

# A Review of the Department's Use of the Material Witness Statute with a Focus on Select National Security Matters

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Office of the Inspector General  
Oversight and Review Division  
September 2014

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## EXECUTIVE SUMMARY

The Department of Justice (Department) Office of the Inspector General (OIG) conducted a review of the Department's use of the federal material witness statute, 18 U.S.C. § 3144, which provides for the arrest and detention of a person if his testimony "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."<sup>1</sup> The review focused on the Department's use of the statute in international terrorism investigations during the years 2000-2012. We evaluated the cases of approximately 112 material witnesses detained during this period, from which we identified 10 investigations involving 12 individuals whose arrests appeared to raise questions regarding whether the Department was misusing the statute. The scope of our review included the conduct of Department personnel as well as the efficacy and sufficiency of applicable procedural safeguards.<sup>2</sup>

First, the review found that the Department used the statute in international terrorism investigations relatively rarely. We determined that the statute is far more frequently used in other scenarios, particularly to obtain testimony from undocumented aliens who have already been detained for deportation but whose testimony is potentially useful for alien smuggling prosecutions. During the years 2000-2012, terrorism cases represented a tiny fraction of the statute's overall use. Although the Department dramatically increased its use of the statute in international terrorism investigations during the period immediately following the September 11 attacks, more recent data reveal an equally stark decline in the use of the statute in such cases in recent years. In fact, according to records we reviewed from the Department of Justice National Security Division (NSD), no material witnesses were detained in international terrorism cases from 2004 through 2012.

Our in-depth review of 10 terrorism investigations did not find sufficient evidence to conclude that the Department misused the statute in international terrorism investigations. We closely scrutinized the material witness warrant affidavits in an effort to determine whether the Federal Bureau of Investigation (FBI) met its responsibility for ensuring that statements in the affidavits were factually accurate, logically supportable,

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<sup>1</sup> The public version of this report contains redactions of information that the Federal Bureau of Investigation (FBI) determined is "law enforcement sensitive" (LES).

<sup>2</sup> As detailed in Section IV of Chapter One, the FBI placed limitations on OIG access to grand jury and Title III materials, which resulted in substantial delays in completing this review.

and not misleading. After reviewing thousands of pages of contemporaneous government documents, we arrived at two closely related conclusions: first, at the time of each warrant's issuance, the government files pertaining to that witness contained substantial evidence documenting the basis for the Department's belief that the witness was involved in or knowledgeable about past or future terrorist conspiracies and was a possible flight risk; second, the affidavits based on those government files presented the underlying information known to the FBI at the time of the witnesses' arrests accurately and with particularity. However, we found that the affidavit submitted in one case contained some inadvertent errors, omitted some relevant information, and could have been more complete. While this case was the exception in our review, it nonetheless illustrates an important prospective point that FBI agents and prosecutors should use great care when preparing a material witness warrant, which can result in the detention of a witness, even when prepared under severe time pressure.

We also attempted to determine whether the Department used the material witness statute to detain the subjects of criminal investigations pretextually, such as to detain the subjects of criminal investigations prematurely while developing evidence establishing sufficient basis to file criminal charges. Several factors, however, made this assessment difficult. Many of the individuals whose cases we reviewed were simultaneously witnesses to – as well as potential subjects of – the same terrorism investigation. Because any subject of an investigation will by definition possess information material to that investigation, it will typically be a simple matter to establish the materiality of the individual's testimony. For immigrants with foreign ties, the flight risk element is also easily established. These circumstances create the potential for pretextual use of the statute. We could not definitively state that the only motive giving rise to each witness's arrest was the preservation of testimony. Moreover, it is not clear that having multiple motives for using the statute to detain an individual – only one of which is to secure his testimony – would constitute misuse of the statute at all. Our review concluded that, although officials sometimes had mixed motives for detaining a witness, a genuine and legitimate interest in securing his testimony appeared to be present in each case.

We also examined whether the failure to actually take testimony from some witnesses or the detention of some witnesses for a prolonged period reflected a potential misuse of the statute. We were concerned that in the majority of the 10 cases that we reviewed the government failed to obtain the detained witness's testimony or release him within 1 month after arrest. However, after reviewing each case in detail, we found reasonable explanations for these delays in each case, as detailed in our report, and found no indication that such explanations were cover for a pretextual use of the statute. In some cases, witnesses consented to the long detention

periods, on advice of counsel. In other cases, post-detention circumstances impeded obtaining prompt testimony or release, such as the need to evaluate demands by the witnesses for immunity. Once these post-detention issues were resolved, we found that the Department then moved appropriately to resolve the detainees' statuses and release them.

We also found that most of the procedural safeguards in the Federal Rules of Criminal Procedure and the material witness statute worked as intended to limit a material witness's time in detention. We confirmed that for each of the cases that we reviewed in detail, a neutral magistrate authorized the witness's arrest based on a sworn FBI affidavit stating with particularity the facts establishing probable cause to believe that the witness's testimony was material to a criminal proceeding and it might become impracticable to secure the presence of the witness by subpoena. We also concluded that other procedural safeguards provided meaningful protections to detained material witnesses to facilitate their release from jail, including access to counsel, access to the evidence used to justify their arrests, and the availability of detention hearings to contest the government's material witness arrest warrant. However, we were unable to assess the efficacy of one provision in the Federal Rules of Criminal Procedure regarding the option of taking a witness's deposition as an alternative to his continued detention in order to testify before a grand jury or at trial. We were unable to assess the value of the option because most witnesses whose cases we reviewed declined to seek this outlet. Thus, we did not have an adequate basis to draw conclusions about the effectiveness of depositions as a means of obtaining a material witness's testimony so as to accelerate his release from custody. Further, with respect to another provision designed to protect a witness from excessive detention through bi-weekly status reports to the court, we found instances where such bi-weekly reporting was not sufficiently met.

We also found that the general conditions of confinement and transportation for the material witnesses in our selected cases were consistent with applicable laws and policies.

The material witness statute is a powerful law enforcement tool and, as such, carries the potential for abuse. If the FBI were inclined to misuse this statute, we would have expected to see it used more frequently. Instead, the statute has been used infrequently, and decreasingly, in terrorism cases. Our review uncovered no clear evidence of abuse of the statute by Department personnel. We found that the Department was selective in its employment of this investigative tool and accurate in presenting to the courts the justification for detaining these witnesses. Our examination of government files confirmed that the assertions made by the Department in material witness warrant affidavits concerning witnesses' links to terrorism and risk of flight were credible and responsibly made. We



also found that the Department sought to resolve the status of the witnesses with adequate diligence. We determined that the statute was used for its intended purpose – to secure a witness’s testimony for a criminal proceeding – and not to preemptively detain or pretextually investigate individuals suspected of criminal offenses.

Appendix A contains the Department’s response to our report.

## CHAPTER ONE – INTRODUCTION

### I. Background

In the wake of the September 11 terrorist attacks, the Federal Bureau of Investigation (FBI) opened a massive investigation called “PENTTBOM.” The investigation focused on identifying the perpetrators of the attacks and on preventing follow-up attacks within the United States and against U.S. interests abroad. To this end, the Attorney General directed federal law enforcement personnel to use “every available law enforcement tool” to arrest persons who “participate in, or lend support to, terrorist activities.”<sup>3</sup> One of the tools law enforcement authorities relied on after the September 11 attacks was the federal material witness statute, 18 U.S.C. § 3144, which provides for the arrest and detention of a person if his testimony “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.”

Although relied on for decades to prosecute illegal immigration and other human trafficking crimes, the statute has historically been used only sporadically in other types of criminal cases. The statute played a relatively prominent role, however, in the investigation of the September 11 attacks – a role that sometimes attracted controversy.<sup>4</sup> Pursuant to our responsibilities under the USA PATRIOT Act and the Inspector General Act, the Office of the Inspector General (OIG) initiated this review to examine the Department of Justice’s (Department) use of material witness warrants during the years 2000-2012.<sup>5</sup>

This report focuses not on the frequent use of the material witness statute in immigration-related cases, but rather on the Department’s use of the statute in certain international terrorism cases. In particular, we examined whether the Department’s use of the statute in these kinds of terrorism

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<sup>3</sup> Memorandum from Attorney General John Ashcroft to United States Attorneys entitled “Anti-Terrorism Plan” (September 17, 2001).

<sup>4</sup> See, e.g., Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*, June 2005, Vol. 17, No. 2 (hereinafter Human Rights Watch Report); Lauryn P. Gouldin, *When Deference is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 Am. Crim. L. Rev. 1333 (2012); Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 Vand. L. Rev. 677 (2005).

<sup>5</sup> Pub. L. No. 107-56 (2001). Signed by President George W. Bush on October 26, 2001, the USA PATRIOT Act provides for a host of new or enhanced law enforcement authorities. In addition, Section 1001 of the act directs the OIG to receive and review claims of civil rights or civil liberties violations by Department employees.

investigations resulted in arbitrary or overbroad detentions of material witnesses. We considered whether the Department's allegations of terrorist links were credible and responsibly made. In short, we evaluated whether the statute was being used for its intended purpose – to secure a witness's testimony for a criminal proceeding – rather than to preemptively detain and pretextually investigate individuals suspected of criminal activity for which probable cause had yet to be established.

## **II. The Methodology of the OIG Investigation**

In total, the OIG reviewed the circumstances of approximately 112 material witnesses in terrorism matters, based on information we obtained from the U.S. Marshals Service (USMS), the National Security Division (NSD), the Criminal Division, a January 2007 Report of the Office of Professional Responsibility, and publicly available information, such as a June 2005 Human Rights Watch report. We focused our preliminary review on criteria such as circumstances of arrest, citizenship status, length of confinement, any special handling remarks recorded by the USMS, and any information indicating whether a particular material witness testified or was subsequently charged with a substantive terrorism offense. Following the initial review of these 112 cases, we identified 53 material witnesses for whom we requested grand jury information from the relevant U.S. Attorneys' Offices. The OIG subsequently received a broad array of materials from these U.S. Attorneys' Offices, including material witness warrant applications; material witness warrant affidavits; other court filings and orders; summaries of witness interviews and proffers; draft indictments; and prosecution memoranda.

We reviewed these and other materials – including internal memoranda and reports, notes, briefing materials, policy and procedural manuals, as well as certain Department officials' e-mail files – in order to identify those cases whose facts and circumstances appeared to raise questions as to whether the Department was misusing the material witness statute in terrorism investigations. Among the indicia of possible misuse we used in identifying such cases were the following:

- Detention of an individual who appeared to have a barely colorable connection to the September 11 attacks;
- Detention of an individual who appeared to have demonstrated a pattern of pre-arrest cooperation with the FBI;
- Detention of an individual who was an American citizen or otherwise had extensive ties anchoring the person to the United States;
- Decision not to call a witness to testify in the underlying case for which the person was detained;

- Decision not to immunize a witness willing to testify only under a grant of immunity;
- Detention of an individual for a prolonged period; and
- Decision to charge a detained material witness with substantive terrorism offenses.

We ultimately identified 10 such cases, involving the detention of a total of 12 witnesses. For each of these cases, we subsequently requested and reviewed thousands of internal FBI documents, most of which contained detailed information unavailable not only to the public but to the judges and magistrates who issued the warrants.<sup>6</sup> In each of the 10 cases a neutral judge authorized the warrant for the material witness's arrest, and we did not seek to independently review or ratify these judicial conclusions. Rather, given our broader access to underlying case files, we assessed the FBI's conduct and practices in describing the underlying information known to the FBI in the sworn affidavits that provided the primary basis to arrest each material witness. In addition, we closely analyzed these 10 cases, with specific attention to the following issues:

- How, if at all, the facts and circumstances of these cases informed our overall assessment of the Department's use of the material witness statute in terrorism cases.
- How the Department established the materiality of the testimony and the risk that the witness might flee if not detained, and whether the information used to establish these statutory requirements fairly reflected the underlying information known to the FBI at the time.
- Why the Department decided to delay or forego obtaining the grand jury or trial testimony of some material witnesses after their arrest, and whether those issues raised any concerns regarding pretextual or otherwise improper use of the statute.
- Whether procedural safeguards have provided meaningful protections to detained material witnesses to facilitate their release from jail, including access to counsel and evidence, detention hearings to contest the government's basis for continued detention, the use of depositions to accelerate release, and periodic status reports from prosecutors justifying continued detention.

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<sup>6</sup> The materials that the various Department components produced to the OIG, while sufficient to enable us to complete this review, were not always comprehensive. Given this fact, the reader should not view the omission of a specific event in the OIG's description of one case – particularly an event included in other cases' descriptions – as evidence of such event's nonoccurrence in that case.

- Whether the conditions under which selected material witnesses were confined and transported were consistent with statutory requirements and relevant regulations and rules.

