayes v. Florida, 470 U.S. 811 (1985); Dunaway v. New York, 442 U.S. 200 (1979); Davis v. Mississippi, 394 U.S. 721 (1969).

[117] 392 U.S. at 8-9.

[118] 387 U.S. 523 (1967).

[119] *Id.* at 534.

seizures which are "unreasonable." If a particular investigative practice was accepted in England at the time of ratification, it might be assumed to be reasonable, or at least not prohibited, by the Fourth Amendment.

There is, of course, a major flaw in this assumption. That is that the Bill of Rights in general, and the Fourth Amendment in particular, were in large measure a repudiation of English practices which were considered intolerable. For example, the use of general warrants to carry out indiscriminate searches was considered particularly abusive. In this case, however, the particular language of the Fourth Amendment addressed the matter by mandating that warrants particularly describe the place to be searched and the things to be seized. Insofar as the Amendment did not specifically provide answers, the default expectation was that established law enforcement procedures were unaffected.[120]

The answer, then, to the riddle of the detention of material witnesses might simply be resolved by the revelation that the practice was well-established in England during the colonial era. Indeed, in 1971, the Court of Appeals for the Ninth Circuit said precisely that. In *Bacon v. United States*,[121] the court reassured the readers of its opinion that the detention of material witnesses was hardly extraordinary, because it was "consonant with the long established rule of English Law, in effect when the United States became a nation."[122] To support this state-

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[120] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999), for a definitive study of the original meaning of the Fourth Amendment and its relation to the common law.

[121] 449 F.2d 933 (9th Cir. 1971).

[122] *Id.* at 938-39. The suggestion that the power granted by the federal material witness law to detain witnesses prior to the failure to comply with a subpoena was established at common law has been asserted by a number of commentators. *See* Roberto Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY'S L.J. 401, 405 n.19 (2003); Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1534-36 (1994); Christina M. Ceballos, Comment, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75, 82 (1999); Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, 37-38 (1958). The evidence presented to support this conclusion is unconvincing. Given that the trial of the

ment, the court cited a single English case that was decided in 1612.[123] It would appear to be the only case cited by this or any other court for the long established rule of English Law. The intrepid academic who succeeds in tracking this one down among the dusty tomes in rarely visited library stacks may be excused for saying, "this better be a good one."

The case is styled the *Countess of Shrewsbury's Trial*,[124] and this is her story: at apparently some time in the early part of the seventeenth century, one Lady Arabella Stuart married Sir William Seymour. Arabella was a first cousin of James I. She was a Catholic, and at one point, the Pope had a grand design for an arranged marriage that would put Arabella on the English throne. The plot failed, and James became firmly ensconced as monarch, but he remained apprehensive regarding her children having claim to the throne. To that end, he forbade the marriage of Arabella to William Seymour. They nonetheless were secretly married. In the words of the court reporter, "[b]eing a marriage with one so nearly related in blood to the king, and without his consent, it was deemed an offence [sic] against the royal prerogative, on which account lady Arabella and her husband were imprisoned; the former in a private house at Lambeth, the latter in the Tower."[125] They

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Countess of Shrewsbury would appear to be the only pre-American revolution decision cited by courts or commentators illustrative of the practice and that the decision fails to support the claim, skepticism would seem justified. The misunderstanding appears to have resulted from the confusion of the power to compel testimony (never questioned) and the power to detain in anticipation of testifying. For example, Studnicki captions a section of her article, *supra*, "The Common Law Power to Detain a Witness." The text, however, speaks only to the power to compel testimony and to punish those who defied a subpoena.

But see Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 706-07 (2005) ("If the *Bacon* court's history is correct, it means that the Founding Fathers themselves authorized the incarceration of individuals who were not even suspected of committing a crime. As history and common sense have it, the *Bacon* court got history wrong.") (footnote omitted).

[123] *Bacon*, 449 F.2d at 938-39 (citing Countess of Shrewsbury's Trial, 2 How. St. Tr. 769 (1612)).

