Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy

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INTRODUCTION

The American legal system has always attached special significance to national security issues. It is not an anomaly that treason is the only crime actually defined in the Constitution. Since the founding of this country, the judiciary has been intimately involved in the government's efforts to protect against national security threats. However, since the events of September 11, 2001, the courts' role in national security matters has become increasingly important. Many of the government's initiatives implemented in the wake of September 11 raise serious constitutional questions, and it is up to the judiciary to articulate the constitutionally permissible balance between ensuring national security and protecting civil liberties.

Since the September 11 terrorist attacks, there have been many instances in which courts have had to address the use of constitutionally questionable means to increase national security. This Development will explore three recent legal developments relating to national security: the use of material witness warrants; racial profiling and increased registration requirements for non-immigrants; and open access to deportation hearings and information on Immigration and Naturalization Service (INS) detainees.

Although developments in these three areas raise very different legal issues—from equal protection concerns, to Fourth Amendment violations, to issues of free speech—the analysis and factors the courts have used to decide these cases is highly similar. In all of these cases, the courts have had to balance a desire to protect national security against a concern that such protection impermissibly intrudes on constitutionally protected rights. In addition, the courts have had to decide if the protections supposedly provided by the challenged government initiatives help prevent terrorism or if, in some instances, they may actually increase animosity towards the United States and make further terrorist activity more likely. The courts hearing these cases must also de-

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termine if there are equally effective alternatives to the constitutionally suspect protections, or if avoiding violations of civil liberties justifies slightly lesser national security protection.

This Development will examine how the courts have attempted to balance their obligation to protect national security against their equally strong obligation to protect civil liberties. The following three Parts will address this balance in three areas of the law of increasing importance: detentions under material witness warrants, exit-entry programs for foreign nationals entering the United States, and press access to deportation proceedings. The choice between these competing obligations is rarely clear, and the decisions in these national security cases reflect the difficulty of this task.

I. MATERIAL WITNESS DETENTIONS

The federal material witness statute authorizes the government to detain witnesses in situations where the witness possesses information deemed material to a criminal proceeding, and the court finds that it may become impracticable to secure his testimony by subpoena. The impracticability determination is based on whether or not the witness poses a high flight risk.[1]

Since September 11, the government has detained between forty and fifty individuals under this statute in connection with the terrorist attacks.[2] In all of these cases the witnesses were detained to secure their appearance before grand juries investigating the attacks.[3] Two suits brought by post-September 11 material witness detainees have challenged the application of the statute to grand jury, as opposed to trial, witnesses, and led two respected district court judges in the Southern District of New York to issue divergent opinions regarding the statutory authority for and constitutionality of such detentions. A recent Second Circuit opinion resolved the split.

After a brief review of the history of the material witness statute, we summarize its application since September 11 and assess the state of the law in the

1. 18 U.S.C. § 3144 (2000). Most states also have material witness statutes that enable law enforcement officials to detain individuals who have information material to a crime under state law. *See, e.g.*, Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L.Q. 1 (1980) (discussing the material witness statutes of numerous states).

2. *See* MUZAFFAR A. CHISHTI ET AL., MIGRATION POL'Y INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11, at 58 (2003) (verifying that twenty-nine people were detained as material witnesses after September 11); Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1 (reporting that at least forty-four people were detained in the year following September 11); Letter from Jamie E. Brown, Acting Assistant Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee (May 13, 2003) [hereinafter Brown Letter] (stating that "fewer than 50" individuals have been detained as material witnesses), http://www.house.gov/judiciary/patriotlet051303.pdf.

3. Brown Letter, *supra* note 2, at 59.

wake of the two contentious district court opinions, the Second Circuit opinion, and recent changes to the Federal Rules of Criminal Procedure.

A. *History of the Material Witness Statute*

Congressional recognition of the government's right to detain witnesses to ensure their testimony at trial dates back to the eighteenth century, and the statutes authorizing such detentions have been through many iterations.[4] The current statutory scheme is made up of three parts: 18 U.S.C. § 3142 ("Release or Detention of a Defendant Pending Trial"), 18 U.S.C. § 3144 ("Release or Detention of a Material Witness"), and Rule 46 of the Federal Rules of Criminal Procedure ("Release From Custody; Supervising Detention"). Rule 46 directs that the provisions of 18 U.S.C. §§ 3142 and 3144 "govern pretrial release."[5] The text of § 3144 is as follows:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.[6]

Prior to September 11, 2001, the material witness statute was used primarily by the INS, and the vast majority of detainees were not United States citizens.[7]

Material witness detentions are controversial because they involve the extreme step of imprisoning individuals who have not been charged with committing any crime. The more usual procedure is to issue a subpoena to compel testimony, and only to imprison the witness once she has failed to comply with the subpoena.[8] The federal subpoena power over witnesses has been read to apply

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4. The statute was originally part of the Judiciary Act of Sept. 24, 1789, ch. 20, §§ 30, 33, 1 Stat. 73, 88-91. For an account of the evolution of the material witness statute, see generally 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 (2002).

5. FED. R. CRIM. P. 46(a).

6. 18 U.S.C. § 3144.

7. For example, in 2000, of over 4000 federal material witness arrestees, 94% were detained by the INS, and only 2% were American citizens. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000, http://www.ojp.usdoj.gov/bjs/abstract/cfjs00.htm (last visited October 6, 2003).

8. *See, e.g.*, United States v. Awadallah, 349 F.3d 42, 62 (2d Cir. 2003) (noting that detention of a material witness "constitutes a significant intrusion on liberty, since a material witness can be arrested with little or no notice, transported across the country, and detained for several days or weeks"); *cf.* United States v. Dionisio, 410 U.S. 1, 10 (1973) (noting the lesser impact of a subpoena as compared to an arrest or investigative stop).

in the grand jury context.[9] Additionally, the court can request bail to ensure that a person will testify,[10] and can imprison, for as long as eighteen months, witnesses who fail to comply with a court order to appear at a grand jury proceeding.[11] Congressional authorization of these alternatives, along with the possibility of taking a deposition to preserve testimony, reinforce the notion that depriving a material witness of liberty by arrest and detention should be used only as a last resort.

B. *Use of the Statute After September 11*

Since September 11, 2001, the government has used the material witness statute to detain dozens of individuals.[12] A recent newspaper article stated that "[w]idespread use of the material witness statute has been one of the most controversial aspects of the Justice Department's investigation of terrorism since the 2001 attacks."[13] Material witness warrants have been used to arrest some of the more high-profile September 11 detainees. Two of the three individuals who have been placed in solitary confinement in naval brigs within the United States as "enemy combatants," Jose Padilla[14] and Ali Saleh Kahlah al-Marri,[15] were originally arrested as material witnesses, as were three individuals facing criminal charges in connection with September 11, James Ujaama,[16] Zacharias Moussaoui,[17] and Mike Hawash.[18] The highly visible use of this statute after September 11, the harsh treatment of the detainees, the fact that many alleged witness detainees were never asked to testify, and the fact that several were later charged with crimes or designated as "enemy combatants," have raised concerns that the government might be using the statute as a pretext to detain individuals for reasons other than securing their testimony.[19] As discussed be-

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9. *See* Bacon v. United States, 449 F.2d 933, 940 (9th Cir. 1971). For the witness subpoena power, see FED. R. CRIM. P. 17.

10. 18 U.S.C. § 3142.

11. 28 U.S.C. § 1826.

12. *See* Brown Letter, *supra* note 2.

13. Edward Walsh, *Court Upholds a Post-9/11 Detention Tactic,* WASH. POST, Nov. 8, 2003, at A11.

14. *See* Padilla v. Bush, 233 F. Supp. 2d 564, 564 (S.D.N.Y. 2002).

15. *See* Al-Marri v. Bush, 274 F. Supp. 2d 1003, 1004 (C.D. Il. 2003).

16. *See* Fainaru & Williams, *supra* note 2.

17. Although Moussaoui was originally arrested on immigration charges, *see* Philip Shenon, *White House Called Target of Plane Plot,*, N.Y. TIMES, Aug. 9, 2003, at A7, news reports indicate that he was subsequently held as a material witness until his indictment. *See, e.g.,* Fainaru & Williams, *supra* note 2.

18. *See In re* Material Witness Detention, 271 F. Supp. 2d 1266 (D. Or. 2003).

19. *See, e.g.*, United States v. Awadallah, 202 F. Supp. 2d 55, 77 (S.D.N.Y. 2002) rev'd, 349 F.3d 42 (2d. Cir. 2003); CHISHTI ET AL., *supra* note 2; HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 60 (2002), *at* http://www.hrw.org/reports/2002/us911/USA0802.pdf; LAWYERS COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS 16 (2002), http://www.lchr.org/pubs/descriptions/loss_report.pdf; Fainaru & Williams, *supra* note 2; Josh Gerstein, *Secret Detentions: Do as USA Says—Or as It does?*, USA TODAY, Mar. 14, 2002, at A15; John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo,*

low,[20] it is often much easier to satisfy the probable cause requirement when arresting someone as a material witness for a grand jury proceeding than when taking her into custody as a criminal suspect. Whereas a suspected criminal may not be arrested until a judge has satisfied herself that the evidence of criminal activity is sufficient to establish probable cause,[21] individuals who are suspected of having information material to a grand jury investigation and who may be deemed a flight risk (such as immigrants, those who cannot afford bail, and those with few ties to a community) can be subjected to arrest and detention solely on the basis of a statement from a law enforcement official.[22]

The different burdens for establishing probable cause to arrest a criminal suspect and a material witness create the opportunity for abuse in the form of pretextual detention under the lower material witness standard in place of arrest as a criminal suspect. A recent report by the U.S. Department of Justice (DOJ) Office of the Inspector General has intensified concerns that the material witness warrant is being used in just such a pretextual manner to detain individuals for preventive or coercive purposes. According to the Inspector General's report, a DOJ official indicated that "the Department's official policy was to 'use whatever means legally available' to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed."[23] This resulted in a "hold until cleared" policy under which "September 11 detainees [were] held without bond until the FBI cleared them of any connections to terrorism."[24] A senior DOJ official, discussing the "hold until cleared" policy in a document entitled "Maintaining Custody of Terrorism Suspects," stated:

> The Department of Justice . . . is utilizing several tools to ensure that we maintain in custody all individuals suspected of being involved in the September 11 attacks without violating the rights of any person. If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant.[25]

These findings, along with statements by Attorney General Ashcroft and former Assistant Attorney General for the Office of Legal Policy Viet Dinh,[26]

NEWSDAY, Sept. 18, 2002, at A6; Rachel L. Swarns, *Muslims Protest Month-long Detention Without a Charge*, N.Y. TIMES, Apr. 20, 2003, at A16.

20. *See infra* Subsection I.E.1.

21. *See* U.S. CONST. amend. IV.

22. *See, e.g.*, Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); *see also infra* Subsection I.E.1.

23. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 13 (2003), http://www.usdoj.gov/oig/special/03-06/full.pdf.

24. *Id.* at 37.

25. *Id.* at 38-39.