### **III. Organization of the Report**

This report comprises five chapters. Chapter One provides an introduction to the report. Chapter Two provides background information on applicable legal provisions and policies regarding the material witness statute. Chapter Three sets forth a general overview on the use of the material witness statute. In Chapter Four, we examine the use of the statute in the 10 specific terrorism-related material witness cases we selected and present our factual findings regarding those uses of the authority. In Chapter Five, we present the OIG's analysis of the Department's use of the material witness statute.

### **IV. Limitation on OIG Access to Grand Jury and Title III Materials and Resulting Delay to the Review**

As part of our review of the 10 cases described above (involving the detention of a total of 12 witnesses), in August and October 2010 we sent document requests to the FBI seeking information about such cases from its files. We had previously requested and received some grand jury material concerning the same witnesses from the NSD and the U.S. Attorneys' Offices responsible for the relevant investigations following their determination that we could receive the material pursuant to the "foreign intelligence exception" to the grand jury secrecy rule in Federal Rule of Criminal Procedure 6(e) (Rule 6(e)).

The FBI, however, took the position that Rule 6(e) prohibited our access to grand jury material. This was inconsistent with both the Department's and the FBI's historical practice of providing such grand jury information to the OIG in connection with our oversight function. The FBI therefore conducted a page-by-page pre-production review of the documents we requested and redacted all information it considered to be grand jury material, as well as several other categories of information, before producing the documents to us. As a result of the redactions, the documents were not useful, and the review came to a standstill.

We brought our objection to the FBI's withholding of this material to the attention of the Deputy Attorney General in November 2010. We advised the Department of our view that the OIG was entitled to the information pursuant to the Inspector General Act, as well as pursuant to the "foreign intelligence exception" in Rule 6(e) and the "attorney for the government" exception in Rule 6(e).

The Deputy Attorney General decided in July 2011 that the OIG would be provided with this grand jury material pursuant to the "foreign intelligence

exception” in Rule 6(e). That decision required an attorney for the Department to review all of the material the FBI had redacted and determine that it met the exception. That process consumed several more months, so that we did not begin receiving the grand jury material until late October 2011, and the FBI did not complete its production until January 2012.<sup>7</sup>

Meanwhile, the FBI also redacted from the documents produced to us several other categories of information. Most significant for the purpose of this review was the withholding of Title III electronic surveillance material. This also was inconsistent with both the FBI’s historical practice of providing such information to the OIG in connection with our oversight function, and with the access provision in the Inspector General Act. The FBI produced this information to the OIG only after receiving a letter from the Deputy Attorney General dated December 5, 2011, stating that the Deputy Attorney General authorized disclosure to the OIG in the material witness warrants review based upon the Deputy Attorney General’s decision that, under the electronic surveillance statute, 18 U.S.C. § 2517(1), the material was appropriate for the OIG’s exercise of its investigative or law enforcement duties because the review was expected to address allegations of misconduct by law enforcement agents that could potentially reflect a violation of criminal law.<sup>8</sup>

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<sup>7</sup> Even then, the Department concluded that a small portion of the material related to Witness 5 (discussed below) did not meet the above-described exception to Rule 6(e) and should therefore be redacted, because it was gathered as part of a pre-September 11 investigation of offenses unrelated to international terrorism. As a result, the OIG did not initially receive all of the materials in the FBI files pertaining to Witness 5. The OIG brought this matter to the attention of the Deputy Attorney General, who determined – relying on a different provision of Rule 6(e) than the foreign intelligence exception described above – that providing the requested materials to the OIG was necessary to assist him in performing his duty to enforce criminal law. See Fed. R. Crim. P. 6(e)(3)(A)(ii). Following this determination, the Deputy Attorney General authorized the FBI to provide such materials to the OIG, which it did. As the Inspector General has previously testified, requiring the OIG to obtain permission from Department leadership in order to be allowed to review relevant documents in the Department’s possession conflicts with the core principles of the Inspector General Act and impairs the OIG’s independence.

<sup>8</sup> The Inspector General, in recent appearances before the Senate Committee on Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies (on April 3, 2014), the House of Representatives Committee on Oversight and Government Reform (on January 15, 2014), and the Senate Committee on Homeland Security and Government Affairs (on November 19, 2013), testified that he disagreed with the method by which the OIG had been permitted access to these categories of documents in this review and in other OIG reviews. The Inspector General noted that the Attorney General and Deputy Attorney General have stated that they will continue to provide the OIG with the necessary authorizations to enable the OIG to obtain records in future reviews. However, the Inspector General stated that requiring the Inspector General to obtain permission from Department leadership in order to be allowed to review critical documents in the Department’s possession impairs the Inspector General’s independence and conflicts with the core principles of the Inspector General Act.

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## CHAPTER TWO – RELEVANT STATUTES, REGULATIONS, RULES, AND POLICIES

In this section we describe the applicable statutes, regulations, rules, and policies governing the use of the material witness statute.

### I. Material Witness Statute

Federal law has provided for the involuntary detention of material witnesses since the early days of the Republic, an authority that derives from the duty that citizens owe to courts to provide testimony.<sup>9</sup> The Supreme Court has observed that “[t]he duty to disclose knowledge of crime rests upon all citizens,” and this duty “is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.”<sup>10</sup>

The material witness statute in its current form, 18 U.S.C. § 3144, was enacted in 1984 as part of the Comprehensive Crime Control Act of 1984.<sup>11</sup> It provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by

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<sup>9</sup> See Act of September 24, 1789, ch. 20, § 33, 1 Stat. 91.

<sup>10</sup> *Stein v. New York*, 346 U.S. 156, 184 (1953); see also *Hurtado v. United States*, 410 U.S. 578, 588 (1973) (citing quotation from *Stein* to support remark that the petitioners did not attempt to attack the constitutionality of incarcerating material witnesses).

<sup>11</sup> Pub. L. No. 98-473, title II, 203(a), October 12, 1984. A Senate Judiciary Report that accompanied the 1984 enactment of 18 U.S.C. § 3144 expressly noted that this statutory provision applied to witnesses in grand jury proceedings. See S. Rep. No. 98-225, at 28 n.88 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3211; *United States v. Awadallah*, 349 F.3d 42, 53-55 (2d Cir. 2003) (discussing legislative history of § 3144 from 1984 enactment). Until the 1984 amendment, the material witness statute was codified at 18 U.S.C. § 3149, which stated, “If it appears by affidavit that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer *shall impose conditions of release*” pursuant to the bail conditions imposed on criminal defendants. (Emphasis added.) The 1984 amendment amplified on this authority by expressly providing for the ability of a judicial officer to issue a warrant for arrest and to order detention if there are no conditions of release that would ensure the witness’s appearance.



deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

The statute requires that the government establish two elements in order to justify detaining a material witness. First, it must appear that the person's testimony is "material in a criminal proceeding." The courts have not required extensive proof to satisfy this element. In *Bacon v. United States*, the case featured most prominently in courts' analyses of the statute, the Ninth Circuit stated: "In the case of a grand jury proceeding, we think that a mere statement by a responsible official, such as the United States Attorney, [that the testimony of the witness is material] is sufficient to satisfy [the first element of the statute]."<sup>12</sup> As detailed below in Chapter Four of this report, in most of the cases we reviewed the government provided detailed factual information to establish materiality and did not rely on "mere" statements from agents or prosecutors.

The second element that prosecutors must establish under the statute is that "it may become impracticable to secure the presence of the person by subpoena." Impracticability is normally established by a showing of probable cause that the witness represents a flight risk. Although the courts have required more than a conclusory statement averring that "it may become impracticable to secure the presence of the person by subpoena," they have not been consistent in their application of the statute's flight risk prong. Some courts have required proof of a witness's demonstrated intent to refuse to cooperate or otherwise frustrate the government's efforts to obtain his testimony.<sup>13</sup> Other court decisions have apparently required only a showing

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<sup>12</sup> 449 F.2d 933, 943 (9th Cir. 1971). The *Bacon* court was interpreting a predecessor statute to 18 U.S.C. § 3144, but the required elements – materiality and impracticability of securing appearance through subpoena – were the same.

<sup>13</sup> For example, in *Bacon*, the appellate court quashed a material witness warrant after finding the government's impracticability showing insufficient. The *Bacon* court found that the government likely established the witness's ability to flee: That she had both "personal contact with fugitives from justice" and access to "large sums of money" to facilitate any escape effort, the court stated, "tend[ed] to show that if Bacon wished to flee, she might be able to do so successfully." (Emphasis in original.) The court did not, however, believe that the government established that the witness "would be likely to flee or go underground." (Emphasis in original.) The court reasoned that, although "an inference can be drawn that [the witness, who had fled when first approached by FBI agents,] wished to avoid apprehension," it did not follow, based on the other evidence in the record, that she would disregard a subpoena to testify before the grand jury. *Bacon*, 449 F.2d at 944–45.

In another Ninth Circuit decision, *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985), the court again rejected an impracticability showing, finding that the government failed to demonstrate that the witness "was a fugitive or that he would be likely to flee the jurisdiction." See also *In re De Jesus Berrios*, 706 F.2d 355, 357 (1st Cir. 1983) (finding the

(Cont'd.)

that the witness possesses both the ability and motive to flee, without necessarily showing a demonstrated intent to avoid service of process or otherwise not cooperate with law enforcement.<sup>14</sup>

## II. Detention

Once a material witness is arrested, the statute directs that a court treat the witness “in accordance with the provisions of section 3142.”<sup>15</sup> Section 3142 sets forth the procedure for the court to follow in deciding whether, pending trial, an indicted criminal defendant should be released, released with conditions, or detained. 18 U.S.C. § 3142. Section 3142(g) lists the factors to be considered in making this determination.<sup>16</sup> However, courts have noted that not all of these factors are applicable when making this determination for a *witness*.<sup>17</sup> By statute, the witness has the right to a detention hearing and the

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impracticability requirement satisfied where the witness “avoided service of several subpoenas ordering him to give testimony before the grand jury”); *United States v. Coldwell*, 496 F. Supp. 305, 307 (E.D. Okla. 1979) (finding valid the arrest of a material witness where he refused to cooperate with law enforcement in the past, refused to testify voluntarily at trial, and evaded service of subpoenas); *United States v. Feingold*, 416 F. Supp. 627, 629 (E.D.N.Y. 1976) (finding the trial witness’s arrest appropriate given multiple unsuccessful attempts to serve him with a subpoena and his “obvious unwillingness to cooperate with the government”).

<sup>14</sup> For example, in *Awadallah*, the Second Circuit Court of Appeals upheld a material witness’s detention in a terrorism investigation *in spite of* his apparent cooperation “in the sense that he responded to questions.” The court concluded that his failure voluntarily “to step forward to share information he had about one of the hijackers,” in combination with (1) his possible incentive to avoid appearing before the grand jury and (2) his possible fear of prosecution, sufficiently demonstrated his flight risk. 349 F.3d 42, 70 (2d Cir. 2003). In arriving at this conclusion, the court notably considered “the totality of the circumstances” known to the court, including “the terrorist attacks known to everyone else on the planet, and the implicit threat of further attacks.” In *United States v. McVeigh*, the court rejected Terry Nichols’s claim that his arrest as a material witness lacked probable cause, despite at least some evidence arguably demonstrating Nichols’s intention to cooperate with authorities prior to his arrest. The court nonetheless held that Nichols’s “renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicate[d] that his testimony cannot be secured through the issuance of a subpoena.” 940 F. Supp. 1541, 1562 (D. Colo. 1996).

<sup>15</sup> 18 U.S.C. § 3144.

<sup>16</sup> These factors include the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the history and characteristics of the defendant, and the nature and seriousness of the danger to any person or the community that would be posed by the defendant’s release. See 18 U.S.C. § 3142(g).

<sup>17</sup> *Awadallah*, 349 F.3d at 63 n.15 (expressly noting that considerations of dangerousness posed by release are inappropriate in the material witness context and that the analysis should focus on considerations that bear upon whether it would be impracticable to secure the witness’s presence by subpoena).

right to counsel before a court makes its determination.<sup>18</sup> The material witness statute, by its incorporation of the procedures in section 3142, also requires that if a court determines that continued detention after arrest of a witness is warranted, it must issue a written detention order containing factual findings and a statement justifying the detention. 18 U.S.C. § 3142(i).

The Federal Rules of Criminal Procedure contain procedural safeguards against prolonged detention of material witnesses. Rule 46(h), relating to the court's obligation to supervise detention pending trial, provides in part:

(1) In General. To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses.

(2) Reports. 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. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).

The requirement that the government make bi-weekly reports with a court was added in 1966 to assist the court to fulfill its responsibility to supervise detained individuals.<sup>19</sup> The rule does not explicitly require that the "report" be made in written form, although the Advisory Committee notes as well as courts and commentators have discussed the rule as requiring the government to "file" a bi-weekly report.<sup>20</sup>

Rule 15(a)(2) of the Federal Rules of Criminal Procedure provides in part:

**Detained Material Witness.** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion

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<sup>18</sup> See 18 U.S.C. §§ 3006A(a)(1)(G); 3142(e).