[124] 2 How. St. Tr. 769 (1612).

[125] *Id.* at 769 (footnote omitted).

both managed to escape and fled in separate ships to France, King James' men captured Arabella before she reached Calais, and she was returned to the Tower. She died there, never seeing William again.

Mary Talbot, the Countess of Shrewsbury, was Arabella's aunt. She was suspected of abetting this scheme, having prior knowledge of both the wedding and the escape. When called before the Privy Council, however, she refused to divulge any information. As a result, she too ended up in the Tower and was brought before a select council "charged with a high and great contempt of dangerous consequence."[126] According to the case report, Lady Arabella "had no evil intent against the king,"[127] but had simply been corrupted by her evil aunt. "And the lords of the Privy Council, knowing the *arcana imperii* [state secrets], did shew [sic] divers perilous consequences, and the rather for this, that the said countess is an obstinate popish recusant, and as was said, perverted also the lady Arabella."[128]

The Countess of Shrewsbury proffered two arguments in her defense: (1) "she had made a rash vow that she would not declare any thing in particular touching the said points; and for that (as she said) it was better to obey God than man,"[129] and (2) "[s]he stood upon her privilege of nobility."[130] The court found both defenses unavailing, holding that "the countess by her allegiance was bound, without being demanded, to reveal to the king what she knows concerning the premises, upon which great mischief may happen to the king and the realm."[131]

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[126] *Id.* at 770 (footnote omitted).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 770-71.

[131] *Id.* at 775. Addressing Lady Arabella, Sir Francis Bacon said:

> For that which you are properly charged with, you must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be any thing that imports the king's service, they ought themselves undemanded to impart it; much more if they be called and examined, whether it be of their own fact or of another's, they

As is readily apparent, the *Shrewsbury* decision provides no support for the notion that the English common law recognized a power to detain material witnesses. The Countess of Shrewsbury was not a material witness; rather, she was a party "charged with a high and great contempt."[132] While the charge against her arose out of her refusal to testify, the substantive charge of abetting the illegal marriage and escape of Lady Arabella arose prior to the time she was taken into custody.

For at least a half century prior to the trial of the Countess of Shrewsbury, the law of England authorized compelling the testimony of witnesses in criminal and civil cases. The Second Act of Phillip and Mary in 1555 empowered justices to bind over witnesses to give evidence against defendants in felony cases.[133] And in 1562, the Statute of Elizabeth provided that in civil cases, any person who refused to testify after being served with process would be subject to a ten pound fine as well as damages for the harm caused to the aggrieved party.[134] Under neither statute, however, was there any recognition of a power to detain witnesses in anticipation of their giving evidence. Similarly, the criminal defendant's right to the compulsory process of witnesses was recognized by the Act of William III in 1695, which gave parties indicted for treason "like [Process] of the Court where they [s]hall be tried, to compel their [Witnesses] to appear for them at any [s]uch Trial or Trials, as is [usually] granted to compel [Witnesses] to appear [against] them."[135] Again, however, there is no suggestion in the law that a potential witness could be incarcerated to insure his presence at the trial.

Moreover, sixteen years after the Countess of Shrewsbury's case, on June 7, 1628, the House of Commons, under the leadership of Sir Edward Coke, enacted the Petition of Right, which

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ought to make direct answer.

Id. at 778.

[132] *Id.* at 770.

[133] Marian Committal Statute, 1555, 2 & 3 Phil. & M., c. 10, § 2 (Eng.).

[134] 1562, 5 Eliz., c. 9, § 12 (Eng.).