26. *See* Stephen R. McAllister et al., *Life After 9/11: Issues Affecting the Courts and the Nation*, 51 KAN. L. REV. 219, 224-25 (2003) (statement of conference participant Viet Dinh, Assistant Attorney General for the Office of Legal Policy, Department of Justice); Cam Simpson, *Roundup Unnerves Oklahoma Muslims*, CHI. TRIB., Apr. 21, 2002, at 1 (quoting Attorney General Ashcroft as stating that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delay-

raise the specter of a new DOJ policy under which, in the absence of evidence to sustain criminal or immigration charges, the material witness statute is to be used as a "tool" of preventive detention, allowing the DOJ to hold those suspected of connection with terrorist activity until their names have been cleared by the FBI. The fact that at least twenty of the individuals detained never testified before a grand jury prior to their release further supports the idea that these detentions may have diverged from their stated purpose of securing testimony.[27]

The application of the law since September 11 has aroused controversy for at least three additional reasons, namely that all of the individuals arrested pursuant to these material witness warrants have been detained for appearance before a grand jury rather than as trial witnesses;[28] more than fifty percent of the material witnesses detained in connection with the September 11 terrorist attacks were held for longer than a month, and several were detained longer than ninety days;[29] and harsh conditions of confinement have been documented in a number of the cases.[30]

The controversy over the use of material witness warrants soon found its way into the courts, resulting in the conflicting holdings in two Southern District of New York cases. This split was recently resolved by the Second Circuit. The points of dispute on the reach and constitutionality of the material witness statute found in those cases provide a basis for exploring its current legal status.

C. *The Controversy in the Second Circuit*

After more than a year of uncertainty, the Second Circuit's opinion in *United States v. Awadallah*[31] finally resolved a dispute between two district courts arising from the aggressive use of the material witness statute post-September 11. The district court in *Awadallah*, which the Second Circuit reversed, had held that the government could not detain material witnesses to testify before a grand jury, but rather that the statute authorized detention of witnesses only to testify at trial.[32] Judge Scheindlin had also suggested that "[i]mprisoning a material witness for a grand jury investigation raises a serious constitutional question under the Fourth Amendment."[33] In *In re Material Witness Warrant*,[34] Chief Judge Mukasey had found statutory authority for grand

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ing new attacks").

27. Fainaru & Williams, *supra* note 2.

28. Brown Letter, *supra* note 2.

29. *Id.*

30. *See infra* Subsection I.E.2.d.

31. 349 F.3d 42 (2d Cir. 2003).

32. United States v. Awadallah, 202 F. Supp. 2d 55, 76 (S.D.N.Y. 2002) (Scheindlin, J.), rev'd 349 F.3d 42 (2d. Cir. 2003).

33. *Id.* at 77.

34. *In re* Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287

jury witness detention, and had held that such detention was not facially unconstitutional.[35] In *Awadallah,* the Second Circuit adopted much of Chief Judge Mukasey's reasoning, holding that the material witness statute was applicable to grand juries, and that Awadallah's detention under the statute did not violate the Fourth Amendment.[36]

The Second Circuit's finding that there is statutory authority to detain witnesses in order to testify before a grand jury (as opposed to at a trial) is supported by the December 2002 Supreme Court amendments to the Federal Rules of Criminal Procedure described in the next Section. However, while the Second Circuit found the government's detention of Awadallah to be constitutional, Judge Scheindlin's opinion raised many important questions about the detention of grand jury witnesses that have yet to be fully laid to rest.

D. *Statutory Authorization for Detaining Grand Jury Witnesses*

Judge Scheindlin and Chief Judge Mukasey each went through a complicated statutory analysis of the material witness statute, seeking to determine whether the term "criminal proceeding" as used in the statute encompasses grand jury proceedings. Chief Judge Mukasey found that the material witness statute did apply to grand jury witnesses, whereas Judge Scheindlin found the opposite. A detailed comparison of the statutory arguments contained in the two cases is provided by recent law review articles.[37] The Second Circuit performed the same statutory analysis and found that the material witness statute did apply to grand jury witnesses, relying heavily on Chief Judge Mukasey's analysis and the legislative history of the material witness statute.[38]

This finding appears to be supported by a December 2002 amendment to Federal Rule of Criminal Procedure 46, "Release From Custody; Supervising Detention," which states that the material witness statute (along with its companion statute, 18 U.S.C. § 3142) governs pretrial detention.[39] Rule 46 also addresses the reporting requirements applicable to pre-trial detentions. In relevant part, the version of the rule in force at the time of the Scheindlin and Mukasey opinions read:

> The attorney for the government shall make a biweekly report to the court listing each *defendant and witness* who has been held in custody *pending indictment,* arraignment or trial for a period in excess of ten days.[40]

(S.D.N.Y. 2002) (Mukasey, C.J.) [hereinafter *Material Witness Warrant*].

35. *Id.* at 300.

36. United States v. Awadallah, 349 F.3d 42, 50-55 (2d Cir. 2003).

37. *See* Roberto Iraola, *Terrorism, Grand Juries and the Federal Material Witness Statute,* 34 ST. MARY'S L.J. 401 (2003); Studnicki & Apol, *supra* note 4.

38. *Awadallah,* 349 F.3d at 50-55.

39. FED. R. CRIM. P. 46(a).

40. *Material Witness Warrant,* 213 F. Supp. 2d. 287, 296 (S.D.N.Y. 2002) (quoting Fed. R. Crim. P. 46(g) (emphasis added)).

Although Chief Judge Mukasey read this to support the proposition that Rule 46 "does not apply exclusively to trial witnesses,"[41] the opposite construction was also possible. A plausible alternative to Chief Judge Mukasey's reading was that the rule was intended to apply to defendants pending indictment and arraignment, and to defendants and witnesses pending trial. The recent amendment seems to resolve this ambiguity in favor of Chief Judge Mukasey's position. The rule now states that:

> An attorney for the government must report biweekly to the court, listing *each material witness held* in custody for more than 10 days *pending indictment*, arraignment, or trial.[42]

The new Rule 46 now appears to provide an unequivocal statement from Congress that a material witness can be detained pending indictment of a defendant—in other words, at the grand jury stage of an investigation.[43] Thus, the statutory issue that so preoccupied the district courts in *Awadallah* and *Material Witness Warrant* has been resolved by the Second Circuit and the Rule 46 amendments described above.

E. *Constitutional Considerations*

Prior to September 11, the Supreme Court had addressed the rights and duties of witnesses in several cases. The Court stated in general terms that "[t]he duty to disclose knowledge of crime . . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."[44] In 1959 the Supreme Court, in *New York v. O'Neill*,[45] upheld a reciprocal material witness statute enacted by over forty states.[46] This statute allowed a judge, upon the request of a judge in another state, to either issue a summons directing a witness to travel to that state and testify at a trial or before a grand jury, or immediately to detain the witness and deliver him to an officer of the requesting court. The Court held that "[b]ecause of the generous protections to be accorded a person brought or summoned before the court of the forwarding State," the statute was not facially unconstitutional.[47] The statute's procedural requirements, however, differed from those of the federal material witness stat-

41. *Id.*

42. FED. R. CRIM. P. 46(h)(2) (emphasis added)

43. However, it is not clear that such was the intent of the Advisory Committee. According to the Advisory Committee Notes, this change was made because the Committee "believed that the [reporting] requirement was no longer necessary [with respect to defendants] in light of the Speedy Trial Act," but was still necessary for detention of material witnesses. FED. R. CRIM. P. 46 advisory committee's note (2002). "While the Committee Notes are not officially sanctioned by the Court, they are nevertheless persuasive evidence of the 'legislative intent' behind each Rule." 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL RULES PAMPHLET 3 (2003 ed.) (footnote omitted).

44. Stein v. New York, 346 U.S. 156, 184 (1953).

45. 359 U.S. 1 (1959).

46. *Id.* at 4-5.

47. *Id.* at 8.

ute, in that the requesting court had to state the number of days the witness would be required to attend, and the forwarding court had to determine that the witness was not only material but also necessary and that the testimony would not result in undue hardship.[48]

The Supreme Court has also held that the detention of material witnesses to give testimony *at a trial* is not a taking within the meaning of the Fifth Amendment and does not give rise to any constitutional imperative for compensation;[49] witnesses *subpoenaed* to testify before a grand jury have a Fifth Amendment right against self-incrimination;[50] and witnesses *subpoenaed* to appear before a grand jury need not be given Miranda warnings.[51] The Supreme Court has never, however, performed a Fourth Amendment analysis of the federal material witness statute as applied to grand jury witnesses. The Second Circuit and Southern District courts, by contrast, focused primarily on Fourth Amendment concerns, and we shall do the same.[52] The remainder of this Part highlights aspects of material witness detention potentially vulnerable to Fourth Amendment challenge and analyzes the courts' treatment of these issues.

The arrest and detention of a material witness to appear before the grand jury constitutes a seizure, and as such must conform to the requirements of the Fourth Amendment. Thus, for the detention of a material witness to be constitutional, the warrant for the witness' arrest must be based on probable cause, and the arrest and detention must also be reasonable.[53]

1. *Probable Cause*

In the context of a criminal arrest, probable cause means probable cause to believe that the suspect has committed a crime. In the case of a material witness

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48. *Id.* at 4-5.

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

50. Counselman v. Hitchcock, 142 U.S. 547 (1892).

51. United States v. Mandujano, 425 U.S. 564 (1976).

52. Many of the Fourth Amendment concerns can also be couched in terms of Fifth Amendment due process protections. Among the possible Fifth Amendment due process questions are the following: How should the requirements of notice and an opportunity to be heard be applied to detained grand jury witnesses? Is the taking of a deposition required whenever possible in order to satisfy substantive due process's narrow tailoring requirement? What length of detention of the innocent violates due process? Does the inherent nebulousness of a grand jury investigation influence the *Mathews v. Eldridge* calculus? *See* United States v. Awadallah, 349 F.3d 42, 55 n.8 (2d Cir. 2003) (noting that the factors relevant to a Fourth Amendment analysis also inform a Fifth Amendment due process analysis). The void for vagueness doctrine might also rear its head. Since the Second Circuit adopted Chief Judge Mukasey's argument that the material witness statute is to be read as referring to the provisions of 18 U.S.C. § 3142 "only insofar as they are applicable to a grand jury setting," this might create the potential for arbitrary and discriminatory enforcement and thus fail the dominant prong of the Supreme Court's void for vagueness doctrine. *Id.* at 61 (citing *Material Witness Warrant*, 213 F. Supp. 2d 287, 296 (S.D.N.Y. 2002)).

53. The Fourth Amendment provides in relevant part: "The 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." U.S. CONST. amend. IV.

the question naturally arises: "Probable cause of what?" The Supreme Court has not addressed this issue, but in *Bacon v. United States*,[54] the Ninth Circuit formulated a two-prong test for the satisfaction of the Fourth Amendment requirement of probable cause in the context of arrest and detention of a witness for appearance before a grand jury. The *Bacon* test has subsequently been adopted by other courts, including the Second Circuit in *Awadallah*.[55] According to the *Bacon* court, "[b]efore a material witness arrest warrant may issue, the judicial officer must have probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his presence by subpoena.'"[56] The flight risk aspect of the requirement means that the material witness warrant will primarily apply to people who have traditionally been considered flight risks, such as immigrants, those who cannot afford bail, and those who do not have significant ties to the community.