<sup>19</sup> Fed. R. Crim. P. 46(h) advisory committee's note (1966); *see also* Levenson, *Federal Criminal Rules Handbook* (2014) at 611.

<sup>20</sup> In 2002, Rule 46(h) was amended to delete the requirement that the government make bi-weekly reports to the court regarding the status of defendants in pretrial detention. However, the Advisory Committee notes state that the rule retained the requirement that the government "file reports" with the court regarding detained material witnesses. Fed. R. Crim. P. 46(h) advisory committee's note (2002); *see also* Levenson, *Federal Criminal Rules Handbook* (2014) at 611 (noting that the government "must file" bi-weekly reports to assist the court in its responsibility of supervising detained witnesses); Wright and Henning, *Federal Practice and Procedure, Criminal* § 774 (2014) (noting that 2002 amendments to the rule deleted the requirement that the government "file bi-weekly reports with the court" regarding the status of any defendants in pretrial detention, but retained the requirement for detained material witnesses).

and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

### **III. Conditions of Confinement**

As stated above, if a court orders the arrest of a material witness, the material witness statute provides that the witness must be treated in accordance with section 3142. Section 3142 does not set forth specific standards governing conditions of confinement applicable to criminal defendants or material witnesses, with one notable exception: Taken together, sections 3144 and 3142(i)(2) require that, if detention is ordered, material witnesses must be confined in a corrections facility and be kept “separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.” 18 U.S.C. § 3142(i)(2).

Under its general statutory duties, the Bureau of Prisons (BOP) has a primary obligation “to provide suitable quarters” for all persons held as witnesses, as well as those charged with or convicted of crimes. 18 U.S.C. § 4042(a)(2). BOP regulations set forth general “segregation” requirements for criminal defendants and material witnesses that are consistent with section 3142. They provide that “pretrial inmates” will be separated from convicted inmates, to the extent practicable. 28 C.F.R. §§ 551.100, 551.104. “Pretrial inmates” are defined to include material witnesses. 28 C.F.R. § 551.101(a)(1).

USMS Directives provide that all persons, including material witnesses, “in the operational custody of the USMS will be fully restrained during transportation” to and from detention facilities. USMS Prisoner Operations Directive 9.18 further provides that “fully restrained” means “secured in a minimum of handcuffs, waist chain, and leg irons.”

### **IV. Special Rules or Policies in National Security Cases**

As noted, the focus of this report is on the use of material witness warrants in selected international terrorism cases. The Department adopted special procedures for approving the use of the statute in such cases following the September 11 attacks. According to a former senior Department manager, all material witness warrant applications related to the September 11 attacks had to be reviewed and approved by the senior Department officials assigned to lead the investigation before they could be filed with a court.

In January 2005, the Department memorialized guidance on prior notification and approval for applications for material witness warrants in certain matters involving terrorism and related offenses. The guidance required the prior approval of the Assistant Attorney General of the Criminal

Division in most cases before seeking a material witness warrant in many international terrorism matters.<sup>21</sup> In addition, the guidance required prior approval for seeking material witness warrants in matters charging offenses under statutes relating to weapons of mass destruction, torture, war crimes, and genocide. However, the guidance did not require prior approval before seeking a material witness warrant in domestic terrorism matters (*i.e.*, a terrorism investigation that does not involve foreign nationals, foreign locations, or connections to foreign countries or groups).<sup>22</sup>

Except for some minor differences, the current version of the U.S. Attorneys' Manual memorializes these same requirements.<sup>23</sup>

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<sup>21</sup> The guidance described "international terrorism matters" to include, among other things, "a terrorism investigation that involves foreign nationals, foreign locations, or connections to foreign countries or groups."

<sup>22</sup> Nevertheless, the guidance did recommend that U.S. Attorneys' Offices notify the Department's Counterterrorism Section of significant developments, which specifically included the filing of a material witness warrant.

<sup>23</sup> See USAM Section 9-2.136-39.

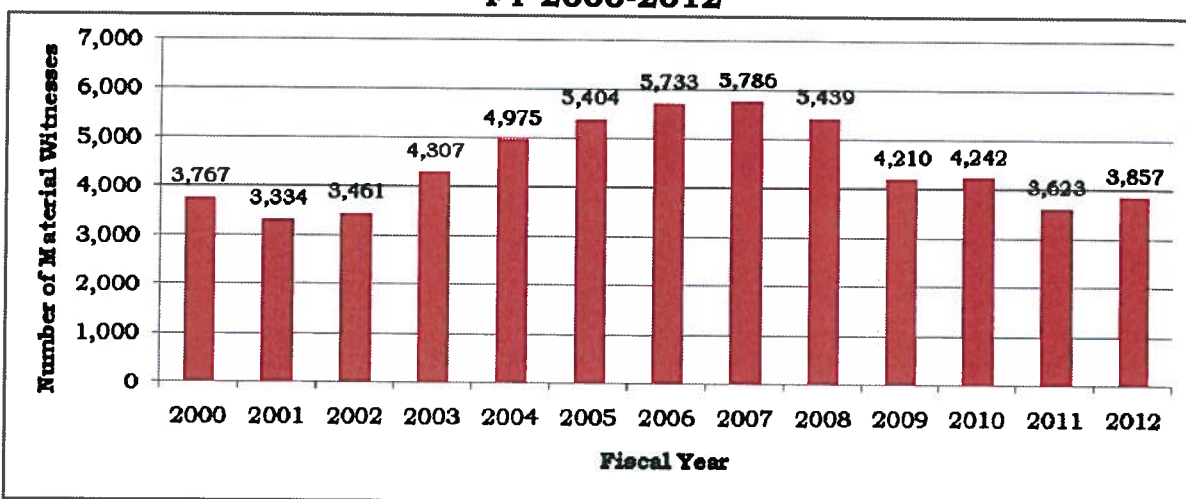
## CHAPTER THREE – GENERAL OVERVIEW OF USE OF MATERIAL WITNESS STATUTE 2000-2012

In this Section we examine aggregate data relating to the Department's use of the material witness statute from 2000-2012.

### I. Volume and Trends in Usage over Time

According to the USMS, between Fiscal Years (FY) 2000 and 2012, the federal government arrested 58,138 material witnesses, which averaged to approximately 4,500 arrests per year. The annual arrests under the statute over this period appear in Figure 1. As that Figure reflects, the number of individuals arrested in a given year as material witnesses rose significantly between Fiscal Years 2002 and 2007 and declined in later years.

**Figure 1: Number of Individuals Arrested as Material Witnesses, FY 2000-2012**



Source: USMS.

### II. Use in Terrorism Cases

Although the statute has received the most attention in connection with its use in international terrorism investigations, we found that its use in this context comprised a very small percentage of the cases in which it was employed, both before and after September 11, 2001.

The aggregate data made available to the OIG by the USMS did not identify the specific types of cases for which each material witness was arrested. However, current and former Department managers who served in the Criminal Division components between the late 1980s and 2000 and

handled terrorism and violent crime cases told us that they could recall few instances prior to the September 11 attacks in which material witness warrants were issued in such cases.<sup>24</sup>

NSD data revealed that since September 11, 2001, fewer than 100 material witness warrants were issued in connection with international terrorism-related cases. Other Department data, compiled by various offices in 2003 in connection with the September 11 investigations, similarly showed a fairly limited use of this tool. For example, the U.S. Attorneys' Offices for the Southern District of New York and the Eastern District of Virginia, which handled the criminal investigations in connection with the September 11 attacks, obtained approximately 55 to 60 material witness warrants that resulted in arrests from September 11, 2001, through December 31, 2003. Over the same period of time, the total number of material witness warrants obtained in all cases exceeded 8,000. Further, the NSD's collective data on material witness warrants show even more limited use of this tool after 2003 and through 2012. More specifically, data from the NSD showed that no material witnesses have been detained in international terrorism cases from 2004 through 2012.

The statistics we received showing a brief increase in the use of material witness warrants in terrorism cases following the September 11 attacks were consistent with witness statements provided to the OIG. Senior prosecutors who oversaw or handled material witness warrants in connection with the September 11 attacks told us the increased use of the statute for a short duration after the attacks was a natural consequence of the unprecedented circumstances: the attacks were carried out by a large number of perpetrators of foreign nationalities, and investigators had to scour leads on an even larger number of individuals associated with the perpetrators, also mainly of foreign nationalities, who posed serious risks of leaving the United States. These prosecutors told us that there was less need for this tool over time as law enforcement agents learned more about the individuals and organizations involved in the terrorist attacks.

### **III. Use in Immigration Cases**

The focus of this report was the use of the material witness statute in high-profile international terrorism cases. As noted, we learned that terrorism cases comprised a tiny percentage of the cases in which the statute was used. Instead, Department witnesses told us that the statute is most frequently used

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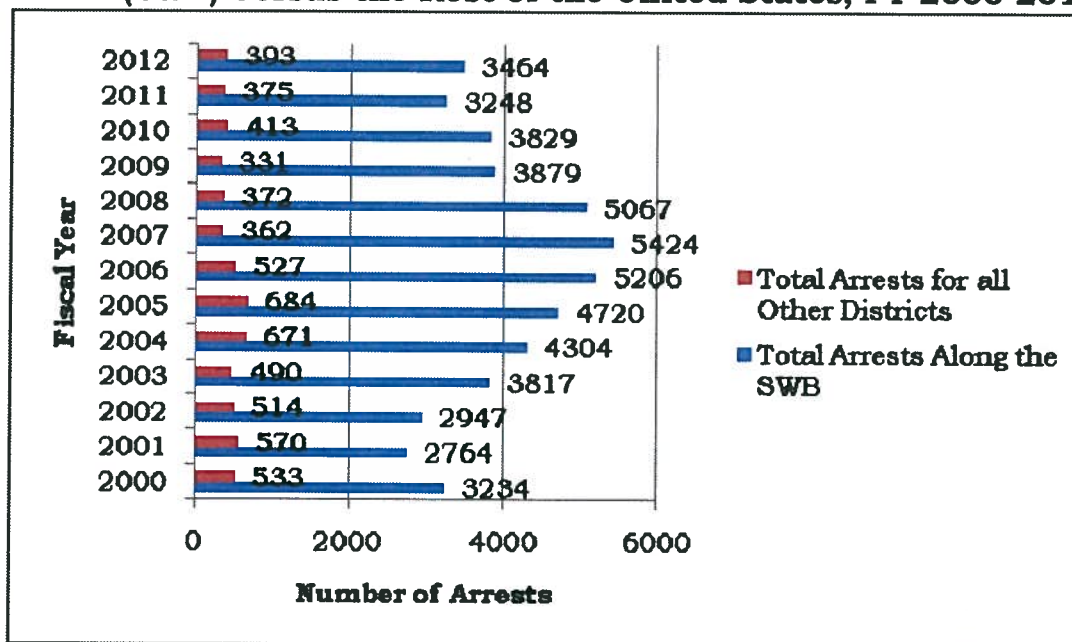
<sup>24</sup> According to the NSD, records regarding the use of the material witness statute in terrorism cases were not kept in a central repository prior to September 11, 2001.

in immigration-related cases, and several aspects of the available data provide strong inferential support for this. We present some of the relevant data here.

To begin with, during 2000-2012 the vast majority of arrests under the statute were made by agencies with jurisdiction over immigration-related matters. According to the USMS data, during this period over 95 percent of all material witness arrests (55,078 individuals) were made by the Border Patrol, Customs and Border Protection, Immigration and Customs Enforcement, or the Immigration and Naturalization Service.<sup>25</sup>

In addition, we found that 89 percent (51,903 individuals) of all of the material witnesses arrested during our review period were arrested in the five southwest border districts: the District of Arizona, the District of New Mexico, the Southern District of California, the Southern District of Texas, and the Western District of Texas.

**Figure 2**  
**Total Material Witness Arrests in Judicial Districts Along the Southwest Border (SWB) Versus the Rest of the United States, FY 2000-2012**



Source: USMS.

<sup>25</sup> On March 1, 2003, the Department of Homeland Security (DHS) absorbed the Immigration and Naturalization Service and the U.S. Border Patrol, formerly part of the Department of Justice, and the U.S. Customs Service, formerly part of the U.S. Department of the Treasury, and redistributed their functions. Our review covers the last several years when the agencies existed separately and includes data regarding material witness arrests from all these agencies.



We examined in more detail the use of 18 U.S.C. § 3144 in three of these districts: the District of Arizona, the Southern District of California, and the Southern District of Texas, which together account for 69 percent (40,061) of the individuals arrested as material witnesses during our review period. We found that material witnesses in all three districts were primarily arrested in conjunction with alien smuggling and human trafficking cases. The immigration authorities typically issue detainers for material witnesses in alien smuggling cases so that once the witnesses testify in the criminal case and are released from USMS custody, they will be remanded to those authorities for deportation.<sup>26</sup> Thus, in this common scenario the use of the statute does not, in and of itself, deprive the witness of liberty inside the United States to which the individual might otherwise be entitled.