[135] 1695, 7 & 8 Will. 3, c. 3, § 7 (Eng.).

sought to reinvigorate the principles of liberty articulated in Magna Carta.[136] In the matter of individual liberty, in petitioning Charles I it observed that, notwithstanding laws to the contrary, including Magna Carta, "divers of your subjects have of late been imprisoned without any cause shewed [sic]," and that when challenges were brought, certain individuals "were returned back to several prisons, without being charged with any thing to which they might make answer according to the law."[137] The Members of the House concluded by

> humbly pray[ing] . . . that your Majesty would be . . . graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, [t]hat in the things aforesaid all our officers and ministers shall serve you according to the law and statutes of this realm, as they tender the honour [sic] of your Majesty, and the prosperity of this kingdom.[138]

Finally, insofar as the common law in the United States is concerned, both federal and state courts have rejected the notion of a common law power to detain material witnesses prior to failure to honor a subpoena.[139]

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[136] *See* SOURCES OF OUR LIBERTIES 62, 62 (Richard L. Perry & John C. Cooper eds., New York 1964) ("The Petition of Right was 'the first of those great constitutional documents since Magna Carta, which safeguard the liberties of the people by securing the supremacy of the law.' It has also been called 'the second Great Charter of the liberties of England' and 'the first great official interpretation of Magna Carta since the time of Edward III.'") (footnotes omitted) (quoting WILLIAM HOLDSWORTH, 5 A HISTORY OF ENGLISH LAW 449 (1927); THOMAS MACAULAY, THE HISTORY OF ENGLAND 74 (Charles H. Firth ed., 1913-15); RODNEY L. MOTT, DUE PROCESS OF LAW 81 (1926)).

[137] Petition of Right (1628) sec. V, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 136, at 74.

[138] *Id.* at sec. XI.

[139] *See* Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971); State v. Hand, 242 A.2d 888, 892 (Essex. County Ct. 1968); Little v. Territory, 114 P.2d 699, 699 (Okla. 1911); Bates v. Kitchel, 125 N.W. 684, 686 (Mich. 1910); Comfort v. Kittle, 46 N.W. 988 (Iowa 1890); Bickley v. Commonwealth, 25 Ky. (2 J.J. Marsh.) 572, 572 (1829); *cf.* Crosby v. Potts, 69 S.E. 582, 582-83 (Ga. Ct. App. 1910) (indicating how early English common law compelled witnesses to testify for the government). *See also* Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 20-25 (1969) (discussing the status of

SEARCHING FOR A SOLUTION

If, then we can find no conventional support for sustaining such detentions, the possibility remains that, at least in the case of thwarting terrorism, we may be justified in developing a theory from whole cloth. This approach is reflected in much of the rhetoric of governmental officials. Following 9/11, Attorney General Ashcroft was quoted as saying that henceforth, it would be necessary for federal law enforcement to "'think outside the box.'"[140] Interpreted in the most favorable light, this observation may be read as suggesting that the protection of the Fourth Amendment is malleable and that reasonableness is in part a function of the felt necessities of the time.

There is precedent for interpreting the Fourth Amendment to accommodate the pressing needs of a particular historical period. For example, both the vehicle exception[141] and the open fields exception[142] to the warrant requirement were developed during the Prohibition era and at least in part were concessions to the fact that liquor laws could not be enforced effectively so long as officers could not search the vehicles of bootleggers or ferret out moonshine stills in remote locations without prior judicial authorization. In our own time, and long before 9/11, courts have sustained the practice of searching persons and hand-carried luggage in airports as a means of thwarting airline hijacking. A few years earlier, the same intrusions would have been condemned as patently unconstitutional.

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the material witness law in various states); Robert Odlin Coyle, Comment, *Confining Material Witnesses in Criminal Cases*, 20 WASH. & LEE L. REV. 164, 164-68 (1963) (discussing the rights of a material witness); Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 700-34 (discussing the balance between the interests of the state and the individual); Bernard Silverman, Comment, *Material Witnesses in Criminal Proceedings: Securing and Assuring Their Attendance*, 18 MO. L. REV. 38, 38-53 (1953) (suggesting ways that material witness laws may be improved).

[140] General Larry D. Thomson, U.S. Deputy Attorney Gen., Remarks Delivered to the National Black Prosecutors Association (Aug. 8, 2002), http://www.usdoj.gov/dag/speech/2002/080802nbparemarks.htm (last visited Oct. 22, 2006).