Although the *Bacon* court required a sufficient showing of the "underlying facts or circumstances" to determine flight risk, the *Bacon* standard for materiality is "a mere statement by a responsible official."[57] While the court acknowledged that, in accordance with the Supreme Court's Fourth Amendment jurisprudence, normally "a judicial officer must be provided with information of sufficient specificity and apparent reliability to permit him to determine independently the existence *vel non* of probable cause,"[58] the *Bacon* court felt that this requirement could be waived in the light of "special function of the grand jury" and the fact that "its proceedings are secret."[59]

In *Material Witness Warrant*, Chief Judge Mukasey adopted the *Bacon* position on materiality, stating that "a court weighing the propriety of a material witness warrant for a grand jury witness should determine materiality based on the representation of the prosecutor, lest grand jury secrecy be compromised."[60] By contrast, in *United States v. Awadallah*,[61] Judge Scheindlin rejected the *Bacon* position on the grounds that "if a judge abdicates her role by delegating her

54. 449 F.2d 933 (9th Cir. 1971).

55. *Awadallah*, 349 F.3d at 64; *see also* Arnsberg v. United States, 757 F.2d 971, 975 (9th Cir. 1985); *In re* de Jesus Berrios, 706 F.2d 355, 357 (1st Cir. 1983); United States v. Oliver, 683 F.2d 224, 230 (7th Cir. 1982). Although the *Bacon* court limited its holding to the grand jury context, 449 F.2d at 943, other courts have applied the standards which it set out to material witnesses testifying at trial. *See, e.g.*, United States v. Feingold, 416 F. Supp. 627 (E.D.N.Y. 1976).

56. *Bacon*, 449 F.2d at 943 (quoting 18 U.S.C. § 3144 (2000)).

57. *Id.* Judge Straub's concurrence in *Awadallah* convincingly argues that the majority's decision weakened the traditionally strong standard for finding impracticability, in large part replacing a "sufficient showing of the underlying facts or circumstances" with "suppositions . . . about the significance of [the witness's] failure to come forward." 349 F.3d at 78-79 (Straub, J., concurring in the judgment) (internal quotation marks omitted).

58. *Bacon*, 449 F.2d at 942.

59. *Id.* at 943.

60. *Material Witness Warrant*, 213 F. Supp. 2d 287, 294 (S.D.N.Y. 2002). This formulation has also been accepted by the First Circuit in *In re de Jesus Berrios*, 706 F.2d at 358; and the Seventh Circuit in *Oliver*, 683 F.2d at 231.

61. 202 F. Supp. 2d 55 (S.D.N.Y. 2002), 349 F.3d 42 (2d Cir. 2003).

authority to the government, she reads the materiality requirement out of the statute."[62]

The Second Circuit's materiality determination in *Awadallah* relied solely upon the affidavit of an FBI official, noting that *Bacon* held that the statement of a responsible official is sufficient to establish materiality.[63] However, while the affidavit in *Bacon* merely stated that the witness was material without giving reasons for this determination,[64] and was nonetheless found to be sufficient to meet the materiality prong of the test, the affidavit in *Awadallah* included factual information about why the FBI official had reason to believe that Awadallah had information material to the September 11 attacks.[65] Furthermore, the Second Circuit analyzed whether these facts would be sufficient to find probable cause.[66]

Thus, the Second Circuit's probable cause analysis was more probing than the "mere assertion" standard employed by *Bacon*,[67] which is vulnerable to criticism on the grounds that it fails the requirements of particularity and independent judicial determination seemingly mandated by the Supreme Court's Fourth Amendment jurisprudence. In 1958, the Court declared that a "neutral and detached magistrate . . . must judge for himself the persuasiveness of the facts relied upon by a complaining officer to show probable cause."[68] In *Terry v. Ohio*,[69] the Court reiterated the need for specificity, explaining that the Fourth Amendment requires law enforcement officers "to point to specific and articulable facts . . . which reasonably warrant the intrusion,"[70] and that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."[71] Specificity and independent judicial review are at the core of the Fourth Amendment because:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those in-

62. *Id.* at 63.

63. United States v. Awadallah, 349 F.3d 42, 65-66 (2d Cir. 2003) (citing *Bacon*, 449 F.2d at 943).

64. *Bacon*, 449 F.2d at 943.

65. *Awadallah*, 349 F.3d at 66.

66. *Id.* at 69-70. The Second Circuit also analyzed the district court's claim that the affidavit contained material misrepresentations, *id.* at 67, and information that was unlawfully obtained, *id.* at 68-69 (citing *Awadallah*, 202 F. Supp. 2d at 96). The court found that "even after excising the information obtained in violation of the Fourth Amendment and emending the . . . misleading statements discussed above, *there remains a residue of independent and lawful information sufficient to support probable cause*." *Id.* at 65 (internal quotation marks omitted) (emphasis added). The key point is that the court assessed the sufficiency of the factual statements in the affidavit to determine materiality rather than relying on the simple statement by an official that Awadallah possessed material information.

67. *Bacon*, 449 F.2d at 943.

68. Giordenello v. United States, 357 U.S. 480, 486 (1958).

69. 392 U.S. 1 (1968).

70. *Id.* at 21.

71. *Id.* at 21 n.18.

> ferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[72]

Notably, the Supreme Court decision that *Bacon* cited as support for the contention that detention of material witnesses was constitutional, *Barry v. United States ex rel. Cunningham*,[73] referred to a prior incarnation of the material witness statute that explicitly required *proof* of materiality.[74]

The asserted justification for determining materiality based solely on prosecutorial say-so, the need to protect grand jury secrecy, is also questionable, because the statute is already riddled with exceptions which allow disclosure. First:

> [C]ourt[s] may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; [or] (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury . . . .[75]

Second, the recent passage of the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act broadened the list of exceptions to allow the disclosure of foreign intelligence information to a broad range of federal agencies, including those involved with intelligence, immigration, and national defense.[76] As the Second Circuit and Chief Judge Mukasey both noted, it is also possible for courts to make a determination based on sealed evidence, which suggests there is an alternative solution which would enable a judge to make a determination of materiality based on actual evidence.[77]

Finally, authorizing a deprivation of liberty on the say-so of a prosecutor is fundamentally at odds with the purpose of the grand jury, which has been described by the Supreme Court as "standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated

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72. Johnson v. United States, 333 U.S. 10, 13-14 (1948).

73. 279 U.S. 597, 617 (1929).

74. In *Barry*, the Court noted that:

> A statute of the United States (U.S. Code, Title 28, § 659) provides that any federal judge, on application of the district attorney, and *being satisfied by proof* that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted."

Id. at 616-17 (emphasis added).

75. FED. R. CRIM. P. 6(e)(3)(E).

76. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). In *Awadallah*, the Second Circuit noted these recent USA PATRIOT Act exceptions, and used them to support the idea that an FBI official, rather than the prosecutor, can sign the affidavit for a material witness warrant, since they give FBI officials access to grand jury information. *Awadallah*, 349 F.3d at 66 n.18.

77. *Awadallah*, 349 F.3d at 61; *Material Witness Warrant*, 213 F. Supp. 2d 287, 294 (S.D.N.Y. 2002).

by an intimidating power or by malice and personal ill will."[78] It seems problematic that the secrecy of the grand jury, which the Supreme Court has justified in terms of protecting the witness from retribution[79] and the target of the investigation from ridicule,[80] should be invoked to prevent the witness from demanding a higher standard than "mere assertion" in order to protect her liberty against faulty government assertions of materiality.[81]

2. *Reasonableness*

To satisfy the Fourth Amendment, the arrest and detention of a material witness must also be reasonable. The Supreme Court has described the reasonableness inquiry as a balancing test, which weighs "the need to search [or seize] against the invasion which the search [or seizure] entails."[82] Alternatively, as the Second Circuit described it in *Awadallah*, the test requires consideration of both "the nature and quality of the intrusion on the individual's Fourth Amendment interests" and "the importance of the governmental interests alleged to justify the intrusion."[83] Furthermore, the seizure must be "reasonably related in scope" [84] to the circumstances which justified it, so "reasonableness depends on not only when a seizure is made, but also how it is carried out."[85]

In *Awadallah*, Judge Scheindlin expressed her belief that "[i]mprisoning a material witness for a grand jury investigation raises a serious constitutional question under the Fourth Amendment, which prohibits unreasonable seizures."[86] In support of this position, Judge Scheindlin sketched four reasons. First, Scheindlin observed that a grand jury investigation "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[87] Second, she reasoned that the detention of *trial* witnesses passes constitutional muster in part because Congress took pains to minimize the invasion of liberty by providing for the taking of depositions as an alternative to incarceration, and that the arguable lack of this alternative in the grand

78. Wood v. Georgia, 370 U.S. 375, 390 (1962).

79. The Court has stated:

> If preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements.

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

80. "[B]y preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Id.*

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

82. Terry v. Ohio, 392 U.S. 1, 21 (1968) (alterations in original) (internal quotation marks omitted).

83. *Awadallah*, 349 F.3d 58 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

84. *Terry*, 392 U.S. at 20.

85. *Garner*, 471 U.S. at 8.

86. United States v. Awadallah, 202 F. Supp 2d 55, 77 (S.D.N.Y. 2002) (internal quotation marks omitted), rev'd 349 F.3d 42 (2d Cir. 2003).

87. *Id.* at 77 (citing Branzburg v. Hayes, 408 U.S. 665, 701 (1972)).

jury context would raise a Fourth Amendment flag.[88] Third, she noted that detention as a material witness might be pretextual, and thus per se unreasonable. "Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute."[89] Lastly, Judge Scheindlin intimated that the harsh treatment of post-September 11 witnesses during confinement might pose a constitutional problem, noting that "[h]aving committed no crime—indeed without any claim that there was probable cause to believe he had violated any law—Awadallah bore the full weight of a prison system designed to punish convicted criminals."[90]

Chief Judge Mukasey did not explore the constitutional problems alluded to by Judge Scheindlin, but determined that "the constitutional problem discerned by the *Awadallah* court does not exist," because the perception would be inconsistent with "a substantial body of case law, including but not limited to Supreme Court case law."[91] However, none of the cases cited by Chief Judge Mukasey directly addressed the constitutionality of arresting and detaining witnesses to appear before the grand jury, but rather dealt with witnesses detained to testify at trial,[92] or witnesses brought before the grand jury by subpoena, rather than by arrest and detention.[93] As the Second Circuit noted in *Awadallah*, "The only prior case that squarely considered the issue . . . [was] *Bacon v. United States*."[94] Nonetheless, although Chief Judge Mukasey did not cite it, as discussed above, *New York v. O'Neill*[95] does support his position that detention of witnesses to give testimony before the grand jury is not per se unconstitutional. In *O'Neill*, the Supreme Court remarked that "Florida could undoubtedly have held respondent within Florida if he had been a material witness in a criminal proceeding within that State,"[96] where the context makes clear that the Court considered a grand jury investigation to fall within the definition of a criminal proceeding.