#### IV. Time in Detention

We examined data relating to the duration that witnesses were detained under the material witness statute for the years FY 2000 to FY 2012. During this period, the median period of detention for all material witnesses was 26 days. Due to the presence of a few long-duration outliers, the average length of detention was higher than the median: 50 days in custody.<sup>27</sup> Though there were some fluctuations, we did not discern any noteworthy patterns in the median or average number of days witnesses were detained during this period.

**Figure 3: Time in Custody, FY 2000 - FY 2012**

| Fiscal Year | Median Number of Days | Average Number of Days |
|-------------|-----------------------|------------------------|
| 2000        | 19                    | 44                     |
| 2001        | 25                    | 61                     |
| 2002        | 26                    | 59                     |
| 2003        | 28                    | 61                     |
| 2004        | 27                    | 56                     |
| 2005        | 27                    | 61                     |
| 2006        | 20                    | 43                     |
| 2007        | 20                    | 45                     |
| 2008        | 25                    | 46                     |
| 2009        | 29                    | 45                     |
| 2010        | 28                    | 46                     |
| 2011        | 29                    | 47                     |
| 2012        | 29                    | 43                     |
| 2000-2012   | 26                    | 50                     |

Source: USMS.

<sup>26</sup> Material witnesses arrested in alien smuggling cases under 18 U.S.C. § 3144 are typically released from custody in the criminal case and deported following Rule 15(a) depositions. Statutory provisions facilitate the use of depositions in this context. Specifically, under 8 U.S.C. § 1324(d), a videotaped deposition of a witness who has been deported or otherwise expelled from the United States may be admitted into evidence if the witness to the violation charged was available for cross examination at the deposition, notwithstanding any provision of the Federal Rules of Evidence. 8 U.S.C. § 1324(d).

<sup>27</sup> The median number is the number in the middle of a data set where half of the dataset will be above the median and half will be below.

## V. Cost of Detention

We attempted to estimate the total cost of detention for material witnesses from FY 2000 through FY 2012. According to the USMS, it does not keep separate cost data for material witnesses. We arrived at these figures by using the BOP's average daily rate to house a prisoner and multiplying it by time spent in detention by material witnesses. Using this method, we estimated the total cost of detention under the statute from FY 2000 through FY 2012 to be approximately \$196.6 million.<sup>28</sup>

**Figure 4: Cost of Detention, FY 2000- FY 2012**

| <b>Fiscal Year</b>                  | <b>Average Daily Rate</b> | <b>Number of Days in Custody</b> | <b>Total Cost per Fiscal Year</b> |
|-------------------------------------|---------------------------|----------------------------------|-----------------------------------|
| 2000                                | \$59.02                   | 164,417                          | \$9,703,891.34                    |
| 2001                                | \$60.75                   | 202,415                          | \$12,296,711.25                   |
| 2002                                | \$61.69                   | 202,562                          | \$12,496,049.78                   |
| 2003                                | \$63.51                   | 258,844                          | \$16,439,182.44                   |
| 2004                                | \$63.57                   | 276,015                          | \$17,546,273.55                   |
| 2005                                | \$64.19                   | 321,957                          | \$20,666,419.83                   |
| 2006                                | \$66.96                   | 244,142                          | \$16,347,748.32                   |
| 2007                                | \$68.28                   | 261,479                          | \$17,853,786.12                   |
| 2008                                | \$70.75                   | 247,650                          | \$17,521,237.50                   |
| 2009                                | \$74.66                   | 182,302                          | \$13,610,667.32                   |
| 2010                                | \$77.49                   | 196,132                          | \$15,198,268.68                   |
| 2011                                | \$79.16                   | 172,630                          | \$13,665,390.80                   |
| 2012                                | \$79.31                   | 166,872                          | \$13,234,618.32                   |
| <b>Total Days and Total Dollars</b> | <b>N/A</b>                | <b>2,897,417</b>                 | <b>\$196,580,245.25</b>           |

Source: BOP and USMS.

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<sup>28</sup> These figures will differ slightly from numbers publicly reported by the Office of the Federal Detention Trustee (OFDT) because OFDT only counts costs for material witnesses housed more than 4 days.

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## **CHAPTER FOUR – MATERIAL WITNESSES IN SELECTED TERRORISM CASES**

In this chapter we examine the 10 cases that we selected for detailed review, involving the detention of a total of 12 material witnesses. As noted above, these were the cases whose facts and circumstances appeared to raise questions about the use of the material witness statute in international terrorism investigations. Based on our review of thousands of internal FBI documents, most of which were not available to the judges and magistrates who issued the warrants, we evaluated these 10 cases for insights into how the FBI and the Department have been using the material witness statute, with attention to the following issues:

- An overall assessment of the Department's use of the material witness statute in terrorism cases.
- How the Department has established the elements of materiality and flight risk and whether the information used to establish such elements was consistent with the underlying information known to the FBI at the time.
- Why the Department decided to delay or forego obtaining the grand jury or trial testimony of some material witnesses after their arrest, and whether those issues raised any concerns regarding pretextual or other improper use of the statute, especially in light of subsequent criminal charges brought against the witnesses.
- Whether procedural safeguards have provided meaningful protections to detained material witnesses, including access to counsel and evidence, detention hearings to contest the government's basis for continued detention, the use of depositions to accelerate release, and periodic status reports from prosecutors justifying continued detention.
- Whether the conditions under which material witnesses were confined and transported were consistent with statutory requirements and relevant regulations and rules.

In this chapter we present factual findings about each of these 10 cases. In Chapter Five, we present the OIG's analysis of the Department's use of the material witness statute based on these factual findings.

## **I. Witness 1**

Witness 1 was born in southern Asia in the 1960s. According to FBI files, he secured a U.S. travel visa in the 1980s and moved to the United States, where eventually he became a U.S. citizen. During the next nine years, Witness 1 worked and lived in the Northeast. In the 1990s, he briefly returned to Asia, where he met and married his wife. Government records stated that he then returned alone to the northeastern United States, taking up residence with two former co-workers, Associate 1 and Associate 2.

As detailed below, Witness 1 was detained as a material witness after the investigation of the September 11 terrorist attacks led to the detention of Associates 1 and 2. Government records did not reflect that Witness 1 ever testified before a grand jury, but reflected that he provided pertinent information to the government under a proffer agreement. He later pled guilty to making false statements to an FBI agent concerning certain financial transactions and was sentenced to probation.

### **A. The FBI Learns about Witness 1**

According to FBI files, federal agents detained Associates 1 and 2 in the aftermath of the September 11 terrorist attacks while the two were travelling across country by common carrier. The agents informed them that passengers with suspicious itineraries were being questioned.<sup>29</sup> During initial questioning, Associates 1 and 2 provided the task force officers with conflicting descriptions of their travel plans and denied possessing, among other things, knives or large sums of currency. Each consented to luggage searches, which revealed, among other items, two box cutters, a small pocket knife, a large amount of cash, hair dye, religious paraphernalia, and a letter referring to a reunion in the afterlife. Both illegal aliens, Associates 1 and 2 were taken into the custody of the Immigration and Naturalization Service (INS).

During the interview, Associate 2 told the agents that he lived with Witness 1 in a residence in the Northeast, for which he provided an address. FBI agents searched the residence a few days later, detaining Witness 1 for questioning in the process. Witness 1 stated to the agents that he was originally from Asia, that his wife continued to reside there, that his roommates, Associates 1 and 2, had left their residence on the morning of September 11, and that he did not know where they went.

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<sup>29</sup> On the morning of September 11, 2001, Associates 1 and 2 had boarded a commercial flight. Following that day's terrorist attacks, the Federal Aviation Administration grounded all air traffic. The grounding stranded Associates 1 and 2 in a city other than their destination. They purchased, with cash, passage to their original destination by ground transportation.

The search of the residence, according to FBI files, revealed the following items: (1) a handwritten note referring to violence and “a coalition of terror”; (2) a large amount of cash; (3) hundreds of telephone numbers and numerous calling cards; and (4) a receipt for a registered mail parcel apparently sent by Witness 1 to relatives in Asia.

#### **B. The Decision to Seek a Material Witness Warrant**

The FBI and local federal prosecutors requested a magistrate to issue a material witness warrant for the arrest of Witness 1. Agents arrested him at his residence later that day.

The affidavit submitted to the court in support of the material witness warrant described the September 11, 2001, terrorist attacks as well as the activities and possessions of Associates 1 and 2 described above. The affidavit provided other information pertaining to Associates 1 and 2, including the following: (1) they paid cash to switch the date of their flight from September 12 to September 11; (2) Associate 2 possessed two Social Security cards and a pilot’s license; (3) Associate 1 possessed two foreign passports, neither of which bore his correct date of birth, and at least one Social Security card issued in the name of another individual; and (4) Associates 1 and 2 had lived with, worked with, and intended to visit an individual whose employee was linked to multiple, suspected September 11 hijackers. Notably, the affidavit concluded that the shared residence appeared to be a “staging point” for Associates 1 and 2, given the “evidence of financial and communications resources” found therein.

The affidavit submitted to the court in support of the material witness warrant for Witness 1 described the discovery, in the residence, of the above-described receipt for a registered mail parcel sent by Witness 1 to relatives in Asia. Paragraph 28 of the affidavit stated:

The investigation to date has uncovered letters and notes from some of the hijackers relating to last wishes and wills to the loved ones. It is possible that this correspondence from [Witness 1] refers to similar subjects and likely will tend to demonstrate and explain [Witness 1’s] and others’ role in the September 11th offense conduct.

The affidavit described Witness 1’s incentive to flee as “considerable,” stating: (1) “It appears that the witness has connections to one or more of the conspirators who were involved in terrorist acts . . . [and] may have an incentive to avoid appearing before the grand jury and/or deprive the investigation of relevant information”; and (2) he may be “concerned that his prior conduct, as set out above, may provide a basis for law enforcement

authorities to investigate and possibly prosecute him.” The affidavit also stated that, with family living in Asia, “the witness has a ready haven to flee to.”

### **C. Witness 1’s Detention as a Material Witness**

Witness 1 was arrested and incarcerated in a local correctional facility’s special housing unit. According to files the OIG reviewed, he appeared with counsel at court conferences 2 days after his arrest and, again, about 2 weeks after his arrest and was detained on his consent. During his detention, he submitted to a series of interviews, after which the court granted a government request to immunize his testimony and ordered him to testify before the grand jury. However, the relevant U.S. Attorney’s Office and court had no records of grand jury testimony from Witness 1, and the local prosecutor who handled this matter did not recall any grand jury testimony from Witness 1 either.<sup>30</sup> Witness 1 was charged under 18 U.S.C. § 1001 with making false statements to an FBI agent concerning certain financial transactions. He pled guilty and was sentenced to probation.<sup>31</sup>

## **II. Witness 2**

Witness 2 was born in Africa in the 1970s and moved to the United States in 2001. Government records that the OIG reviewed stated that, after hearing about the September 11, 2001, terrorist attacks, Witness 2 rejoiced, claimed to have specific knowledge regarding the attacks’ perpetrators, and predicted that additional assaults on American interests would follow. As detailed below, the government detained Witness 2 as a material witness in connection with the investigation of the September 11 terrorist attacks. The prosecutors never called him to testify before a grand jury, and the court ordered his release about 10 days after his arrest.

### **A. The FBI Learns about Witness 2**

In the aftermath of the September 11, 2001, terrorist attacks, a confidential source reported that Witness 2 had made statements celebrating the attacks. The ensuing FBI investigation revealed the following facts. Witness 2 met and married his wife, an American, when she was visiting Africa. She returned home to the United States and, after securing a visa, Witness 2 joined her in 2001 and began working as a manual laborer. According to FBI documents we reviewed, on September 11, 2001, Witness 2’s employer

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<sup>30</sup> According to the relevant U.S. Attorney’s Office, Witness 1 provided pertinent information to the government from October to December 2001, pursuant to a proffer agreement.

<sup>31</sup> Associates 1 and 2 each eventually pled guilty to credit card fraud (18 U.S.C. § 1029(b)(2)).

described to a friend Witness 2's joyful reaction to the terrorist attacks. The friend later told the FBI that, according to Witness 2's employer, Witness 2 "was literally crying with joy and laughing over the fact that so many people had been killed." The friend, who also knew Witness 2, described to the FBI similar statements Witness 2 subsequently made directly to her, expressing glee over the September 11 attacks and predicting additional American bloodshed. The friend also told the FBI that Witness 2 had told her about his upcoming overseas business trip. The FBI subsequently conducted several additional interviews of individuals claiming to have spoken with Witness 2 in the aftermath of the September 11 attacks.