[141] Carroll v. United States, 267 U.S. 132 (1925).

[142] Hester v. United States, 265 U.S. 57 (1924).

In practice, today the material witness statute is rarely used in other than terrorist-related investigations. Prior to 9/11, it had been used almost exclusively by the Immigration and Naturalization Service in illegal immigration investigations.[143] But the fact that the power is rarely used is far from reassuring. For if we accept the unchallenged assumption that the law is constitutional, it means upon a proper showing of risk, either (a) material witnesses in all cases may be detained indefinitely should federal prosecutors choose to use their power more liberally, or (b) the only parties at risk are material witnesses that match the profile of previously identified terrorists.

If the first reading is correct–if prosecutors have the constitutional right to detain any material witness upon no more of a showing than the prosecutor's averment that the witness will likely not honor a subpoena–then surely the practice deserves constitutional scrutiny. If, on the other hand, the law is only used as a weapon against terrorism, and only individuals who fall within a class of suspected terrorists are vulnerable, then there are different reasons to voice constitutional concern.

Over a half century ago, this country subjected a significant number of its citizens to involuntary internment for no reason other than their being of Japanese heritage. While that action was sustained by the Supreme Court,[144] it is not a celebrated episode in American history.[145]

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[143] *See* Witness to Abuse, *supra* note 1, at 14 (footnotes omitted) (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2000*, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs00.htm.):

> Before September 11, the vast majority of persons arrested as material witnesses were non-U.S. citizens arrested by the former Immigration and Naturalization Service (INS). In 2000, for example, 94 percent of the 4,168 federal material witness arrests were made by the INS, and less than 2 percent were citizens. Most of the material witnesses arrested by the INS were immigrants who were smuggled into the country, and the INS sought to ensure their testimony in trials against the smugglers before the witnesses left the country.

[144] Korematsu v. United States, 323 U.S. 214 (1944).

[145] *See* John M. Burkoff, *"A Flame of Fire": The Fourth Amendment in Perilous*

And yet, some may nonetheless argue that today the risks are too high: that those who share a cultural and/or religious affinity with our avowed enemy may either return to their homeland or otherwise accept that their identity subjects them to greater scrutiny. In other words, it is simply a question of survival.

We have heard this argument before, and in a context similar to that of Osama Awadallah. On June 28, 1954, Lloyd Barenblatt was subpoenaed to testify before the House Un-American Activities Committee at the height of the Red Scare.[146] Barenblatt declined to answer five questions regarding his knowledge of Communist Party activities at the University of Michigan.[147] One of the questions concerned his knowledge of the Communist Party affiliation of a named individual.[148] For his refusal to answer, Barenblatt was held in contempt.[149] The Supreme Court affirmed the conviction.[150] A majority of the Court was prepared to give deference to Congress regarding the magnitude of the problem it addressed and the appropriate way of responding to it.[151] Four Justices, however, dissented.[152] Justice Black, in an impassioned opinion denied that, in this case, "First Amendment freedoms must be abridged in order to 'preserve' our country."[153] "That notion," he said, "rests on the unarticulated premise that this Nation's

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Times, 74 Miss. L.J. 631, 652 (2004) ("[S]uspending or ignoring the Fourth Amendment and other constitutional protections in perilous times, even in times of legitimate and serious threats to our national security, was not only *not* productive, it was instead *destructive* of our constitutional fabric, and of our self-congratulatory claims, trumpeted throughout the world, that we are a nation of democratic virtues governed by the fair and even-handed application of the rule of law.").

[146] Barenblatt v. United States, 360 U.S. 109 (1959).

[147] *Id.* at 114.

[148] *Id.*

[149] *Id.* at 115.

[150] *Id.* at 134.