However, because the *O'Neill* Court did not consider a Fourth Amendment challenge, reliance on *O'Neill* does not resolve all of the constitutional problems delineated by Judge Scheindlin. Assessment of the constitutionality of such detentions requires a Fourth Amendment reasonableness analysis. In the

88. *Id.* at 78.
89. *Id.* at 77.
90. *Id.* at 60.
91. *Material Witness Warrant*, 213 F. Supp. 2d 287, 298 (S.D.N.Y. 2002).
92. Hurtado v. United States, 410 U.S. 578 (1973).
93. United States v. Mandujano, 425 U.S. 564 (1976); Counselman v. Hitchcock, 142 U.S. 547 (1892).
94. United States v. Awadallah, No. 02-1269, 2003 U.S. App. LEXIS 22879, at *20-21 (2d Cir. Nov. 7, 2003).
95. 359 U.S. 1 (1959); *see also supra* note 45.
96. *O'Neill*, 359 U.S. at 7.

remainder of this Section, we briefly describe the major elements of such an analysis, using the four concerns raised by Judge Scheindlin as a framework, and noting whether and how these issues were resolved in the opinions of Chief Judge Mukasey in *Material Witness Warrant* and the Second Circuit in *Awadallah*. The contentions are first, that the Fourth Amendment reasonableness calculus might be different for trial and grand jury witnesses because there is arguably a higher risk of error in grand jury proceedings; second, that the deposition alternative is arguably less problematic in the grand jury context than at trial, so reluctance on the part of the government to take a deposition and free the witness impacts the assessment of Fourth Amendment reasonableness; third, that the reduced requirements for establishing materiality as described above increase the possibility that material witness warrants will be improperly used for purposes other than securing testimony; and fourth, that the harsh conditions of confinement applied to material witnesses are unreasonable under the Fourth Amendment. As noted previously, each of these concerns must be evaluated in light of the Fourth Amendment balancing test, and the seizure must be "reasonably related in scope to the circumstances which justified it."[97]

a. Risk of Error

The Fourth Amendment reasonableness calculus involves balancing the governmental interest in crime prevention and detection against the liberty interest of the individual.[98] In the grand jury context, there may be a greater risk of erroneous assessment of materiality on the part of the government, and if so, this likelihood of error must weigh on the liberty interest side of the scale. In the case of a trial witness, a grand jury has already established that there is probable cause to believe that a particular individual has committed a specific crime. However, when a grand jury witness is asked to sacrifice her liberty, it may not even have been ascertained whether any crime has been committed, and the whole investigation may be based on weak evidence such as the tips and personal knowledge of the prosecutor. As the Second Circuit observed in *Awadallah*,

> the materiality of the testimony given by a trial witness can be assessed on the basis of the indictment, discovery materials, and trial evidence, whereas grand jury secrecy requires the judge to rely largely on the prosecutor's representations about the scope of the investigation and the materiality of the witness's testimony.[99]

The danger of erroneously depriving a witness of his liberty on the basis of

97. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

98. This might also be cast in terms of a Fifth Amendment *Mathews v. Eldridge* test: the risk of erroneous detention of a witness (due to abuse by law enforcement or incorrect attribution of materiality) being arguably greater in the context of an as yet unformed investigation perhaps lacking even a suspect, than at trial. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

99. *Awadallah*, 349 F.3d at 61-62. The Second Circuit, however, ultimately agreed with Chief Judge Mukasey that, despite issues of grand jury secrecy and limited and unreliable information, the materiality determination was nonetheless "within the district court's competence." *Id.*

such "tips" was illustrated by the case of Abdallah Higazy. Mr. Higazy, an Egyptian-born student, was arrested as a material witness in December 2001, based on claims that he had been in possession of a ground-to-air radio while staying in a hotel close to the World Trade Center on September 11.[100] After three weeks of detention, the FBI obtained a confession in the course of a polygraph examination at which Mr. Higazy's counsel was not present.[101] Charges brought on the basis of this confession were dropped five days later when another hotel guest, an airline pilot, came forward to claim the radio in question.[102] Mr. Higazy's narrow escape from the dire consequences of the FBI's reliance on flawed information demonstrates the high potential for erroneous detention at the grand jury stage. This risk of error should be included in the calculus for determining the reasonableness of witness detention in the grand jury context.

There are at least two other reasons why the Fourth Amendment balance may tip in a different direction in the case of grand jury witnesses. Unlike a trial court, a grand jury can consider hearsay evidence,[103] so an interview with the witness recounted by law enforcement might satisfy the governmental interest in the witness' information. Furthermore, a traditional rationale for detaining witnesses, namely the need to ensure their physical safety,[104] is weaker in the case of a grand jury witness, because grand jury secrecy is meant to guarantee that the target of the investigation remains ignorant of the proceedings until an indictment is prepared.

b. The Deposition Alternative

The material witness statute states that "[n]o 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."[105] The proportionality prong of Fourth Amendment reasonableness analysis would appear to require that the Government take seriously this statutory injunction: detention of a witness who has not been charged with committing a crime is not a proportionate means of addressing the government's compelling need for information if a deposition might be taken instead. Furthermore, it may be less reasonable for the government to prefer live testimony to a deposition in the grand jury rather

100. United States v. Awadallah, 202 F. Supp. 2d 55, 79 n.29 (S.D.N.Y. 2002), rev'd 349 F.3d 42 (2d. Cir. 2003).

101. *Id.*

102. *Id.*

103. *See* Costello v. United States, 350 U.S. 359, 363-64 (1956).

104. Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 618 (1929) (detention of witness appropriate "where suspicions exist that a witness may disappear, *or be spirited away*, before trial" (emphasis added)).

105. 18 U.S.C. § 3144 (2000).

than trial context because grand juries may admit hearsay evidence.[106] A deposition at a grand jury proceeding, as opposed to a trial, also seems unlikely to raise Sixth Amendment Confrontation Clause concerns.

In *Awadallah*, the government first argued that the deposition provision would not apply to a grand jury witness.[107] Based on her statutory interpretation, Judge Scheindlin agreed.[108] Judge Scheindlin also suggested that the provision of a deposition alternative was a constitutionally required part of the statutory scheme for detaining witnesses, and used this as further evidence that the material witness statute did not apply to grand juries.[109] By contrast, in *Material Witness Warrant*, Chief Judge Mukasey found that "the remedy of testimony by deposition might be available to a grand jury witness."[110] However, he also determined that the burden lay on the witness to request a deposition, which the witness had failed to do in that particular case.[111] Therefore, Chief Judge Mukasey did not consider the possibility, alluded to in *Awadallah*, that the taking of a deposition was a constitutionally required part of the statutory scheme for detaining witnesses.

At the Second Circuit, the "government's altered position on appeal [was] that Congress intended depositions to be available as a less restrictive alternative to detaining a grand jury witness."[112] The Second Circuit noted that recent changes to Rule 46 make it clear that Congress intended to make the deposition alternative available to grand jury witnesses.[113] Although deeming it "awkward," the Second Circuit accepted the Government's "pivot" on the deposition question,[114] holding that the "deposition mechanism is available for grand jury witnesses detained under 18 U.S.C. § 3144,"[115] subject to the imposition by the district judge of "additional conditions for the conduct of [the] deposition . . . according to grand jury protocol."[116]

The Second Circuit referred to the deposition mechanism as the "first procedural safeguard" limiting the material witness statute's potentially "significant infringements on liberty . . . and reasonably balanc[ing] it against the government's countervailing interests."[117] Nonetheless, the Second Circuit concluded that "the deposition mechanism invoked in § 3144 . . . is not re-

106. *See Costello*, 350 U.S. at 363-64.
107. *Awadallah*, 202 F. Supp. 2d at 78.
108. *Id.*
109. *Id.*
110. *Material Witness Warrant*, 213 F. Supp. 2d 287, 296 (S.D.N.Y. 2002) (citing FED. R. CRIM. P. 15, 46(g)).
111. *Id.* at 302.
112. United States v. Awadallah, 349 F.3d 42, 60 (2d Cir. 2003).
113. *Id.* at 60-61 (citing FED. R. CRIM. P. 46(h)(2)).
114. *Id.* at 59.
115. *Id* at 60.
116. *Id.*
117. *Id.* at 59.

quired in every instance."[118] Based on the text of § 3144, the court determined that the taking of a deposition is subject to the conditions that "the testimony of such witness can be adequately secured by deposition" and that "further detention is not necessary to prevent a failure of justice."[119]

Having discussed the limitations on deposition availability built into the material witness statute itself, the court went on to apply an additional restriction taken from § 3142.[120] The Second Circuit noted that a deposition may be denied whenever "'after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.'"[121] But a witness's appearance need not be secured, provided that the deposition meets § 3144 conditions of adequacy and avoiding failure of justice. The Second Circuit's application of § 3142 to material witnesses seems to eviscerate the deposition alternative explicitly provided by the statute and the rules of criminal procedure.[122] A more reasonable reading of the statutes is that § 3142 applies only to criminal defendants whose presence cannot be substituted by a deposition.

c. Pretextuality

Judge Scheindlin also voiced the concern that the government's use of the material witness warrant might be pretextual and thus per se unreasonable. "Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute."[123] Under the *Bacon* materiality standard, if an individual can be shown to be a flight risk, it is far easier to establish probable cause to detain a material witness than a suspect,[124] and this difference in standards raises the concern that law enforcement officials will obtain custody of a suspect under cover of a material witness warrant, in order to create the oppor-

118. *Id.* at 62 (citing 18 U.S.C. § 3144 (2000)).

119. *Id.*

120. As is described *supra* Subsection I.A, 18 U.S.C. § 3144 applies solely to material witness detainees, while 18 U.S.C. § 3142 governs detention of both material witnesses and defendants. This can result in confusion regarding which sections apply only to defendants. See *Awadallah*, 349 F.3d at 61.

121. *Id.*, 349 F.3d at 62-63 (quoting 18 U.S.C. § 3142(e)). The Second Circuit noted that the § 3142(e) concern with assuring the safety of persons and the community is "inappropriate in the material witness context." *Id.*, at 63 n.15.

122. The Second Circuit appears to have relied on this misapplication of § 3142(e) in determining that Awadallah was reasonably detained for twenty days pending his grand jury testimony despite his lawyer's request for a deposition. *See Id.* at 63 ("Awadallah's attorney argued . . . that a deposition should be taken pursuant to § 3144. The court found that, under § 3142, there were no conditions of release that would reasonably assure Awadallah's appearance before the grand jury.").