The FBI interviewed Witness 2. During the interview, Witness 2 stated that on the morning of September 11 he had been working alongside his employer. He denied celebrating the terrorist attacks, however. Later in the interview, Witness 2 confirmed to the agents that he intended to visit his cousins overseas in the coming months.

#### **B. The Decision to Seek a Material Witness Warrant**

Subsequent to the FBI's interview of Witness 2, the FBI and local federal prosecutors requested a magistrate to issue a material witness warrant for Witness 2's arrest. Agents arrested him the following day upon his return from his overseas trip.

The FBI affidavit submitted to the court in support of the material witness warrant described the September 11, 2001, terrorist attacks as well as the 1998 attacks on the U.S. embassies in Kenya and Tanzania. To demonstrate the materiality of Witness 2's potential grand jury testimony, the FBI relied on the testimony of five confidential sources, each of whom claimed to have discussed the terrorist attacks with Witness 2 during the month of September 2001. According to the affidavit, the confidential sources told the FBI that Witness 2 had stated that the attacks occurred because "America put its nose where it doesn't belong," that "the Arabs . . . [had done] what they had to do," that "America is going down because we are going to finish them," that more Americans would die in future attacks, and that he had "proof" that Iraq – and not Osama Bin Laden – was behind the attacks.

The affidavit also asserted that securing Witness 2's testimony by subpoena might become impracticable. After recounting Witness 2's categorical denials of the statements ascribed to him by five confidential sources, the affidavit stated, "It appears that the witness has already given false statements." The affidavit then stated that Witness 2 might have an incentive to flee the authorities because: (1) he knew – having been told by the agents who interviewed him – that lying to federal agents was a crime; and (2) he had apparently already lied to federal agents.



The affidavit also stated that Witness 2 was a legal resident alien who entered the United States “just a few months ago.” Lastly, the affidavit noted that Witness 2’s “time in the community is minimal” and that he was at that moment overseas, visiting “cousins” (quotation marks in original) for whom he could provide neither addresses nor contact telephone numbers.<sup>32</sup>

### **C. Witness 2’s Detention as a Material Witness**

Following Witness 2’s arrest, he was incarcerated at a local detention center. Within a few days after his arrest, Witness 2 had his initial appearance and detention hearing before a federal district judge with court-appointed counsel present. At the detention hearing, the federal district judge ordered Witness 2’s detention based on the strong showing of flight risk, citing, among other things, frequent overseas travel, several relatives and contacts overseas, and incentive to flee from possible criminal charges.<sup>33</sup> The district judge rejected the argument by Witness 2’s counsel that Witness 2 be released on conditions, including 24-hour home detention, given the presence of close family members in the United States.

In an interview with FBI agents a few days later, Witness 2 admitted to making most of the above-described statements celebrating the attacks. He stated that he did not have any knowledge regarding Iraq’s involvement in the terrorist attacks. He also denied having any connections to or information about “anti-American groups.” He stated to the agents that he did not know any fundamentalist Muslims, any of the September 11 hijackers, or any members of al Qaeda or Hamas. He stated that he makes “stupid” remarks when he is nervous. The court released Witness 2 a week later on his own recognizance after he subsequently demonstrated to the government that he had meaningful ties to the United States and was willing to answer questions and not flee. Shortly thereafter, the court vacated the material witness warrant. The relevant U.S. Attorney’s Office told us they had no records indicating that he ever appeared before the grand jury or was charged with a criminal offense.

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<sup>32</sup> The affidavit did not indicate whether the FBI had checked to see if the “cousins” were really cousins, or otherwise expand on the implied skepticism that they were real cousins. The FBI subsequently confirmed that the individuals were, in fact, Witness 2’s cousins and that they lacked criminal records.

<sup>33</sup> The district judge also noted in his order that the government made a substantial showing in the alternative that Witness 2 posed a “danger to the community,” but did not rely on this factor for his detention ruling.

### **III. Witness 3**

Witness 3 is a native of an African country who came to the United States on a student visa in the 1990s. Witness 3's odd behavior at a hotel shortly after the attacks of September 11, 2001, drew the FBI's interest. He was initially detained for alleged immigration violations and then detained as a material witness.

#### **A. The FBI Learns about Witness 3**

Shortly after the September 11 attacks, an FBI field office received a report from an employee of a hotel about Witness 3. According to contemporaneous government files, hotel personnel notified the FBI that Witness 3 paid for his room in cash and had not permitted any maid service since he checked into the hotel. FBI records regarding the report from hotel personnel stated that Witness 3 appeared nervous when hotel security personnel went to his hotel room to speak with him and hotel security personnel observed newspapers on the September 11 attacks "scattered about the room."

Within a few hours after receiving the report from the hotel, FBI agents visited Witness 3 at the hotel and found him to be "very relaxed and cooperative." However, due to some inconsistent statements and the possibility that he may have removed incriminating material before FBI agents arrived, the FBI agents asked Witness 3 if he would take a polygraph test, which he subsequently did. According to the FBI's written summary of the polygraph test, the FBI polygraph examiner concluded that Witness 3's recorded responses to questions regarding the September 11 attacks were "indicative of deception."

During the FBI's interview, Witness 3 consented to a search of his hotel room. According to the FBI interview summary, the FBI learned from the interview that Witness 3 came to the United States to attend a flight school. Witness 3 informed the FBI that he had accumulated approximately 20 flight hours but had not obtained his private pilot's license. The FBI also learned that Witness 3 had intended to move soon to another city, but decided to stay in town for his upcoming hearing on alleged immigration violations.<sup>34</sup> Witness 3 informed the FBI that he had moved out of his apartment in the summer of 2001, and started staying at hotels.

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<sup>34</sup> Witness 3 came to the attention of the INS prior to the terrorist attacks on September 11, 2001. In the summer of 2001, the INS issued Witness 3 a notice to appear at a hearing for alleged immigration violations.

Later, in the fall of 2001, an INS officer detained Witness 3 for removal proceedings regarding alleged immigration violations, and he was sent to a county jail.

The next day, FBI and INS agents interviewed Witness 3 at local FBI offices. According to the FBI's interview summary, Witness 3 informed the FBI that he had married an American citizen with whom he had children, but they had separated. Witness 3 said that their separation was cordial. Witness 3 was unable to provide the FBI with his wife's whereabouts. Initially, he declined an FBI agent's invitation to call anyone, including telephone directory service, who would have knowledge of his wife's whereabouts. He eventually attempted to locate his wife by calling telephone directory service but was unable to find her. In addition, Witness 3 told the FBI that he had few personal belongings because he wanted to "start a new life" elsewhere, and had sold or given away most of his belongings. Witness 3 also informed the FBI that he had not traveled abroad for a period of years. Witness 3 told the FBI that he had worked in car sales for several years.

#### **B. The Decision to Seek a Material Witness Warrant**

In October 2001, an office within FBI Headquarters sent an urgent electronic communication (EC) to all FBI divisional offices to obtain information regarding certain detained aliens as part of "Project Lookout," a coordinated operation among the FBI, the INS, and certain Department components after September 11, 2001.<sup>35</sup> Witness 3's name appeared on the list of approximately 120 alien detainees included in "Project Lookout." Witness 3's name was also listed on a Department memorandum that identified several detainees about whom the Department had been able to "obtain specific facts showing a meaningful investigative interest" who warranted continued detention in connection with the September 11 attacks or future attacks. Besides Witness 3's pilot training and odd hotel behavior, the memorandum noted questions regarding Witness 3's identity and his connections to terrorist activities.

A few weeks later, an immigration judge issued an order of removal for Witness 3 regarding the immigration violations. Shortly thereafter, the Department filed an application for a material witness warrant for Witness 3, supported by an FBI affidavit, in a federal district court that was located in a state different from where Witness 3 was then being detained on the immigration violations. The material witness warrant was subsequently approved by a federal magistrate judge.

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<sup>35</sup> One of Project Lookout's primary objectives was to ensure that alien detainees who were involved with the September 11 attacks or may have had relevant information regarding the investigation into the attacks remained in INS custody when they appeared for a detention hearing before an immigration judge.

The affidavit alleged that Witness 3 possessed information material to an ongoing federal grand jury investigation regarding the criminal terrorist attack on the Pentagon on September 11, 2001, and coordinated attacks on the same day. The affidavit described how Witness 3 came to the FBI's attention from hotel reports of "suspicious behavior." In addition, the affidavit described some of the contents in Witness 3's hotel room that hotel personnel observed, including much news material on the September 11 attacks and Witness 3's apparent possession of multiple passports.

The affidavit stated that Witness 3 told FBI agents that he came to the United States to learn to fly airplanes and had been enrolled at a flight school, but had not received his private pilot's license.

The affidavit also described that a consent search of Witness 3's belongings in his hotel room revealed the names and telephone numbers of individuals connected to associates of Osama bin Laden, and documentation suggesting that Witness 3 was a professional pilot.

The affidavit noted that Witness 3 originally came to the United States on a student visa and subsequently married an American citizen. However, the affidavit noted that government agencies were investigating the validity of this marriage after Witness 3 could not identify the whereabouts of his alleged wife or children. The affidavit also noted that Witness 3 originally told the FBI that he gave away all of his belongings because he wanted to start a new life in another city. However, the affidavit stated that he later retracted the statement and informed the FBI that he sold all of his belongings. The affidavit further noted that Witness 3 was in INS detention at the time of the material witness warrant application, after his immigration bond had been revoked.

The affidavit stated that Witness 3's presence before a grand jury could not reasonably be assured by subpoena or other means short of detention, given the nature of the underlying crimes being investigated, Witness 3's immigration status in the United States, and the foregoing information regarding Witness 3's suspicious conduct.

### **C. Witness 3's Detention as a Material Witness**

As noted in the material witness warrant application, Witness 3 had already been arrested and detained by the INS when the application was filed and signed by a federal magistrate judge in another state. Shortly after the material witness warrant was issued, Witness 3 had his initial appearance on the warrant before a federal magistrate judge, who was located in the jurisdiction where Witness 3 was currently being detained on the INS charges, with court-appointed counsel present. That same day, the magistrate judge ordered Witness 3's temporary detention on the warrant, pending a hearing on

Witness 3's removal from the current federal district court to the federal district court in another state that issued the material witness arrest warrant.

A few days later, Witness 3, with counsel present, consented to his removal to the issuing district of the material witness warrant. Witness 3 also requested a detention hearing in the issuing district. The same day, a federal magistrate judge issued an order to the U.S. Marshals to take custody of Witness 3 and transfer him "forthwith" to the U.S. Marshals or other authorized officer in the issuing district court. Witness 3 was also ordered detained pending a detention hearing in that court.

Witness 3 was not transferred until one month later via USMS airlift, despite the order that he be transferred "forthwith." Reasons for the delay are not indicated in the documents provided or made available to the OIG.

Shortly after his transfer, Witness 3 was produced for his initial appearance before a federal magistrate judge in the federal district court that issued the material witness warrant. That same day, the government moved to unseal the material witness warrant and affidavit for Witness 3 for the limited purpose of permitting his counsel to read those materials prior to the detention hearing.

Witness 3's detention hearing took place within a day after his initial appearance, and the next day, the federal magistrate judge ordered Witness 3's continued detention. The order was memorialized on a one-page form entitled, "Order of Detention Pending Trial," which is typically used for criminal defendant detention hearings, and mainly required that certain boxes on the form be checked. Under Part II of the template order, entitled "Written Statement of Reasons for Detention," the order included only the notation "due to the nature of the charges, defendant is a risk of flight" and stated that a more complete basis for detention "has been recorded and is available for transcription in the event of appeal."

The records we reviewed on this case reveal that Witness 3 passed a polygraph test in the early months of 2002. Materials provided to the OIG by the Department indicate that Witness 3 never testified before the grand jury.<sup>36</sup> Shortly after Witness 3 passed the polygraph test, the Court vacated the material witness warrant and Witness 3 was released back into INS custody for deportation.

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<sup>36</sup> As reflected in documents pertaining to a different material witness detained in the same time frame, the federal district court convened a "specially designated panel" of the grand jury for the September 11 attacks, which was not fully formed until sometime in early 2002. This may explain why the government did not make a decision on whether or not to bring Witness 3 before the grand jury sooner.

According to government documents, by late spring of 2002, the INS began travel preparation to effectuate Witness 3's removal. Witness 3 was subsequently deported from the United States.

#### **IV. Witness 4**

Witness 4 was born in Africa in the 1960s. He legally entered the United States in the 1990s and attended flight school on a student visa. As detailed below, Witness 4 was detained while attempting to board a flight under suspicious circumstances shortly after September 11, 2001, and was further detained by the INS as a visa overstay. Federal prosecutors obtained a material witness warrant for Witness 4 while he was in INS custody. Witness 4 declined to testify without a grant of immunity, and the INS subsequently deported him home to Africa.