[151] *Id.*

[152] *Id.* at 134, 166. Justice Black filed a dissenting opinion, in which Chief Justice Warren and Justice Douglas joined. *Id.* at 134. Justice Brennan filed a dissenting opinion. *Id.* at 166.

[153] *Id.* at 145 (Black. J., dissenting).

security hangs upon its power to punish people because of what they think, speak or write about, or because of those with whom they associate for political purposes."[154]

Barenblatt would not speak to his knowledge regarding Francis Crowley.[155] Awadallah disavowed that he knew Khalid Al-Mihdhar.[156] Never mind the fact that in both cases the interrogator undoubtedly already knew the answers to the questions, so the witness was not withholding otherwise inaccessible information. Never mind that it strains credulity to believe that Barenblatt's responses would be vital to the drafting of anti-communist legislation or that Awadallah's would be vital to the war against terrorism. In both cases, the failure to respond satisfactorily to their inquisitors culminated in a citation for contempt.

Notwithstanding the claim of the Justice Department that each of the detained witnesses had information relevant to potential prosecutions for terrorist activities, at least thirty of the seventy individuals examined in the Human Rights Watch study never appeared before a grand jury or at a trial as witnesses, and "only seven were ever arrested on terrorism-related charges."[157] And yet, "[o]ne-third of the seventy . . . witnesses . . . were incarcerated for at least two months."[158]

The challenge to our system of justice and the rule of law could not be clearer: how can we remain true to the values of the freest society the world has ever known while responding effectively to those who would destroy us? In his seminal work, *A Theory of Justice*, philosopher John Rawls referred to this dilemma as the obligation in a democratic society to "tolerate[] . . . the intolerant."[159] Rawls allowed "that an intolerant sect has no title to complain when it is denied an equal liberty,"

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[154] *Id.*

[155] *Id.* at 114 (majority opinion).

[156] *Awadallah I*, 202 F. Supp. 2d 82, 87 (S.D.N.Y. 2002), *rev'd*, 349 F. 3d 42 (2d Cir. 2003), *cert. denied sub nom.* Awadallah v. United States, 543 U.S. 1056 (2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[157] Witness to Abuse, *supra* note 1, at 2.

[158] *Id.* at 3.

[159] JOHN RAWLS, A THEORY OF JUSTICE 90 (rev. ed. 1999).

because "[a] person's right to complain is limited to violations of principles he acknowledges himself."[160] But, he continued, it did not follow from this that the tolerant have the right to suppress the intolerant.[161] Only in those instances in which "they sincerely and with reason believe that intolerance is necessary for their own security" can they legitimately draw the line.[162] The governing principle, according to Rawls, was this:

> [J]ust citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger. They can properly force the intolerant to respect the liberty of others. . . . But when the constitution itself is secure, there is no reason to deny freedom to the intolerant.[163]

"The leading principle," Rawls concluded, "is to establish a just constitution with the liberties of equal citizenship."[164] Our response to the intolerant "should be guided by the principles of justice and not by the fact that the unjust cannot complain."[165]

During the course of my remarks, I have, somewhat randomly, shifted my focus between two dimensions of the issue before us. At the broader constitutional level, I have suggested that there are serious reasons to question the per se legitimacy of detaining material witnesses. In the context of contemporary practice, I have called attention to the aggravated circumstances in which the law is being used in the investigation of terrorist activities. But I am not suggesting that the use of the power in this category of cases is uniquely troubling; rather, I have focused on such cases simply because that is where the power is being used today. Simply because the law is being used pri-

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[160] *Id.*

[161] *Id.* at 191.

[162] *Id.* at 192. "Justice does not require that men must stand idly by while others destroy the basis of their existence." *Id.*

[163] *Id.*

[164] *Id.* at 193.

[165] *Id.*

marily against an insular and largely unpopular minority is not reason to ignore the constitutional question. Indeed, it provides all the more reason to do so.

In the post-9/11 world, it is an unfortunate happenstance to be named "Osama." Perhaps the prudent Middle Easterner would shorten his name to "Sam." But it is no crime to fail to do so.