123. United States v. Awadallah, 202 F. Supp. 2d 55, 77 (S.D.N.Y. 2002), rev'd 349 F.3d 42 (2d Cir. 2003).

124. *See supra* Section I.B.

tunity for coercion.[125] A further fear is that the statute may be applied to obtain preventive detentions outside the narrow range of instances in which preventive detentions have been deemed constitutional.[126] The recent Department of Justice Office of the Inspector General report discussed above provides a reliable indication that these concerns may be valid with respect to post-September 11th material witness detentions.[127]

Although the Second Circuit agreed with Judge Scheindlin that "it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established,"[128] it saw "no evidence to suggest"[129] any such impropriety in *Awadallah's* detention.

d. Conditions of Confinement

The Supreme Court has held that "reasonableness depends on not only when a seizure is made, but also how it is carried out."[130] The conditions of confinement to which post-September 11 witnesses have been subjected may provoke future challenges to the constitutionality of the material witness statute.

These conditions have often been extraordinarily harsh. For example, Mr. Awadallah was placed in solitary confinement, denied family visits, strip-searched in front of a video-camera every time he was taken to and from his cell, and subjected during transportation to leg restraints, a belly chain, and a set of handcuffs looped through the belly chain.[131] During his testimony before the grand jury, Mr. Awadallah, a witness not accused of any crime, was obliged

125. In addition to exemplifying the risk of error problem described above, *see supra* Subsection I.E.2.a, the false confession extracted from Abdallah Higazy also lends weight to concerns about suspect coercion under cover of witness detention. *See Awadallah*, 202 F. Supp. 2d at 79 n.29.

126. Aside from being outside of the purview of the statute, detention for preventive reasons raises a host of civil liberty concerns, and has only been approved in very limited circumstances with many procedural safeguards. *See, e.g.*, Kansas v. Crane, 534 U.S. 407 (2002) (holding that the Constitution requires a specific finding that an offender lacks the ability to control his behavior before he can be detained for preventative purposes under a sex offender statute); United States v. Salerno, 481 U.S. 740 (1987) (holding that detentions under the Bail Reform Act do not violate due process because the government must demonstrate with clear and convincing evidence at an adversary hearing that detainees pose a risk to public safety, and because detainees receive numerous procedural protections, including right to counsel, and the right to testify, present witnesses, and cross-examine other witnesses); Addington v. Texas, 441 U.S. 418 (1979) (holding that, despite substantial procedural protections in civil commitment cases, including access to counsel and trial before a jury, Texas's reliance on a standard of proof requiring only a preponderance of the evidence, rather than clear and convincing evidence, was insufficient).

127. *See supra* notes 23-25.

128. *Awadallah*, 349 F.3d at 59.

129. *Id.*

130. Tennessee v. Garner, 471 U.S. 1, 8 (1985).

131. United States v. Awadallah, 202 F. Supp. 2d 55, 60-62 (S.D.N.Y 2002), rev'd 349 F.3d 42 (2d Cir. 2003).

to wear prison garb and was handcuffed to his chair.[132] Nor were these extreme conditions unique to Mr. Awadallah's detention. The government has stated that all the material witnesses taken to the New York Metropolitan Correctional Center would be treated as security risks, subject to the same protocols as the African embassy bombers, until the authorities had "concrete evidence that there was not a terrorist association or anything of that nature."[133] Similarly, an Oregon man, Mike Hawash, detained as a material witness for five weeks until the government brought criminal charges against him, was subjected to the same solitary confinement and strip-searching routine, and was allowed only a single telephone call home each week.[134]

The conditions of confinement endured by the material witnesses in *Material Witness Warrant* and *Awadallah* have yet to be addressed by the courts.[135] In the future, however, the courts are likely to be called upon to decide whether, in light of the availability of alternatives such as home detention and electronic surveillance, such conditions of confinement can be reconciled with the Fourth Amendment requirements articulated in *Garner* and *Terry* that a seizure be executed in a reasonable fashion and that it be reasonably related in scope to the circumstances which justified it.[136]

F. *Conclusion*

The high visibility of post-September 11 detention of material witnesses has turned a spotlight on the statutory authority for and constitutionality of such detentions. The statutory question regarding the applicability of the material witness statute outside the trial context appears to have been resolved in favor of detaining witnesses to appear before the grand jury. However, recent jurisprudence has not abated Fourth Amendment concerns about the appropriate standard for determining materiality, the risk of erroneous detention in the grand jury context, the possibility of pretextual detentions, the role of depositions, and the harsh conditions of confinement. Hopefully, as these cases con-

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132. *Id.* at 78.

133. *Id.* at 61.

134. *See* Brian Lehman, *Abusing the Material Witness Statute: Why Detaining Grand Jury Witnesses Violates The Fourth Amendment*, FINDLAW, May 06, 2003, *at* http://writ.corporate.findlaw.com/commentary/20030506_lehman.html.

135. Chief Judge Mukasey deferred discussion regarding the allegations of harsh treatment until such time as he had heard the views of the Bureau of Prisons. *Material Witness Warrant,* 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002). Judge Scheindlin similarly declined to make findings of fact on the disputed issues regarding conditions of confinement. *Awadallah*, 202 F. Supp. 2d at 59 n.4. Finally, the Second Circuit "ma[de] no ruling on the propriety of the conditions of Awadallah's detention . . . [because t]hese issues lie outside the scope of this appeal." United States v. Awadallah, 349 F.3d 42, 62 n.14 (2d Cir. 2003).

136. *See* Tennessee v. Garner, 471 U.S. 1, 8 (1985); Terry v. Ohio, 392 U.S. 1, 19-20 (1968). These conditions of confinement also raise a red flag with respect to Fifth Amendment substantive due process doctrine, which forbids any infringement on fundamental liberties that is not narrowly tailored to meet a compelling government interest. *See, e.g.*, Lawrence v. Texas, 123 S.Ct. 2472, 2491 (2003).

tinue to come before the courts, clearer guidelines will emerge to facilitate preservation of testimony crucial to effective prosecution of suspected terrorists, without compromising core constitutional protections.

II. EXIT-ENTRY PROGRAMS

On June 6, 2002 the Department of Justice announced the implementation of the National Security Entry-Exit Registration System (NSEERS).[137] NSEERS required non-immigrant males from selected countries who entered and remained in the United States for thirty days or longer to be interviewed, fingerprinted, and photographed.[138] The program, which was intended to serve as a precursor to an eventually comprehensive registration program, also required aliens to reregister each year and to notify an INS officer when changing addresses or leaving the United States.[139]

The exit-entry program re-initiated the registration requirement of section 263 of the 1952 Immigration and Nationality Act (INA),[140] a provision whose enforcement was scrapped in the 1980s due to fiscal concerns.[141] Enforcement of the registration provision first resurfaced in 1991 after the Gulf War, when non-immigrants from Iraq and Kuwait were required to be registered and fingerprinted.[142] In 1993, the Justice Department lifted the requirement,[143] but issued a rule stating that the Attorney General could require non-immigrants from certain countries to be registered and fingerprinted by the INS at their U.S. port of entry.[144] The same day, the Attorney General announced that non-

137. Press Release, U.S. Dep't of Justice, National Security Entry-Exit Registration System: Strengthening our Entry-Exit Registration System to Protect Americans from Possible Terrorist Threats (June 5, 2002), *available at* http://www.usdoj.gov/ag/speeches/2002/natlsecentryexittrackingsys.htm.

138. *Id.* Registrants who remained in the country for longer than thirty days were required to report to an immigration office between their thirtieth and fortieth days in the country. Registrants who remained in the United States for longer than one year were required to report to an immigration office within ten days of the one-year anniversary of their entry. All registrants could enter and exit the country only through ports designated by the Department of Homeland Security. *See* U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., Special Registration Procedures for Visitors and Temporary Residents, *available at* http://uscis.gov/graphics/shared/lawenfor/specialreg/srprocl.htm. The special registration requirements for new visitors continued for approximately seven months, and the Department of Homeland Security ended the thirty-day and one-year reregistration requirements for those who registered during that seven month period on December 1, 2003. Audrey Hudson, *Registration of Muslims, Arabs Halted*, WASH. TIMES, Dec. 2, 2003, at A1.

139. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

140. Immigration and Nationality Act of 1952 § 263(a), 8 U.S.C. § 1303(a) (2003).

141. Eric Schmitt, *U.S. Will Seek To Fingerprint Visa Holders*, N.Y. TIMES, June 5, 2002, at A1.

142. Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents, 56 Fed. Reg. 1566 (Jan. 16, 1991) (repealed 1993).

143. Addition of Provision for the Registration and Fingerprinting of Nonimmigrants Designated by the Attorney General; Removal of the Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents, 58 Fed. Reg. 68,024 (Dec. 23, 1993) (codified at 8 C.F.R. pt. 264).

144. *Id.*

immigrants from Iraq and Sudan were required to register.[145] Iran and Libya were added in 1996,[146] and two years later, the Justice Department issued a rule requiring non-immigrants from these four nations to be photographed upon admission into the United States.[147]

The current wave of alien registration received its impetus from a congressional mandate in the USA PATRIOT Act instructing the Department of Justice to create an exit-entry tracking system of all non-immigrants/aliens by 2005.[148] Eight months after the passage of the USA PATRIOT Act, without consulting Congress, the Justice Department issued a proposed rule instituting NSEERS.[149] The final rule mandated that, beginning on September 11, 2002, registration was required of (1) non-immigrants from countries specified in future Federal Register notices and (2) non-immigrants designated by either consular officers abroad or inspection officers at a U.S. port of entry, based on information these officers believed necessitated the "close monitoring" of particular aliens.[150] The criteria used to determine which aliens in the latter class of non-immigrants would be required to register were not published.

Over the following months, the Justice Department added twenty-one countries[151]—all Arab or Muslim nations, except for North Korea—to the registration list. Criticisms of the programs centered around two main contentions: first, that NSEERS was not an effective means of preventing terrorism; and second, that the program's use of ethnic and racial profiling was an unacceptable law enforcement tactic.[152]

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145. Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Sudanese Travel Documents, 58 Fed. Reg. 68,157 (Dec. 23, 1993).

146. Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iranian and Libyan Travel Documents, 61 Fed. Reg. 46,829 (Sept. 5, 1996).

147. Requirement for Registration and Fingerprinting of Certain Nonimmigrants, 63 Fed. Reg. 39,109 (July 21, 1998).

148. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §414, 115 Stat. 272, 353 (2001).

149. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40,581 (proposed June 13, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

150. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (codified at 8 C.F.R. pts. 214, 264).

151. The twenty-one countries added in those months, in addition to Iran, Iraq, Libya, and Sudan, are: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Jordan, Kuwait, Lebanon, Morocco, North Korea, Oman, Qatar, Pakistan, Saudi Arabia, Somalia, Syria, Tunisia, the United Arab Emirates, and Yemen.

152. *See e.g.*, Press Release, American Immigration Lawyers Association, AILA Urges Repeal of Special Registration (Jan. 9, 2003), *available at* http://www.aila.org/contentViewer.aspx?bc=9,594,2220; Letter from Amnesty International, to Attorney General John Ashcroft (Jan. 10, 2003), *available at* http://www.amnestyusa.org/news/2003/usa01102003-3.html ("[T]he special registration order applies only to immigrants from selected countries while similarly situated immigrants from other countries are not affected. . . . If people are being targeted and detained under this system, or singled out for harsh treatment, solely on grounds of their nationality or gender, this would appear to be in breach of the right to non-discrimination recognized under international law.").