##### **A. The FBI Learns about Witness 4**

A few days after September 11, 2001, an FBI special agent responded to an incident at a nearby airport involving Witness 4, who had attempted to board a flight across the country transporting several "suspicious items." A "routine security search" of his checked luggage had revealed flight manuals, a commercial pilot's license, various documents bearing Arabic writing, and materials relating to the CIA, prior terrorist attacks, and strategies for "beating" a polygraph examination. According to FBI documents, a subsequent, more detailed search of Witness 4's checked baggage revealed two cardboard boxes containing newspapers reporting the September 11, 2001, terrorist attacks, a piece of paper containing CIA and State Department phone numbers, documents revealing the locations of numerous U.S. airports, as well as various passports, credit cards, and identification documents that did not belong to him. The luggage search also revealed a handwritten note referring to making a false bomb threat and a non-lethal weapon, the presence of which Witness 4 had not disclosed to airline officials prior to his flight, as required by aviation regulations.

Witness 4's flight had originally been scheduled for September 11, 2001, but the Federal Aviation Administration had grounded all commercial flights, including his, in the aftermath of that day's terrorist attacks. FBI files we reviewed stated that FBI and INS officials questioned Witness 4, who provided false information to them about his immigration status and a false alien identification number. Although Witness 4 claimed to be a lawful U.S. permanent resident, an INS database search revealed this to be false. After flight school, Witness 4 had departed the United States, but he subsequently reentered the country without submitting to an immigration inspection. According to FBI interview notes, Witness 4 told the agents he was a pilot. The FBI also learned that Witness 4 had contacted the airline one day before his

rescheduled flight's departure seeking details regarding extra airport security measures implemented in response to the terrorist attacks.

Having confirmed Witness 4's illegal immigration status, the INS detained him at the airport and transported him that day to a local jail. The FBI initiated a formal investigation of him the next day. Authorities subsequently transferred Witness 4 to an INS detention facility. Less than a week later, the INS commenced proceedings to remove Witness 4 from the United States, scheduled a hearing for the following month, and transferred Witness 4 to another INS detention facility.

## **B. The Decision to Seek a Material Witness Warrant**

We reviewed a contemporaneous document that listed several INS detainees, including Witness 4, in whom the FBI had at that time an ongoing investigative interest. FBI documents showed that between September 18, 2001, and early November 2001, the FBI ran background and records checks on Witness 4, interviewed his associates, and sought information about him from family members and officials at his home-country's U.S. embassy.

The FBI interviewed Witness 4 a second time. According to FBI notes from this interview, Witness 4 told the agents that, having completed flight school, he had been working as a flight simulator instructor prior to his arrest. He stated that he carried the weapon to protect himself from enemies he made competing in martial arts tournaments and that he was interested in joining either the CIA or the FBI.

The FBI provided a declaration to the immigration court regarding its interest in Witness 4's continued detention. The FBI informed the court that Witness 4's activities at the airport at which he was originally detained, in addition to his lack of immigration status, "warranted further inquiry." According to these documents, the FBI informed the immigration court that it was in the process of determining whether Witness 4 was "linked to or possessed knowledge useful to the investigation of the terrorist attacks." Two days later, Witness 4 appeared before an immigration judge and conceded removability on the grounds that he had entered the United States without inspection. The judge ordered him held without bond. One month later, an immigration judge ordered Witness 4's deportation to his home county in Africa.

Four days later, in response to a request by the FBI and federal prosecutors, a magistrate issued a material witness warrant for Witness 4's arrest. The FBI affidavit submitted to the court in support of the application for the material witness warrant described the September 11 attacks and the related investigation. To establish the materiality of Witness 4's potential grand jury testimony, the affidavit described the circumstances of his arrest at

the airport and listed the items discovered in his luggage. The affidavit stated that Witness 4 had questioned airline personnel one day before his scheduled flight regarding newly implemented airline security measures and that he had failed to declare the weapon. The affidavit stated that Witness 4 told the FBI that he was a pilot, that he carried the weapon for self defense, and that he possessed the other materials due to his interest in joining the CIA or the FBI. The affidavit also stated that Witness 4 told the FBI that he was a U.S. resident and that he possessed a passport and a resident alien card but had left both documents at his residence. The affidavit further stated, however, that, according to INS records, Witness 4 was a citizen of an African country residing in the United States in violation of his immigration status.

The affidavit also asserted that Witness 4's grand jury testimony could not reasonably be secured by subpoena or by any other means short of detention. In support of this proposition, the affidavit cited Witness 4's "suspicious" conduct, "questionable" immigration status, and "the nature of the underlying crimes being investigated" (each of which had been described in greater detail earlier in the affidavit).

### **C. Witness 4's Detention as a Material Witness**

Within days of the issuance of the material witness warrant, a federal district court ordered Witness 4 transferred from the INS detention center to the issuing district pursuant to the warrant. Witness 4's initial appearance in the issuing district took place about a month later. Court documents pertaining to Witness 4's subsequent detention hearing showed that the government argued that the following factors weighed in favor of detaining him: (1) his lack of a current permanent address in the United States; (2) his illegal status, INS detainer, and looming deportation; (3) his potential criminal liability in another district for having provided false information to the INS regarding his immigration status; (4) his strong ties to his home country; and (5) his apparent access to passports and other documents in the names of other individuals. The court ordered Witness 4's continued detention. In addition to finding Witness 4 a flight risk, the court also found under the circumstances that there were "no conditions of release that would reasonably assure that the witness would not . . . pose a danger to other persons, or the community, if released."

According to FBI files we reviewed, Witness 4 submitted to an additional interview by prosecutors later that month. The following day, Witness 4 agreed to a 2-week continuance of his detention. According to court documents we reviewed, Witness 4 subsequently rejected a government request to take a polygraph and informed local prosecutors that he would testify before the grand jury only if granted immunity from prosecution. Materials provided to the OIG by the Department indicate that Witness 4 never testified before the grand jury. Soon thereafter, a U.S. district court in another jurisdiction issued



a warrant for Witness 4's arrest for providing false statements to INS agents regarding his immigration status during his original interview. Two days later, the district court that had issued Witness 4's material witness warrant dismissed it. In moving to dismiss Witness 4's material witness warrant, the government provided the following explanation:

Initially, it appeared [Witness 4] intended to cooperate, agreeing to debriefings and agreeing to take a polygraph test. Last week, however, he fired [his attorney], and his new counsel . . . advises that [Witness 4] will not take a polygraph and will not testify in the grand jury unless granted immunity from prosecution. Since we have been unable to verify most of the information provided by [Witness 4] thus far, we are not in a position to request a grant of immunity for him. Since he has refused further debriefings and a polygraph, we are unable to use his assistance to further the investigation of this matter.

Witness 4 remained in USMS custody on a detainer pursuant to the false statements charges pending in the other jurisdiction. The following month, the FBI notified the INS that it no longer had an investigative interest in Witness 4. The USMS transferred Witness 4 to the jurisdiction where he was originally detained, where he was convicted of providing false statements to the INS. The court sentenced him to time served. In the ensuing weeks, the FBI closed its investigation of Witness 4, and the INS deported him.

## **V.     Witness 5**

Witness 5, a native of a Middle Eastern country, entered the United States on a student visa in the 1980s. Shortly after the September 11 attacks, the FBI received reports that Witness 5 had behaved in a "suspicious" manner at hotels near where some of the hijackers were seen before the attacks. Witness 5 was subsequently detained as a material witness for more than 60 days, and then was returned to INS custody for deportation without ever having testified.

### **A.     The FBI Learns about Witness 5**

Shortly after September 11, 2001, the FBI canvassed certain areas where several of the hijackers were seen before September 11. The FBI received several reports of Witness 5's unusual behavior at hotels in one of these areas where he stayed during the summer of 2001. For example, hotel employees told the FBI that Witness 5 did not want any maid service in his room without him present; paid for his room in cash; and made telephone calls from the hotel pay phones, even for calls to the hotel front desk. Hotel employees also told the FBI that Witness 5 had requested hotel shuttle service drop-offs in odd locations, such as behind shopping plazas. Moreover, the proprietor of one

hotel told the FBI that he had seen Witness 5 praying in the hotel parking lot with someone who resembled one of the hijackers. This proprietor also told the FBI that Witness 5 requested several room changes and claimed to work for a federal government agency. Based on this information, the FBI began 24-hour surveillance of Witness 5.

A few days later, the FBI learned that the state police from a neighboring state had issued an arrest warrant for Witness 5, during the summer of 2001, based on a non-terrorism, felony offense.

In late September 2001, the FBI observed Witness 5 engaged in odd behavior. For instance, on one evening, the FBI observed Witness 5 deposit a plastic bag in a trash receptacle outside of a restaurant, and then remain nearby for several hours. The FBI later recovered the bag, which contained an electronic device wrapped in several additional plastic bags. FBI records stated that subsequent FBI analysis of the device determined that it could be used as a detonator for a bomb.

FBI records state that the FBI continued to observe Witness 5 engaged in unusual behavior, such as using isolated pay phones and making multiple cash deposits at a bank on a given day, even though a friend of Witness 5 told the FBI that Witness 5 did not have a job and that the friend was unaware how Witness 5 obtained his money. The FBI also observed Witness 5 traveling to various business establishments and discarding other plastic bags. The FBI recovered these bags, some of which contained documents written in Arabic, including one statement that reportedly translated to "preparing for the end."

The State Police, with FBI agents present, arrested Witness 5 on a felony arrest warrant from the neighboring state near the end of September 2001. The FBI interviewed Witness 5 at the police station after they advised him of his rights. After responding to a few preliminary questions regarding his background and student visa, Witness 5 requested that the interview be terminated so that he could retain counsel, and the interview was terminated at that time.

In addition, the FBI interviewed a friend of Witness 5. The friend told the FBI that Witness 5 was a devout Muslim. The friend also told the FBI that Witness 5 said that Osama bin Laden "is a good Muslim who would not have been responsible" for the September 11 attacks.

A few days later, Witness 5 was transported to the neighboring state for detention on the local felony charge after he waived extradition at a hearing. By this time, the INS had also placed two immigration detainers on Witness 5

and seized his passport after determining that Witness 5's student visa had expired and he was in the United States illegally.<sup>37</sup>

Approximately one week after Witness 5's arrest on the local felony charge, a state detective advised the FBI that he doubted the charge against Witness 5 would be prosecuted due to a lack of evidence and a lack of cooperation from the complainant. Witness 5's court date for the local felony charge was scheduled for several weeks later.

## **B. The Decision to Seek a Material Witness Warrant**

Within 2 days after Witness 5's arrest on the local charge, the Department began preparations to obtain a material witness arrest warrant for Witness 5. According to records, the FBI sought to re-interview Witness 5, who was represented by counsel, but that effort "ha[d] not yet succeeded." The FBI's report indicated in substance that Witness 5 was being held on an INS detainer, which would ensure that he remained in custody while it obtained a material witness warrant.

Shortly after Witness 5's arrest, an FBI field office provided a U.S. Attorney's Office with a draft affidavit to support a material witness arrest warrant for Witness 5. The FBI also opened a formal criminal investigation on Witness 5 within 1 month of his arrest on the local felony charge.

Approximately 7 weeks after Witness 5's arrest, the local felony charge against him was dismissed, and he was transferred to the custody of INS for deportation proceedings.

The Department subsequently filed a material witness warrant application for Witness 5, supported by an FBI affidavit, in federal district court. The warrant was approved by a federal magistrate judge.

The affidavit in support of the application for a material witness warrant contained 11 pages devoted to the materiality of Witness 5's potential testimony to an ongoing federal grand jury investigation regarding the terrorist attacks on September 11, 2001. The affidavit first described in detail the evidence collected by the FBI as outlined above, including the reports by the hotel employees that Witness 5 had "acted suspiciously" during the summer of 2001, and the odd behavior that the FBI observed during surveillance, including his discarding of the electronic device, wrapped in several sealed bags, in a public trash can and waiting in the vicinity for several hours. The affidavit also described the papers that Witness 5 discarded, which contained

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<sup>37</sup> A detainer is a request filed with the institution where a detainee is incarcerated for the institution to hold the detainee for the filing authority or provide advance notice prior to any release. See, e.g., *Carchman v. Nash*, 473 U.S. 716, 719 (1985).

several Arabic writings that referenced “plans” for “the End.” The affidavit stated that Witness 5 was identified by a hotel proprietor as having prayed in the hotel parking lot with an individual who resembled one of the hijackers. In addition, the affidavit described statements that Witness 5 reportedly made to his friend, including the favorable statement about Osama bin Laden.

The affidavit noted that INS special agents learned that Witness 5 had originally entered the United States on a student visa, but was now out of status and illegally in the country.

In order to demonstrate that Witness 5 was a flight risk, the affidavit stated that Witness 5’s presence before a grand jury could not reasonably be assured by subpoena or other means short of detention, given the nature of the underlying crimes being investigated, Witness 5’s questionable immigration status in the United States, and the foregoing information regarding Witness 5’s suspicious conduct.