EPILOGUE: THE CONTINUING SAGA OF OSAMA AWADALLAH

Notwithstanding that Osama Awadallah has never been convicted or even charged with any crime related to the events of September 11, 2001,[166] federal authorities have continued their relentless pursuit of a perjury conviction based upon Awadallah's denials that he was acquainted with one of the terrorists and that the handwriting in an examination booklet was his. Awadallah was released on bail in November 2001, thereafter graduated from Grossmont College and enrolled as a full-time student at San Diego State University.[167]

At a pretrial conference on May 16, 2005, the prosecution submitted a supplemental list of witnesses that it might call at the trial for perjury.[168] When the defense requested identification of these witnesses, the prosecution declined, maintaining that it was not required to do so prior to trial.[169] The trial court ordered the prosecution to do so, whereupon it disclosed that the witnesses included several members of the grand jury

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[166] The prosecution nevertheless endeavored to associate Awadallah with those events at his trial, which ended in a mistrial apparently as a result of the emotional element which pervaded the jury deliberations. United States v. Awadallah (*Awadallah VI*), No. 01 CR 1026 (SAS), 2006 WL 2242442, at *5 (S.D.N.Y. Aug. 3, 2006). Although Judge Scheindlin "admonished the jury that Awadallah was not charged with participating in the September 11 attacks," the prosecution began and ended its closing argument "with an appeal to recall that this case involved 'the worst terrorist attacks in [this/our] nation's history.'" *Id.* at *5 & n.53 (alteration in original) (citation omitted). Judge Scheindlin observed that the "problem was undoubtedly exacerbated" by this tactic. *Id.* at *5 n.53.

[167] United States v. Awadallah (*Awadallah III*), 401 F. Supp. 2d 308, 312 (S.D.N.Y. 2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).

[168] *Id.*

[169] *Id.*

that had returned the indictment against Awadallah.[170]

In explaining the relevance of the testimony of these witnesses, the prosecution referred to Awadallah's indicated defense "'that any incorrect statements he may have made in his October 10 grand jury testimony were not knowingly made [but were] the result of memory lapse, misunderstanding, exhaustion, confusion and intimidation.'"[171] "To rebut this defense," the prosecution intended "to call the grand jurors to testify to their impressions of Awadallah as he testified–namely that 'he neither appeared nor behaved as if he were confused or conversely that he appeared lucid or coherent.'"[172] At the time of this request, the prosecution had already contacted and interviewed many if not all of the members of the grand jury.[173] Upon learning of this, counsel for Awadallah "requested permission to contact the grand jurors to determine whether he might wish to call any of them as trial witnesses."[174] The trial court thereupon wrote each of the grand jurors to determine if any would be willing to be interviewed by defense and six jurors agreed.[175]

On May 24, 2005, the court made a preliminary ruling on the admissibility of the proposed testimony. It ruled "that the grand jurors [could] testify as to the physical conditions of the room during Awadallah's grand jury testimony, Awadallah's physical appearance, and the behavior and manner of the prosecutor."[176] The court also ruled "that the grand jurors may not testify as to whether, in their opinion, Awadallah's testimony was knowingly false, or whether Awadallah appeared 'confused' during his testimony."[177]

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[170] *Id.*

[171] *Id.* (alteration in original) (quoting Def.'s Reqs to Charge No. 3, at 5).

[172] *Id.* (quoting Government's Letter of May 23, 2005).

[173] *Id.*

[174] *Id.*

[175] *Id.* "[O]ne juror informed the Court that he was not willing to talk to Mr. Berman [counsel for Awadallah]; two more jurors were unwilling to be contacted by Mr. Berman, but asked that the Court give them Mr. Berman's number, so they could contact him if they chose." *Id.* at 312-13.

[176] *Id.* at 313.