A. *The Program's Effectiveness as a Counter-Terrorism Tool*

NSEERS was based on voluntary registration, and it resulted in the arrest and deportation of many out-of-status visitors who appeared at INS offices to fulfill their registration requirements. In many cases, these visitors had applied for lawful residency and their applications were pending at the time of their arrests and subsequent deportation. In fact, according to the American Immigration Lawyers Association (AILA), "[s]ome INS offices are detaining and deporting people who are technically out-of-status, often due to INS delays and inefficiencies."[153] AILA has also reported that some of those detained have approved employment authorization documents and are thus eligible to adjust their status under section 245(i).[154]

Many of those detained were also among the 640,000 individuals who had attempted to legalize their status under a pre-September 11 special visa program that required them to pay a $1,000 fine to remain in the country.[155] Others were awaiting review of pending asylum applications. In fact, on March 18, 2003, Department of Homeland Security Director Tom Ridge announced that asylum seekers from thirty-four nations—including all of the countries on the registration list—would be automatically detained.[156]

Even student visa holders, including those who fell one credit short of fulfilling their visa requirements, were detained.[157] Thus, the program appeared to target individuals who voluntarily registered with the government in an effort to eventually acquire legal status, rather than terrorists or criminals unlikely to appear at INS offices.

Another major factor contributing to the arrest of registrants was confusion regarding registration deadlines and requirements. Under NSEERS, missing a registration caused aliens to become out-of-status and subject to possible deportation.[158] Thus, even aliens legally in the country who missed their registration deadlines could be deported under the regulation. In a hearing before the House Judiciary Committee, the Director of the ACLU Washington National Office argued that "[a] series of inadequately publicized deadlines for the registration of temporary residents resulted in mass confusion and arrests. Problems have

153. Letter from AILA, to President George W. Bush (Jan. 9, 2003) (on file with the Yale Law & Policy Review); *see also* Letter from Sens. Russ Feingold and Edward Kennedy, and Rep. John Conyers, to Attorney General John Ashcroft (Dec. 23, 2002) [hereinafter Feingold Letter] (on file with the Yale Law & Policy Review).

154. Immigration and Nationality Act of 1952 § 245(i), 8 U.S.C. § 1255(i) (2003).

155. Matthew Barakat, *Immigrant Advocates: Program Is Catch-22*, ASSOCIATED PRESS, Apr. 15, 2003, *available at* http://www.kansas.com/mld/kansas/news/5713688.htm.

156. Mark Engler & Saurav Sarkar, *Agency Should Halt U.S. Abuse of Immigrants*, NEWSDAY, Apr. 25, 2003, at A37.

157. *Id.*

158. Lillian Thomas & Bill Schackner, *Immigration Officials Draw Heat from All Sides*, PITTSBURGH POST-GAZETTE, June 21, 2003, at A1 (quoting Crystal Williams, Staff Attorney, American Immigration Lawyers Association).

included conflicting advice about who must register and widespread denials of the statutory and constitutional rights of registrants. . . ."[159] Thus, rather than targeting illegal immigrants or potential terrorists, the program, due to confusion over its mandates, appears to have created an entirely new class of out-of-status aliens.

Once visitors registered with the INS, it was also unclear how the government used the information it obtained through the fingerprinting, photographing, and interviewing of registrants to fight terrorism. Some questioned whether the INS possessed the resources necessary to process all the information it collected through NSEERS.[160] The information requested of registering aliens and collected by individual INS offices around the country varied, and it was often hand written on forms rather than being entered automatically into a computer system.[161] Some INS offices collected information such as eye color, height, weight, and family history, while others collected more personal information such as personal bank account information, credit card information, and even affiliations with campus political, religious, or social groups.[162] Because NSEERS guidelines did not explain how the information would be analyzed or used, it remains unclear if the data was ever processed and eventually incorporated into the intelligence infrastructure.

B. *NSEERS's Reliance on Racial Profiling*

Media reports documented large numbers of arrests of voluntary registrants, mostly aliens from Arab and Muslim nations. In December 2002, between 500 and 700 visitors were arrested in southern California, including one-fourth of all registrants at the INS office in Los Angeles.[163] According to the INS, many of those arrested had submitted status-adjustment applications that had not been processed.[164] Others had pending green card applications, some with INS interviews already scheduled.[165] Thus, in some cases, the INS's inefficiency in processing applications resulted in the deportation of aliens whose status might otherwise have been legalized.

The mass arrests in Los Angeles prompted a lawsuit by the American-Arab

159. *War on Terrorism and Immigration Enforcement: Hearing Before the Subcomm. on Immigration, Border Security and Claims, House Comm. on the Judiciary*, 108th Cong. 79 (2003) (statement of Laura W. Murphy, Director, ACLU Washington National Office), *available at* http://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954_0f.htm.

160. Christian Bourge, *Analysis: Immigration Policy Spurs Debate*, UPI, July 14, 2003 (quoting Roberto Suro, Director of the Pew Hispanic Center), *available at* http://www.washtimes.com/upi-breaking/20030711-105818-4799r.htm.

161. Jane Black, *At Justice, NSEERS Data Spells Chaos*, BUS. WK. ONLINE, May 2, 2003, *at* http://www.businessweek.com/technology/content/may2003/tc2003052_6532_tc073.htm.

162. *Id.*

163. Meagan Garvey, *Hundreds Are Detained After Visits to INS*, L.A. TIMES, Dec. 19, 2002, at 1.

164. *Id.*

165. *Id.*

Anti-Discrimination Committee (ADC), the Alliance of Iranian Americans (AIA), the National Council of Pakistani Americans (NCPA), and the Council on American Islamic Relations (CAIR) seeking to prevent the government from detaining registrants without arrest warrants and deporting visitors qualified to legalize their status.[166] The request for an injunction was rejected by a judge in the U.S. District Court for the Central District of California, who found that the INS had broad discretion in deporting out-of-status visitors and that a pending application did not confer the right to defer removal.[167]

In total, according to the Department of Homeland Security, approximately 82,000 men were registered through NSEERS.[168] Some 2,700 remain in detention, and 13,400 are facing deportation.[169] None have been charged with engaging in terrorist activities or being a part of a terrorist network.[170]

In response to the perceived ineffectiveness of NSEERS, some members of Congress called for the elimination of the program. In a letter to Attorney General John Ashcroft, Senators Edward Kennedy and Russ Feingold and Congressman John Conyers called for the suspension of NSEERS. They described the program as "a second wave of roundups and detentions of Arab and Muslim males disguised as a perfunctory registration requirement," alleging that many of the registrants had been "arrested and detained without reasonable justification."[171]

On January 23, 2002, the Senate passed an amendment eliminating funding for the program, citing concerns about racial profiling and civil liberties violations.[172] The House, however, authorized funding, and the program was included in the final version of a 2003 appropriations bill.

Because the program targeted largely Arab and Muslim nations, visitors from these countries were disproportionately impacted: while out-of-status visitors from Arab and Muslim countries were required to register and were often deported, the INS did not appear to take an equally aggressive approach to seeking out and deporting out-of-status visitors from other nations.

The program's apparent reliance on racial profiling also threatened to undermine the war on terrorism by alienating Arab-American and Muslim communities that have cooperated with the government's counter-terrorism efforts.

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166. David Rosenzweig, *3 Groups Sue over Arrests of Arab Men*, L.A. TIMES, Dec. 25, 2002, at 3.

167. American-Arab Anti-Discrimination Comm. v. Ashcroft, 241 F. Supp. 2d 1111, 1112 (C.D. Cal. 2003).

168. Tom McCann, *Special Registration Shows Key Changes*, CHI. LAW., Aug. 2003, at 23 (citing Department of Homeland Security spokesperson Marilu Cabrera).

169. *Id.*

170. Lillian Thomas, *Muslim Men Register Warily*, PITTSBURGH POST-GAZETTE, Mar. 16, 2003, at A13 (quoting Bureau of Citizenship and Immigration Services spokesperson Amy Otten).

171. Feingold Letter, *supra* note 153.

172. *See Budget*, NAT'L J. TECH. DAILY, Feb. 13, 2003, LEXIS, Nexis Library, National Journal's Technology Daily File.

As an immigration expert testifying before the House Judiciary Committee recently explained:

> There is reason to be concerned, however, about the targeting of Arab and Muslim foreign nationals for registration. The Special Registration program implicitly assumes that citizens of the stated countries are believed to be more likely to be participating in terrorist activities than those of other countries (even ones with known terrorist organizations operating within their territories). There was little consultation with Arab and Islamic communities prior to the implementation of the registration system, leading to an increase in tensions between members of these communities and government officials. Yet, cooperation of the Arab and Islamic communities in the United States is a key ingredient in the intelligence gathering needed to identify actual threats. To the extent that the Special Registration makes such cooperation harder to achieve, it may harm national security and reduce the likelihood of apprehending terrorists.[173]

C. *The Future of Alien Registration*

On April 29, 2003, the Department of Homeland Security announced the implementation of a new exit-entry tracking system that will eventually track all non-immigrant visitors to the Unites States beginning on January 5, 2004. The program, entitled United States Visitor and Immigrant Status Indicator Technology (US-VISIT), will combine elements of NSEERS with the Student and Exchange Visitor Information System (SEVIS).

According to the Department of Homeland Security, which will administer US-VISIT pursuant to the Homeland Security Act of 2002, the program will:

> (1) Collect, maintain, and share information, including biometric identifiers, through a dynamic system, on foreign nationals to determine whether the individual:
>
> - Should be prohibited from entering the U.S.;
> - Can receive, extend, change, or adjust immigration status;
> - Has overstayed their visa; and/or
> - Needs special protection/attention (i.e., refugees); and
>
> (2) Enhance traffic flow for individuals entering or exiting the U.S. for legitimate purpose by:
>
> - Facilitating travel and commerce;
> - Respecting the environment;
> - Strengthening international cooperation; and
> - Respecting privacy laws and policies.[174]

Information collected under US-VISIT will be available to ports-of-entry officials, special agents in the Bureau of Immigration and Customs Enforcement (ICE), adjudications staff at immigration services offices, U.S. consular

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173. Testimony of Susan Martin, Director of the Georgetown University Institute for the Study of International Migration, Before the House Comm. on the Judiciary, Oct. 16, 2003, *available at* www.house.gov/judiciary/martin101603.pdf.