### **C. Witness 5’s Detention as a Material Witness**

In late 2001, Witness 5 had a detention hearing before a federal magistrate judge with counsel present. According to an FBI summary of the detention hearing, the government notified the court that a grand jury relating to the September 11 attacks would not be fully formed for several weeks. The magistrate judge therefore ordered that Witness 5 be detained until a date approximately 8 weeks later in order to appear before the grand jury. The magistrate judge’s detention order, memorialized on the standard 1-page form, briefly noted that Witness 5 was “a risk of non-appearance due to lack of information and his immigration status.” The order stated that a more complete statement “has been recorded and is available for transcription in the event of appeal.” After the detention hearing, Witness 5’s attorney informed the government that Witness 5 wanted to meet with the FBI agents to address questions that they had regarding his activities.

Witness 5’s counsel subsequently filed a motion requesting that Witness 5’s deposition be taken pursuant to 18 U.S.C. § 3144 and Federal Rule of Criminal Procedure 15, and that Witness 5 thereafter be released from custody to leave the United States. In support of this motion, Witness 5’s counsel argued that Witness 5 was improperly being held as a material witness because no indictments had been presented yet to a grand jury. Witness 5’s counsel also stated that Witness 5 met with the government to explain Witness 5’s lack of involvement in any criminal activities. Witness 5’s counsel also acknowledged that Witness 5 was an illegal alien, whose status in the United States had expired, and who wanted to return home.

The United States opposed this motion on January 7, 2002. However, the United States acknowledged in its reply to Witness 5’s motion that law

enforcement personnel met with Witness 5 twice, Witness 5 was cooperative, and the United States was in the process of verifying Witness 5's information that he had no involvement or knowledge regarding the September 11 attacks. The United States added that it intended to call Witness 5 before a "specially designated panel of the grand jury" within a few weeks, if it was determined that his testimony was needed as a material witness. Alternatively, the United States stated that if Witness 5's information was fully verified, the United States might join a motion with Witness 5's counsel to release Witness 5 for deportation, which would obviate the need for a deposition. The Court denied Witness 5's motion, citing the government's review of Witness 5's statements and the status conference scheduled for a few weeks later.

Witness 5 was released from custody as a material witness approximately 60 days after the issuance of his material witness arrest warrant, at the request of United States after the FBI determined that Witness 5's activities were not connected to the September 11 attacks or to persons involved in the attacks. The federal magistrate judge ordered that Witness 5 be returned to the custody of the INS for deportation.

## **VI. Witness 6, Witness 7, and Witness 8**

Witness 6 was born in the United States in the 1970s, Witness 7 was born in the Middle East in the 1970s, and Witness 8 was born in the United States in the 1980s. Witness 6 and Witness 8 were U.S. citizens by birth, and Witness 7 immigrated to the United States as a child, where he became an American citizen. Not long after the September 11 terrorist attacks, Witness 6 and Witness 7 left the United States together to travel to another country (Country 1), ostensibly for vacation. Country 1's security officials, however, believing the two intended to commit an act of terrorism inside Country 1, barred them from entering the country and returned them the following day to the United States.

The FBI arrested Witness 6, Witness 7, and Witness 8 later that month as material witnesses in an ongoing terrorism investigation. All three individuals appeared before the grand jury, after which Witness 8 was released and Witness 6 and Witness 7 pled guilty to making false statements on their passport applications.

### **A. The FBI Learns about Witness 6, Witness 7, and Witness 8**

Within months of the September 11 terrorist attacks, Witness 6 and Witness 7 arrived at a U.S. airport intending to travel to Country 1. FBI interview notes stated that airline security personnel searched them and determined that they possessed no luggage other than "carry-on plastic bags" which contained a video camera, approximately \$2,000 in cash, a compass, a calculator, a cellular telephone with a telephone number from a Middle Eastern

country in its memory, and a letter from Witness 8, handwritten in Arabic, addressed to Witness 7. When questioned at the airport by airline security personnel, neither Witness 6 nor Witness 7 was able to articulate an intended itinerary for the trip or identify any relatives, friends, or other contacts inside Country 1.

Security personnel questioned the two about the Arabic letter found in their possession. According to the files the OIG reviewed, Witness 6 and Witness 7 claimed no knowledge of the letter's existence and stated that it "was just put in [the] suitcase by someone." The two told the officials that they neither spoke nor read Arabic. Airline security permitted Witness 6 and Witness 7 to board their flight.

Country 1's security agency questioned Witness 6 and Witness 7 after they arrived in Country 1, and denied them entry into Country 1. A translation of the Arabic letter revealed, according to FBI documents we reviewed, a "farewell" message "which could easily be interpreted as a letter encouraging [Witness 7] to die in the name of Jihad." The letter stated, in part:

When I heard what you are going to carry out, my heart was filled with the feeling of grief and joy. . . . I do know that Allah says in the Holy Qur'an: "NOTHING IS THE LIFE OF THIS WORLD BUT PLAY AND AMUSEMENT. BUT BEST IS THE HOME IN THE HEREAFTER." . . . I have no right to prevent you from leaving home for the sake of Allah and his messenger, but it is incumbent upon me to encourage you and help you, because Islam urges Jihad for the sake of Allah. . . . You will always and forever remain in my heart and my invocation. You will, by your action, give honor to [your family and your family's name]. I ask God to love you and be your hearing with which you hear and your sight with which you see, and your hand with which you attack with violence and your leg with which you walk. I also ask Allah that your action be in compliance with Allah's order and sacrifice for His sake and propagation of Tawhid doctrine and in defense of Islam and the homelands and territories of Muslims, and to raise high the word of Allah, this is the Jihad for the sake of Allah. . . . I hope that this letter will arrive before you travel to Allah and His messenger, peace and blessing of Allah be upon him, so I promise you that we will meet, Allah willing, either in the present life in various types of jihad for the sake of Allah or in the hereafter.

Relying in part on a translation of the letter, Country 1's security agency concluded that Witness 6 and Witness 7 intended to commit a suicide attack inside Country 1. Country 1's authorities returned the two to the United States the following day and sought FBI assistance in investigating them.

The FBI interviewed Witness 7 at his residence upon his return home. According to FBI notes of the interview, Witness 7 purchased the airline tickets to Country 1 with cash about 10 days prior to departure. He stated to agents that he also filed an expedited U.S. passport application at that time and admitted that he falsely claimed on the form that his previous U.S. passport had been lost. Witness 7 stated that his previous U.S. passport, which bore stamps from travel to an Arabic country earlier that year, risked drawing unwanted attention from security personnel in Country 1. Interview records reflected that Witness 7 initially stated to the agents that he could both speak and read Arabic and that the letter he was carrying was from his cousin. Later in the interview, however, he stated that he could not speak or read Arabic and that the letter he was carrying was actually from Witness 8. When asked to explain why Witness 8 would have written him a letter arguably urging jihad, Witness 7 told the agents that he did not know what the letter said. According to FBI records, on the day after the FBI interviewed Witness 7, he was observed attempting to “evade and harass” an FBI team surveilling him.

The FBI also interviewed Witness 6’s father. During the interview the father consented to a search of Witness 6’s bedroom, which revealed the dates of his trip to Country 1 carved into the headboard of Witness 6’s bed. The FBI interviewed Witness 6 at his residence the following day. According to FBI notes, he appeared cooperative during the interview. He told the agents that he had carved the above dates – identifying the date he left the United States and the date he returned to his bed – into his headboard to commemorate his attempt to enter Country 1. He stated that Witness 7 had invited him on a sight-seeing trip to Country 1, had made all of the arrangements, and had purchased the airline tickets for both of them. Witness 6 told the agents that he had no knowledge of the Arabic letter until officials from Country 1 showed it to him. He also stated that he did not consider Witness 7 a threat to the United States or Country 1.

Interview notes we reviewed showed that Witness 6 presented to the agents a recently issued U.S. passport, stating that he had misplaced his previous passport. He stated to the agents that he wanted a new passport because his previous passport had a stamp inside it that could have complicated his entering Country 1. He denied falsely claiming on his passport application that his previous passport had been lost.

## **B. The Decision to Seek a Material Witness Warrant**

Court documents the OIG reviewed showed that, based on the FBI’s investigation, the FBI and a U.S. Attorney’s Office requested a magistrate to issue a material witness warrant for the arrest of Witness 6, Witness 7, and Witness 8, the author of the Arabic letter.

To demonstrate the materiality of these individuals' potential grand jury testimony, the FBI presented the facts that had led it to suspect that the three had knowledge of a terrorism plot. The affidavit submitted to the court in support of the material witness warrant described Witness 6's and Witness 7's abortive trip to Country 1, stating that "several factors regarding the intended travel of these two individuals raised suspicion as to their actual purpose." The affidavit provided the following information pertaining to Witness 6 and Witness 7: (1) the two arrived at the airport only 1 hour prior to departure, far less time than the airline's departure policy required, carrying recently issued U.S. passports with numbers close in sequence; (2) although they said that they intended to visit Country 1 for several weeks, neither passenger checked any luggage or made any lodging reservations; (3) neither Witness 6 nor Witness 7 could identify an intended itinerary or any relatives, friends, or other contacts inside Country 1; (4) a search of the two revealed a cellular telephone, a compass, and a video camera; and (5) Witness 7 carried the suspicious Arabic letter, addressed to him.

Quoting long passages from the Arabic letter, the affidavit described the FBI's belief that "the letter appears to be a farewell from [Witness 8], for a suicide mission in the name of Jihad." The affidavit concluded that Witness 6's, Witness 7's, and Witness 8's testimony "would be material to its investigation of individuals alleged to be involved in acts of international terrorism."

The affidavit also asserted that securing these individuals' testimony by subpoena might become impracticable.<sup>38</sup> Citing Witness 7's "numerous false and misleading statements" as well as the "serious implications" of the intended trip to Country 1, the affidavit asserted that the two had "every incentive to avoid further contact with law enforcement authorities." Specifically, the affidavit cited Witness 7's false statements regarding the Arabic letter's authorship, his equivocation about his command of the Arabic language, and the false statement on his passport application. According to the affidavit, these actions would cause Witnesses 6, 7, and 8 "to be concerned that further investigation may provide a basis for possible criminal charges in a plot to commit acts of international terrorism," thus increasing their risk of

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<sup>38</sup> In addition to the foregoing information offered in support of the impracticability argument, the affidavit provided countervailing facts (theoretically lessening the argument's impact). For example, the affidavit provided information regarding these individuals' U.S. citizenship and ties to the community, including: (1) that Witness 6 was born in the United States; (2) that all three had U.S. addresses; (3) that Witness 8 at the time attended a U.S. university; (4) that all three had Social Security numbers; and (5) that Witness 6 and Witness 7 had U.S. passports. Notably, the affidavit also revealed that Witness 7 (but not Witness 6, whose interview as described below presumably occurred too late to reference in the affidavit) had submitted to voluntary FBI interviews at his residence prior to his arrest.



flight. A magistrate judge granted the application and issued material witness warrants authorizing the arrest of all three individuals.

Agents arrested Witness 7 at his residence that day, but delayed arresting Witness 6 and Witness 8. FBI files stated that Witness 6 appeared at the time to be cooperating with authorities and that the execution of his material witness warrant was deferred pending his continued cooperation. The FBI re-interviewed Witness 6 about a week later, and, according to FBI notes of the interview, he continued to appear cooperative. He submitted to a polygraph examination the following day – which he failed – and was arrested as a material witness.

As with Witness 6, the FBI deferred arresting Witness 8 until after attempting to interview him. When the FBI interviewed Witness 8, he told agents that, prior to his departure, Witness 7 had described the trip chiefly as a religious journey to visit a particular mosque. According to FBI interview notes, Witness 8 stated that he had no knowledge of any other plans Witness 7 may have had. He stated that, out of concern for Witness 7's safety, he drafted and mailed the Arabic letter to him. After the FBI showed him a copy of the letter, Witness 8 stated that he agreed with its overall translation but believed that the FBI had taken its meaning out of context. He also stated that he had copied some of the verses from the Quran and did not know their exact meaning. The following day, Witness 8 refused to submit to a polygraph examination and was arrested as a material witness.

### **C. The Detention of Witness 6, Witness 7, and Witness 8 as Material Witnesses**

Following his arrest, Witness 7 was housed at a local jail. The following day, Witness 7 appeared in court pursuant to the material witness warrant, and the court made the warrant and affidavit available to defense counsel for inspection and review, but not duplication.<sup>39</sup> A few days later, Witness 7 appeared with counsel at a detention hearing, where the court ordered that he remain in custody. The following month, Witness 7's attorney filed a motion arguing that, because Witness 7 was not a flight risk, the court should reconsider its original detention order. In the alternative, Witness 7's attorney requested that the government depose Witness 7, who, he stated, would testify, either by deposition or before the grand jury, "if his Fifth Amendment rights are protected." Materials provided to the OIG by the Department indicate that Witness 7 testified, under a grant of immunity, before the grand jury the following day. The court vacated the material witness warrant the next day

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<sup>39</sup> At the request of Witness 7's attorney, the court subsequently modified this order to permit duplication of the material.

and ordered his release. Ten months later, Witness 7 pled guilty to making a false statement on a passport application and was sentenced to probation.