[177] *Id.*

Both parties urged the trial court to reconsider the ruling, the defense contending that the testimony should not be permitted at all, and the prosecution maintaining that the scope of testimony had been improperly restricted.[178] After due consideration, the trial court's final order was essentially an elaboration of its preliminary ruling:

> [T]he grand jurors are precluded from testifying as to their subjective impressions. However, the grand jurors are not precluded from testifying as to objective physical conditions and events in the may [sic] draw its own conclusions from the grand jurors' testimony as to physical facts; the danger that the trial jurors will simply defer to the grand jury's opinion of Awadallah's intent is not present if the testimony is so limited. . . .
>
> Accordingly, the grand jurors may testify as to, *e.g.*, the temperature, layout and occupancy of the room, or whether anyone raised their voice or made any threatening physical gestures, or whether Awadallah showed signs of physical injury. However, they may not testify as to their mental impressions: *i.e.*, that Awadallah did or did not appear lucid or composed, or did or did not appear confused, or that the prosecutor did or did not appear to be intimidating.[179]

The prosecution appealed this ruling to the Court of Appeals for the Second Circuit, which affirmed.[180] In its appeal, the prosecution also requested that on remand the case be assigned to a different district judge "'to preserve the appearance of justice.'"[181] The court of appeals observed that no such request had been made by the Office of the United States Attorney for the Southern District of New York since 1973, and in all the cases cited by the prosecution in support, the request had been made by the defendant, or initiated by the court itself on the defendant's behalf.[182] The court denied the motion,

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[178] *Id.*
[179] *Id.* at 320.
[180] United States v. Awadallah (*Awadallah IV*), 436 F.3d 125 (2d Cir. 2006).
[181] *Id.* at 128.
[182] *Id.* at 135.

finding no support for the prosecution's contention that the trial judge had either acted as an advocate for the defendant or prejudged ultimate issues favorable to the defendant.[183]

On May 23, 2005, the day prior to the pretrial conference at which the court made its preliminary ruling,

> [T]he parties selected a panel of twelve jurors and three alternate jurors. . . . The [final] ruling was published . . . on May 31 and the Government immediately filed an appeal. The jury had not yet been sworn, . . . [and the trial judge] informed that jury that "unforeseen events and circumstances prevent us from going forward with this case at this time." [The judge then] gave the [jury] the following instructions:
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> > So what happens next is that your jury service is over without this trial proceeding at this time. When we can proceed, we will call all of you. And if you are able to serve, in other words, if you're not out of town or in some other way unavailable, if you're able to come back and serve, we will keep this jury. But we can't ask you to put your lives on hold. So you can go back to our work, go back to your plans, go back to your summer vacations, because we can't tell you the exact date. But when that date comes, and it could be days, could be more, we will call you. And if you're available, you are the jury in this case and that's what we'll do.[184]

The court of appeals affirmed the evidentiary ruling on January 26, 2006, and on February 10, the trial judge notified the fifteen panel members that the trial was to commence on April 17, and asked each juror whether he or she would be available and if not to provide an explanation.[185] The prosecution contended that to recall any of the jurors on the panel would violate the Jury Service and Selection Act, which provides that "all litigants in Federal courts entitled to trial by

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[183] *Id.* at 135-37.

[184] United States v. Awadallah (*Awadallah V*), No. 01 CR. 1026(SAS), 2006 WL 738407, at *2 (S.D.N.Y. Mar. 23, 2006) (footnotes omitted) (quoting *Awadallah III*, 401 F. Supp. 2d 308, 310 (S.D.N.Y. 2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006); Transcript of Record at 11-12).