174. Press Release, United States Department of Homeland Security, Fact Sheet: US VISIT Program (May 19, 2003), *available at* http://www.dhs.gov/dhspublic/display?content=736.

offices, and other law enforcement agencies.[175]

Delays in implementing the program, however, are already likely, as a recent Government Accounting Office (GAO) report found that current plans for the US-VISIT program do not include important information about how the Department of Homeland Security plans to implement the program.[176] The head of the Bureau of Immigration and Customs Enforcement, Michael Garcia, has stated that the Department of Homeland Security must first formulate several aspects of the program, such as decisions on "whether all people entering and exiting the U.S. will have to submit biometric information and whether exit control will be based on interviews with law enforcement or . . . biometrics and direct observation."[177]

While the comprehensive nature of the US-VISIT program appears to alleviate concerns regarding racial profiling, it remains to be seen whether violations of the new system's requirements will be universally enforced, or focused primarily on the nations targeted under NSEERS.

The program is also likely to spur privacy concerns, as photographs and fingerprints will be collected through the use of biometric technology and distributed among federal authorities for use against all visitors to the United States.

Some have already begun to question whether the necessary technology is available to effectively implement the program. For example, the ACLU recently released a report on facial recognition technology, conducted by an independent security firm at Boston's Logan Airport, which concludes that the "number of system-generated false positives was excessive, and as a result, the operator's workload is taxing and strenuous, requiring constant undivided attention and periodic relief, which amounts to a staffing minimum of two persons for one workstation."[178]

D. *Conclusion*

Enforcement of the country's immigration laws is perhaps one of the most important mechanisms the government has at its disposal in fighting terrorism. While the US-VISIT program appears to avoid the racial profiling concerns associated with NSEERS, it remains to be seen not only whether the program will be enforced in a manner that treats immigrants from all nations equitably, but also whether it can implemented in a manner that truly enhances the nation's

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175. *Id.*

176. Jose Latour, U.S. VISIT Program Plans Appear Incomplete (June 12, 2003) *at* http://www.usvisanews.com/memo2107.html.

177. *Id.*

178. Press Release, American Civil Liberties Union, Three Cities Offer Latest Proof That Face Recognition Doesn't Work, ACLU Says (Sept. 3, 2003), *available at* http://www.aclu.org/Privacy/Privacy.cfm?id=13430&c=130.

security.

Pilot programs such as NSEERS have not even attempted to incorporate the technology that will be used in future programs such as US-VISIT. And given the questions regarding the government's ability to process the information it currently collects, it is unclear whether the Department of Homeland Security will have the capacity to process the large increase in information that new technology is projected to produce.

While US-VISIT may eventually serve as a powerful tool in monitoring the flow of immigration into the country, concerns regarding the effectiveness of new biometric technology and the government's information-processing abilities must be addressed before the program can be relied upon as a strong line of defense in the war against terrorism.

III. NATIONAL SECURITY AND THE ROLE OF JUDICIAL DEFERENCE

In the two years since the September 11 attacks, courts have had the difficult task of balancing national security concerns against the judiciary's traditional role as a check on executive power. The courts' struggle to strike a balance between deferring to the government and requiring the government to justify and explain its actions is highlighted in a recent series of appellate cases concerning the public's right to information and issues of national security. For the most part, the courts in these cases were weighing the same factors and using the same tests. However, the outcomes were strikingly different. Furthermore, what is especially interesting about these cases is that, although the courts have historically exhibited strong deference to the executive in times of war,[179] these recent decisions indicate that courts may be exhibiting more deference than in the past, and that this deference is continuing to increase.

The three cases showing this trend were all decided within a year of each other and concern the issue of the public's right to information about and access to INS deportation hearings. These cases, *Detroit Free Press v. Ashcroft*,[180] *North Jersey Media Group v. Ashcroft*,[181] and *Center for National Security Studies v. United States Department of Justice*,[182] were heard by three different circuits, but concerned the same group of people and involved substantially similar arguments. However, only the Sixth Circuit, the first of the three courts to decide the issue, held that the public's right to information outweighed the government's interest in national security. In the second case,

179. Shirin Sinnar, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens under the USA Patriot Act*, 55 STAN. L. REV. 1419, 1449 (2003) ("Courts have always treated national security as a powerful justification for government restrictions on individual rights, especially in the immigration context.").

180. 303 F.3d 681 (6th Cir. 2002).

181. 308 F.3d 198 (3d Cir. 2002).

182. 331 F.3d 918 (D.C. Cir. 2003).

North Jersey Media Group, decided a few months after *Detroit Free Press*, the Third Circuit engaged in a lengthy balancing test but ultimately distinguished *Detroit Free Press* and held that national security concerns, at least in that case, outweighed the public's right to information. Lastly, the third case, *Center for National Security Studies*, decided by the D.C. Circuit in June 2003, came down the most strongly in favor of deference. The *Center for National Security Studies* court required only minimal justification from the government in support of its national security concerns. This leniency provoked a stinging dissent from Judge Tatel,[183] but it may be indicative of the way this body of law is developing.

A. *The* Detroit Free Press *Decision*

In *Detroit Free Press*, members of the press and public brought actions against the Attorney General claiming that their exclusion from alien removal proceedings violated their First Amendment rights and seeking an injunction against any future closures. The government, however, argued that issues of national security necessitated closed hearings and that public safety would be imperiled if the hearings were open. In order to decide this case, the court in *Detroit Free Press* balanced the government's interest in protecting national security against the public's right to have information regarding the government's actions. After weighing these competing concerns, the court came down on the side of information and access.

The *Detroit Free Press* court began its analysis by employing the test developed by the Supreme Court in *Richmond Newspapers*.[184] According to the *Detroit Free Press* court, the *Richmond Newspapers* test requires, first, that there be a tradition of public access to these trials and, second, and that this unbroken history of public access has played a "significant positive role."[185] The court had little difficulty deciding that both criteria were satisfied and that therefore the only reason to deny access to these proceedings was if such access posed a real danger to national security. The rest of the opinion was spent balancing these competing concerns.

Throughout the opinion, Judge Keith emphasized the importance of an informed public and the danger of government secrecy,[186] while also acknowledging the very real security threat currently facing the nation.[187] The court's desire to engage in a substantive examination of both sides of the issue is mani-

183. *See id.* at 937 (Tatel, J., dissenting).

184. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

185. 303 F.3d at 700.

186. *See, e.g., id.* at 683 ("An informed public is the most potent of all restraints upon misgovernment" (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936))).

187. *See, e.g., id.* at 682 ("No one will ever forget the egregious, deplorable, and despicable terrorist attacks of September 11, 2001. These were cowardly acts.")

fest in its almost hostile approach to the subject of deference. In response to the government's argument that the government's plenary power over immigration warrants deferential review, the court stated:

> We are unpersuaded by the Government's claim, which would require complete deference in all facets of immigration law, including non-substantive immigration laws that infringe upon the Constitution. We hold that the Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the government.[188]

Furthermore, the *Detroit Free Press* court believed that the scope of deference requested by the government was unprecedented. Although courts have historically shown deference to the government in times of war, the court viewed the government's request as a significant expansion of traditional deference. After discussing the *Chinese Exclusion Case*,[189] which the government cited for the proposition that the government has plenary authority over immigration, the court stated that if it were to adopt the government's position it would "expand upon the rule from this case,"[190] and would actually result in giving the government "more deference."[191] In fact, the court viewed the deference asked for by the government as so extreme that it would require ignoring the dictates of the Constitution. The court stated "[w]ere we to adopt the Government's position, one would wonder whether and how the Constitution could limit the political branches' power over immigration matters."[192]

In *Detroit Free Press*, the court agreed that the government was entitled to deference on issues of substantive immigration law, but refused to extend that deference to all immigration matters. The court insisted that the difference between the deference due in the case of substantive versus non-substantive immigration laws was "meaningful," and that the "Government is not entitled to special deference" regarding the latter.[193] Although the court was willing to defer to the government on substantive matters, it was unwilling to extend that deference to other areas.

The *Detroit Free Press* court was also highly unreceptive to arguments advocating generalized rules rather than case-by-case determinations. For example, the government argued that its request for greater deference was sanctioned by the Supreme Court in *Zadvydas v. Davis*[194] because in *Zadvydas* the Court had stated that situations involving terrorism might require more deference.[195] However the *Detroit Free Press* court rejected this argument, stating that

188. *Id.* at 685.
189. 130 U.S. 581 (1889).
190. *Detroit Free Press*, 303 F.3d at 686.
191. *Id.* at 686 n.7.
192. *Id.* at 686.
193. *Id.* at 688.
194. 533 U.S. 678 (2001).
195. *Detroit Free Press*, 303 F.3d at 691 (citing *Zadvydas*, 533 U.S. at 691, 696).

"nothing in *Zadvydas* indicates that given such a situation, the Court would defer to the political branches' determination of who belongs in that 'small segment of particularly dangerous individuals' without judicial review of the individual circumstances of each case."[196] As this treatment of *Zadvydas* indicates, the court was wary of broad, generalized rules. Furthermore, the court's concern with the government's request to keep the information on the detainees secret seemed to stem from the breadth and generalized nature of the request and not from the underlying premise, which the court acknowledged, that the release of certain information could jeopardize national security. According to the court, the information the government wished to keep secret was not limited to "'a small segment of particularly dangerous' information, but a broad indiscriminate range of information, including information likely to be entirely innocuous."[197] The court cited the lack of "definable standards" used to determine when a case is of "special interest" and should be closed.[198] According to the court, "the Government must be more targeted and precise in its approach."[199]

B. *The* North Jersey Media *Decision*

In *North Jersey Media*, the Third Circuit was decidedly more receptive to the government's arguments for increased deference than the Sixth Circuit had been. Much of the *North Jersey* opinion is spent distinguishing *Detroit Free Press* and explaining why, under a balancing approach, national security concerns outweigh those of information and access. The *North Jersey Media* court argued that both the district court,[200] which it overruled, and the *Detroit Free Press* court, with which it disagreed, conducted fairly one-sided inquiries and "did not consider the policies militating against media access."[201] According to the Third Circuit, these other courts "discussed only the policies favoring openness," whereas the Third Circuit believed that "the flip side of the coin"[202] must also be considered. In addition, the Third Circuit described the "flip side of the coin" in much graver terms than the Sixth Circuit. While the Sixth Circuit acknowledged the importance of the events of September 11,[203] the Third Circuit described those events as initiating a new era, one which in many ways requires

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 693.
200. North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288 (D.N.J. 2002).
201. North Jersey Media Group v. Ashcroft, 308 F.3d 198, 200 (3d Cir. 2002).
202. *Id.* at 200. The court discussed the need to consider the flip side of the coin in relation to *Detroit Free Press*, stating that "as we have explained, that calculus perforce must take count of the flip side—the extent to which openness impairs the public good." *Id.* at 202.
203. *See, e.g., Detroit Free Press*, 303 F.3d at 682.

a break with past precedents.[204]

Like the *Detroit Free Press* court, the *North Jersey Media* court also used the *Richmond Newspapers* test to determine whether there was a right of access to deportation hearings, but the *North Jersey Media* court reached the opposite conclusion. The court disagreed with *Detroit Free Press*, and, after a lengthy discussion, held that "[w]e ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*."[205]

If the *North Jersey Media* opinion had concluded after the court's finding that there was no history or tradition of openness in deportation proceedings sufficient to satisfy *Richmond Newspapers*, then the difference between the Sixth and Third Circuit opinions would not have been all that striking. The difference between the two opinions would simply have been related to how the two circuits interpreted past case law and precedent, but would not have represented a fundamental difference in the courts' approach to questions of national security and access to information. However, the second half of the *North Jersey Media* opinion reveals that the significant difference between the two opinions is very much a difference in how the two courts regarded their role in relation to national security issues.