[185] *Id.* at *2.

jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[186] The parties agreed that if all fifteen previously chosen jurors were available to serve, the trial could proceed.[187] The defense argued that using less than all of the properly selected jurors did not violate the Act, and that to hold otherwise would "reward[] the [prosecution] for taking an appeal on which it failed to prevail."[188] The prosecution responded that to use some but not all of the prior panel would be tantamount to impaneling "volunteer[]" jurors, a practice which had been held to violate the Act.[189]

The trial court responded that the recalled jurors could not properly be considered volunteers, because they had been instructed that their obligation to serve had not ended.[190] The original panel had been "'selected at random from a fair cross section of the community,'" and no argument had been put forward that the recall would result in "'impermissible discrimination against individuals or group.'"[191] Rather, the jurors would all remain obligated to serve, absent an individual showing of "'undue hardship or extreme inconvenience.'"[192] The court concluded that no substantial violation of the Act would result.[193]

At the same time, the court noted that while the defendant had a significant interest in have his fate determined by the jury first impaneled, the prosecution had "a countervailing interest in the opportunity to choose a complete jury at once, using its peremptory strikes strategically to obtain a desired whole."[194] To this end, it ruled that all recalled jurors would

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[186] 28 U.S.C. § 1861 (2000).
[187] *Awadallah V*, 2006 WL 738407, at *3.
[188] *Id.* at *3.
[189] *Id.*
[190] *Id.* at *4-5.
[191] *Id.* at *4 (citations omitted).
[192] *Id.* (citation omitted)
[193] *Id.*
[194] *Id.*

> be subjected to a renewed voir dire examination. Any juror not excused for cause [would] be seated as part of the panel of thirty-five people from which the jury and alternates shall be chosen. Additional voir dire [would] be conducted to complete th[e] panel. [Thereafter both parties would] be entitled to use peremptory strikes in the usual manner.[195]

In May of 2006, the proceedings against Awadallah culminated in a mistrial.[196] Thereafter, Awadallah moved for a change of venue, citing the fact that "[d]uring the 'emotionally heated jury deliberations,' some jurors 'were tearfully discussing their September 11 recollections in the jury room.' This . . . convinced Awadallah that 'New Yorkers are too close to the events of September 11, 2001' for him to receive a fair trial in the Southern District of New York."[197] The court found the argument less compelling than other cases in which the issue was raised, because Awadallah was charged with perjury, not terrorism.[198] Nonetheless, the court acknowledged that the evidence adduced regarding the deliberations in Awadallah's trial revealed bias in the jury deliberations.[199] "Thus," the judge cautioned, "the first deliberation should be treated as a miner's canary, alerting all parties to the possibility of dangerous prejudice flowing from jurors' personal experiences of the September 11 attacks."[200] She nevertheless concluded that the problem would not likely be alleviated, and might indeed be exacerbated, by moving the trial to another venue, and the motion was denied.[201]

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[195] *Id.*

[196] *Awadallah VI*, No. 01 CR 1026 (SAS), 2006 WL 2242442 (S.D.N.Y. Aug. 3, 2006).

[197] *Id.* at *1 (footnote omitted) (quoting Letter from Sarah Kunstler, Counsel to Defendant, to the Court (May 20, 2006) (on file with the court)).

[198] *Id.* at *4. The court distinguished the Timothy McVeigh case, in which the trial was moved from Oklahoma City, Oklahoma, to Denver, Colorado.

[199] *Id.* at *5.

[200] *Id.*

[201] *Id.* Judge Scheindlin offered three reasons for her conclusion: (1) "[T]he effects of the September 11 attacks were felt nationwide, and there is no reason to believe that jurors in a different jurisdiction would lack an emotional response

On the fifth anniversary of the 9/11 attacks, the case of Osama Awadallah appeared no nearer to resolution than on the day of his arrest, September 21, 2001.

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with prejudicial effects." *Id.* (2) The likelihood of "'intensive publicity'" might be greater in a small city than in Manhattan. *Id.* (quoting United States v. Dioguardi, 428 F.2d 1033, 1039 (2d Cir. 1970)). (3) "[T]he Southern District of New York serves one of the country's most 'diverse cross-section of ethnicities, backgrounds, and experiences," reducing the potential for local bias. *Id.* (quoting United States v. White, No. 02 CR. 1111, 2003 WL 721567, at *5 (S.D.N.Y. Feb. 28, 2003)).