The second half of the *North Jersey Media* opinion examined the possible benefits of open access to deportation hearings. The court noted the different values served by openness and agreed that these values are also served by open access to deportation hearings.[206] However, the court strongly disagreed with the conclusion that when openness achieves these positive values then openness serves a "significant positive role" in the proceeding.[207] The court's conclusion is a significant break from precedent. The court readily admitted that it had not found a single case supporting its position, stating that "[u]nder the reported cases, whenever a court has found that openness serves community values, it has concluded that openness plays a 'significant positive role' in the proceeding."[208] However, the court did not believe such a conclusion was warranted, and explained that openness cannot simply be evaluated in terms of its benefits, but must also be evaluated in terms of the whether it "impairs the public good."[209]

Unlike the *Detroit Free Press* opinion, which spent more than a page discussing the benefits of openness,[210] the *North Jersey Media* opinion is more

204. 303 F.3d at 202 ("The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches.").

205. *Id.* at 212.

206. *Id.* at 217.

207. *Id.*

208. *Id.*

209. *Id.*

210. 303 F.3d. at 704-5. The court listed five reasons why openness is beneficial: it acts as a check

concerned with evaluating the possible harms.[211] Whereas the *Detroit Free Press* opinion devoted a paragraph to discussing each of the possible benefits of openness, the *North Jersey Media* opinion devoted the same amount of space to discussing the potential harms. In addition, the *North Jersey Media* court had a very different approach to the speculative nature of these harms. The *Detroit Free Press* court stated that "we do not believe speculation [about national security risks] should form the basis for such a drastic restriction of the public's First Amendment rights,"[212] while the *North Jersey Media* court stated that the extent of national security risks are "unavoidably speculative" and therefore it was "hesitant to conduct a judicial inquiry into these national security concerns."[213]

Similarly, the *North Jersey Media* court was much more willing than the *Detroit Free Press* court had been to defer to the executive on issues of national security. The court explained its willingness to defer by noting that "national security is an area where courts have traditionally extended great deference to Executive expertise."[214] Because of this tradition of deference, the court held "that to the extent that the Attorney General's national security concerns seem credible, we will not likely second-guess them."[215]

However, although the *North Jersey Media* court felt that the government deserved great deference on issues of national security, these concerns were not in fact the primary reasons for the court's decision in favor of the government. The *North Jersey Media* found for the government despite the lack of empirical evidence establishing the need for closed deportation proceedings, but not because it felt national security issues and policies of deference eliminated the need for such evidence. Rather, the court based its ruling on a determination that, under a *Richmond Newspapers* analysis, there was no First Amendment right to attend deportation hearings. The court stated that strong justification was "appropriate only after finding a First Amendment right. Because we find no such right to attend deportation hearings, the speculative nature is not fatal."[216] Compared to the *Detroit Free Press* court, the *North Jersey Media* court was significantly more receptive to the idea of granting greater deference to the government on national security issues, but ultimately the court did not use

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on the actions of the executive by assuring that proceedings are conducted fairly and properly, it ensures that the government does its job properly and does not make mistakes, it avoids feelings by certain community members that they are being unfairly targeted, enhances the perception of fairness and integrity, and it ensures that the individual citizen can participate in our system of government.

211. 308 F.3d at 217. Although the Third Circuit listed six benefits of openness, which is one more than the Sixth Circuit, it devoted only one paragraph total to these benefits, as compared with the *Detroit Free Press* opinion, which spent a paragraph discussing each benefit.

212. 303 F.3d at 709.

213. 308 F.3d at 219.

214. *Id.*

215. *Id.*

216. *Id.* at 219 n.14.

deference as the primary justification for allowing closed deportation hearings.

The change in position between *North Jersey Media* and *Detroit Free Press* is apparent in Judge Scirica's dissent in *North Jersey Media*.[217] Judge Scirica's dissenting opinion is substantially similar to the Sixth Circuit's unanimous decision in *Detroit Free Press*. Like the Sixth Circuit, Judge Scirica argued for case-by-case determinations and rejected the general closure of deportation hearings approved by the majority.[218] Like the *Detroit Free Press* opinion, Judge Scirica's dissent is wary of granting broad deference to the government on all issues of national security. According to Judge Scirica, "deference is not a basis for abdicating our responsibilities under the first amendment."[219] Although he recognized that the "government's asserted interest—national security—is exceedingly compelling,"[220] Judge Scirica asserted that national security concerns need not override "[c]herished traditions of openness."[221] Like the Sixth Circuit, Judge Scirica argued for a compromise. He proposed a "case-by-case approach [which] would permit an Immigration Judge to independently assess the balance of these fundamental values."[222]

C. *The* Center for National Security Studies *Decision*

The third case in the trilogy is *Center for National Security Studies*, decided by the D.C. Circuit in June 2003.[223] Like *Detroit Free Press* and *North Jersey Media*, *Center for National Security Studies* deals with the conflict between openness and national security; unlike the other two, however, *Center for National Security Studies* comes down unquestionably in favor of deference on issues of national security. Although *Center for National Security Studies* is different from the other two cases in that it did not involve the question of access to the actual hearings, it is similar in that it involved issues of access to information about those detained. Furthermore, the government's arguments against the release of this information are very similar to those used in both *Detroit Free Press* and *North Jersey Media*. But the *Center for National Security Studies* court's receptiveness to such arguments is quite different.

Unlike the other two opinions, which caution against the use of deference

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217. *Id.* at 221 (Scirica, J., dissenting).

218. *Id.* at 225. Judge Scirica stated:

> Were the logic analysis focused only on special interest cases, I would agree that national security would likely trump the arguments in favor of access. Although paramount in certain deportation cases—like terrorism—national security is not generally implicated in the panoply of deportation hearings that occur throughout the United States.

Id.

219. *Id.* at 226.

220. *Id* at 227.

221. *Id.* at 228.

222. *Id.*

223. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003)

without specific justifications, the *Center for National Security Studies* court took the opposite approach, advocating deference as a default rule that can only be overcome by a strong showing of specific harms. The court stated that it could not "conceive of any reason to limit deference to the executive in its area of expertise to certain FOIA exemptions so long as the government's declarations raise legitimate concerns that disclosure would impair national security."[224] The court then made it clear that on issues of national security nearly all government concerns would be considered "legitimate." The court stated:

> The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it 'could reasonably be expected' that harm will result. It is abundantly clear that the government's top counterterrorism officials are well suited to make this predictive judgment. Conversely the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security.[225]

The court further added that it would "reject any attempt to artificially limit the long-recognized deference to the executive on national security issues."[226]

Another difference between the *Center for National Security Studies* decision and the earlier two is that not only did the *Center for National Security Studies* court find the government's arguments describing how disclosure could harm national security "more than reasonable,"[227] but in some cases, the court even supplied the arguments. For example, the court found that the government's predictive judgment that disclosure of detainee's names would threaten national security was not undermined by the government's disclosure of some of the detainees' names. Although the government failed to explain adequately why the release of some names was not a threat, the court offered its own explanation. The court hypothesized that such disclosures might be strategic disclosures which "can be important weapons in the government's arsenal during a law enforcement investigation."[228] For the *Center for National Security Studies* court, such possible explanations were sufficient to demonstrate why the "court should not second guess the executive's judgment in this area."[229]

Similarly, the *Center for National Security Studies* court held that the government clearly established an adequate connection between the detainees and terrorism that warranted full deference. However the proof that the court relied upon to demonstrate that the detainees were connected to terrorism was simply the fact that the government questioned them in connection with its terrorism

224. *Id.* at 928.
225. *Id.* (internal citation omitted).
226. *Id.*
227. *Id.* at 929.
228. *Id* at 931.
229. *Id.*

investigation. The court quoted the government's statement that the INS detainees were "originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States."[230] According to the government's declaration, these detainees were "in violation of federal immigration laws, and in some instances . . . they had links to other facets of the investigation."[231] Therefore, because the government stated that "concerns remain" about the detainees' links to terrorism, the *Center for National Security Studies* court held that the "clear import of the declarations is that many of the detainees have links to terrorism," and that there is a "rational link between disclosure and the harms alleged."[232]

In a scathing dissent, Judge Tatel lambasted the majority opinion for its "uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case."[233] Tatel described the government's position as a request for the court "simply to trust its judgment," a request which Tatel believed the court should not have granted.[234] The difference between *Center for National Security Studies* and the *Detroit Free Press* and *North Jersey Media* opinions is that, as Tatel pointed out, the *Center for National Security Studies* court "treats disclosure as an all or nothing proposition."[235] As such, the *Center for National Security Studies* court was willing to grant greater deference to the government's request without requiring the "detail and specificity" that Tatel would demand.[236]

In *Center for National Security Studies*, the court cited the *North Jersey Media* opinion to support its holding, [237] but the *Center for National Security Studies* opinion goes much further on the issue of deference than *North Jersey Media.* Although the *North Jersey Media* court cited principles of deference, it was not deference alone that led the court to hold that INS deportation hearings could be closed. Conversely, in *Center for National Security Studies*, principles of deference do seem to be the primary reason for denying the plaintiffs' request for information, and this is a definite change from *North Jersey Media.* In *Center for National Security*, the court was willing to base a denial of information primarily on principles of deference.

230. *Id.* at 931.
231. *Id.*
232. *Id.*
233. *Id.* at 937 (Tatel, J., dissenting).
234. *Id.* at 939.
235. *Id.* at 940.
236. *Id.*
237. *Id.* at 932.

D. *Conclusion*

Whether or not the D.C. Circuit *should* have required more explanation from the government before denying the plaintiffs' information request is debatable. However, what seems fairly clear is that in the past year courts have become more willing to defer to the government on issues of national security and more willing to accept the government's arguments that access to hearings and information about INS detainees, in all circumstances, has the potential to harm the government's anti-terrorism investigation.[238]

238. In October of 2003, an administrative error revealed just how far this trend towards government secrecy had gone:

> The case, MKB v. Warden, arrived at the US Supreme Court in June. At issue is whether a federal judge and federal appeals-court panel abused their discretion when they granted a government request to seal an entire case challenging the detention of an Algerian waiter in south Florida after Sept. 11. Not only were all proceedings conducted in closed session, but all documents were ordered sealed, and docketing clerks were instructed to maintain case files under a secret filing system. In essence, there was no public indication that the litigation even existed.

Warren Richey, *Supreme Court Asks for More Input on Secret Sept. 11 Case*, CHRISTIAN SCIENCE MONITOR, Nov. 7, 2003, at 2. If the Supreme Court continues the trend of increasing judicial deference regarding matters of national security then MKB may only be the first of many cases the public never hears about.