After Witness 6's arrest, he too was housed in the same local jail. He appeared with counsel at a detention hearing a few days later, during which the court ordered that he remain in custody. Under a grant of use immunity, he testified before the grand jury 10 days later, after which the court vacated the material witness warrant and ordered his release.<sup>40</sup> He appeared again before the grand jury about a month later. Five weeks after that, Witness 6 was arrested on charges of committing perjury before the grand jury and released on bond the same day, following his initial appearance in court. Documents we examined revealed an FBI strategy to continue the investigation "in an effort to obtain an indictment against [Witness 6], with the ultimate goal of convincing him to cooperate against [Witness 7]." Later that year, Witness 6 pled guilty to making a false statement on a passport application and received a sentence of less than 6 months incarceration.

Witness 8 was also housed at the local jail following his arrest. He appeared with counsel at a detention hearing a few days later and was ordered to remain in custody. He appeared before the grand jury about 2 weeks after his arrest, and the court vacated the material witness warrant that day. He was not further charged.

## **VII. Witness 9**

Witness 9 is a U.S. citizen born in the United States in the 1960s. According to FBI files the OIG reviewed, Witness 9 converted to Islam in the 1990s, attached himself to a suspected terrorist leader, and attempted to establish a jihad training camp in the United States.

As detailed below, the government arrested Witness 9 as a material witness in an ongoing terrorism investigation several months after the September 11 terrorist attacks. The prosecutors did not call Witness 9 to testify before a grand jury under the material witness warrant, and he subsequently pled guilty in federal court to multiple counts of providing material support to terrorism.

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<sup>40</sup> Witness 6 and Witness 8 were able to testify less than 2 weeks after their arrests, while Witness 5 (discussed in the section immediately above) waited for two months for a "specially designated panel" of the grand jury relating to the September 11 attacks to be fully formed. We note that the basis for the arrest of Witness 6 and Witness 8 was the suspicious nature of the trip to Country 1, not any evidence of an alleged connection to the September 11 attacks.

## **A. The FBI Learns about Witness 9**

In the late 1990s, the foreign intelligence organization of a European country (Country 2) informed the FBI that a suspected terrorist leader who provided support to al Qaeda had dispatched al Qaeda operatives from Country 2 to the United States in order to establish a terrorist training camp. About 2 months after the receipt of this information, the FBI opened a full-field international terrorism investigation of Witness 9.

FBI records that we reviewed revealed that the FBI learned that Witness 9 had developed ties to the suspected terrorist leader during the late 1990s. The suspected terrorist leader was the imam of a mosque, located in Country 2, who preached a radical form of Islam and maintained connections to multiple foreign terrorist organizations. Witness 9 visited the suspected terrorist leader in Country 2 in the late 1990s and then returned to the United States in order to distribute recordings of the suspected terrorist leader's teachings. Witness 9 subsequently returned to Country 2 and began to develop Internet websites for one of the suspected terrorist leader's organizations, which advocated violent jihad against the West. Government records stated that during visits to Country 2 Witness 9 married and later had a daughter with a citizen of Country 2. Witness 9 also received training at a terrorist training camp in Asia in the 1990s. In addition, with the suspected terrorist leader's "letter of reference," Witness 9 was able to enter an Asian country in 2000 and meet with other terrorist leaders there.

FBI files showed that in the late 1990s, Witness 9, accompanied by several members of a local mosque, visited a remote property in the United States (the U.S. Property) on three separate occasions. During these visits, individuals fired weapons and engaged in other kinds of terrorist training. According to contemporaneous government records we reviewed, Witness 9 sent a document around that time to the suspected terrorist leader in which he proposed establishing a terrorist training camp on the U.S. Property. Records revealed that the document Witness 9 sent to the suspected terrorist leader stated that a "number of brothers" awaited training there.

As noted, the FBI received information that the suspected terrorist leader had dispatched two al Qaeda operatives from Country 2 to the United States in order to establish a terrorist training camp. According to FBI files, after arriving in the United States, the operatives met with Witness 9 in order to assist in constructing the training camp. Country 2's foreign intelligence organization had described Witness 9 as the suspected terrorist leader's principal point of contact with a network of U.S.-based Islamic extremists. However, after the suspected terrorist leader's operatives found fewer would-be trainees at the site than they expected, they abandoned plans to establish the U.S. training camp and left the country.

Contemporaneous government records revealed that after the failure of the training camp plan, Witness 9 traveled back to Country 2 and allegedly became the suspected terrorist leader's personal assistant. Witness 9 encouraged at least one other American Muslim to join him in Country 2 and assist with the website. The suspected terrorist leader's prior assistant was subsequently captured and detained by U.S. forces. He told the FBI that the suspected terrorist leader had ordered Witness 9 to sneak the prior assistant into an Asian country, that Witness 9 performed a shooting demonstration in another Asian country, and that Witness 9 delivered certain technology to terrorists in the region. The former assistant also stated to the FBI that Witness 9 had usurped his role as the suspected terrorist leader's close personal aide.

## **B. The Decision to Seek a Material Witness Warrant**

Court documents the OIG reviewed showed that prosecutors subsequently obtained a material witness warrant for Witness 9 from a federal judge. According to the affidavit submitted in support of the warrant, agents arrested Witness 9 earlier that day "in anticipation of the issuance of [the] warrant."<sup>41</sup>

The FBI affidavit submitted to the court in support of the material witness warrant first described the September 11 terrorist attacks and the ensuing investigation. To establish both the materiality of Witness 9's potential grand jury testimony as well as the proposition that securing his testimony by subpoena may become impracticable, the affidavit detailed his role within a global Islamic fundamentalist network. Citing information provided by a convicted terrorist, the affidavit broadly outlined a global al Qaeda network that coordinated terrorist objectives such as education, recruitment, training, logistics, trafficking in false documents, movement of currency, infiltration of operatives, and violent attacks. Citing investigators and media sources from Country 2, the affidavit placed the suspected terrorist leader within this network, describing his role in advancing al Qaeda's agenda; his advocacy of jihad and the imposition of Shariah law; his alleged association with overseas terrorist plots; and his admitted membership in a terrorist group that allegedly perpetrated a major attack on U.S. interests in the Middle East.

Finally, relying on a series of confidential witnesses, the affidavit described several other details regarding Witness 9, including the fact that he was an American citizen with a wife and daughter living in Country 2. The affidavit also described in detail Witness 9's history with the suspected terrorist

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<sup>41</sup> Available documents do not indicate the circumstances surrounding the pre-warrant arrest, and do not indicate whether the witness ever raised any objection to being arrested "in anticipation of the issuance" of the warrant.

leader: his abortive attempt to establish the U.S. training camp; his communications and recruitment responsibilities as the suspected terrorist leader's "main assistant"; his having "smuggled" a confidential witness into an Asian al Qaeda training camp "for jihad"; and his delivery of certain technology to an overseas terrorist organization.

### **C. Witness 9's Detention as a Material Witness**

Witness 9 was arrested the same day the material witness warrant was issued. He was detained in a local jail and appeared before a local magistrate judge the following day. In a hearing held a few days later, the court found that Witness 9 was the individual named in the material witness warrant and ordered him to be transferred to another federal district pending a detention hearing. At the detention hearing 3 days later, Witness 9 declined to contest his detention. At that same proceeding, Witness 9 declared his intention to assert his Fifth Amendment privilege against self-incrimination should the government call him to testify before the grand jury. Following this hearing, the government transferred Witness 9 to the district that issued his material witness warrant, where he was incarcerated in a local jail. Witness 9 reasserted his Fifth Amendment privilege through counsel, and prosecutors subsequently sought Departmental authorization to apply for a compulsion order granting Witness 9 immunity. Materials provided to the OIG by the Department indicate that Witness 9 never testified as a material witness.

Following a detention hearing about a week later, a federal magistrate judge ordered Witness 9's continued detention. According to court documents filed by Witness 9's attorney in advance of a subsequent status hearing, Witness 9 sought reconsideration by the magistrate of this detention order, arguing that: (1) the material witness statute was unconstitutional; (2) the material witness statute's scope did not include *grand jury* witnesses; and (3) Witness 9 was not a flight risk.<sup>42</sup> In support of Witness 9's continued detention, the government replied that the material witness statute was constitutional and that it did apply to grand jury witnesses. The government also stated that, absent detention, Witness 9's testimony could not be adequately secured, citing Witness 9's multiple outstanding arrest warrants; his multiple prior criminal convictions; his failure over the years to appear in

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<sup>42</sup> Witness 9's attorney stated that he did not represent a flight risk for the following reasons: even though he was well aware that federal authorities were investigating him, Witness 9 did not flee prior to his arrest and had remained cooperative throughout the arrest process; the government had confiscated Witness 9's passport (although, as his attorney conceded, "there was some suggestion that there might be a second passport since his current passport is a replacement for one that was lost"); he had been told by the government he was on a "no-fly" list; the government of Country 2 had barred his return to that nation; and methods available to monitor witnesses released on bond were sufficient to ensure his appearance.

various courts; his failure to pay court-ordered child support; his wife and family residing overseas; his lack of both a fixed U.S. address and a legitimate source of income; and his possession of multiple passports and aliases.

At the status hearing, the magistrate judge continued for 1 month Witness 9's request for reconsideration. The same day that the hearing was continued in the issuing district, and just over 5 weeks after Witness 9's arrest as a material witness, a grand jury in another district indicted Witness 9 for conspiracy to provide material support to terrorism. In response to the indictment, the U.S. Attorney's Office in the issuing district requested that the court there vacate the material witness warrant and, on the following day, the court did so and ordered Witness 9 to be sent to the indicting district to face prosecution. Eight months later, pursuant to a plea agreement, Witness 9 pled guilty to violating the United States International Emergency Economic Powers Act. The court sentenced him to several months in prison. The plea agreement required Witness 9 to cooperate with federal terrorism investigations for up to 10 years from the date of the agreement.

Shortly thereafter, Witness 9 testified before a grand jury in another district. Five years later, a judge in the district in which he had been convicted found Witness 9 guilty of supervised release violations. Shortly after that, he entered guilty pleas in another district to, among other things, his involvement in the training camp conspiracy, providing goods and services to terrorists, and escorting an individual into a foreign country for jihad training. Government documents that the OIG reviewed stated that Witness 9 "has been cooperating with the U.S. government against unindicted conspirators." Federal prosecutors told the OIG that Witness 9 has testified as a cooperating witness in two federal terrorism trials.

### **VIII. Abdullah al-Kidd (Detained March 16, 2003)**

Abdullah al-Kidd is a native born U.S. citizen, formerly known as Lavoni T. Kidd, who attended the University of Idaho. Al-Kidd is an African-American male who converted to Islam. As detailed below, al-Kidd was detained as a material witness in March 2003 in connection with a visa fraud and false statements indictment of an individual who was suspected of providing material support to terrorists. Al-Kidd was never called to testify at the trial. He subsequently sued the FBI agents who obtained the warrant for his arrest, alleging the FBI violated his Fourth Amendment rights because the warrant contained material omissions, and thus lacked sufficient probable cause to properly support his arrest and detention under the material witness statute. As a result of al-Kidd's civil litigation, more information about his case has been made public and more relevant details are available for this case study than for many of the others presented in this report.

## **A. The FBI Learns about al-Kidd**

In the weeks after the September 11 attacks, the FBI's office in Coeur d'Alene, Idaho, began investigating a group of foreign students at the University of Idaho in Moscow, Idaho, for possible links and material support to terrorist organizations. Special Agent Michael Gneckow was the lead FBI case agent on the Coeur d'Alene criminal investigation.

By the end of October 2001, the FBI had identified Sami al-Hussayen, a citizen of Saudi Arabia and computer science doctoral student at the University of Idaho, as a subject in its investigation. According to FBI documents created in late October 2001, the FBI's investigation of al-Hussayen revealed that al-Kidd had financial interactions with al-Hussayen and other students who were subjects of the FBI's investigation. Accordingly, the FBI sought to obtain more information regarding al-Kidd.

FBI records show that on December 11, 2001, the FBI added al-Kidd to the list of titled subjects in the Coeur d'Alene criminal investigation based upon the following details that the FBI learned between late October 2001 and early December 2001. First, al-Kidd had received "significant payments" from al-Hussayen and another subject of the investigation since March 2000, for yet unknown reasons. [REDACTED]

[REDACTED] Additionally, the FBI determined that al-Kidd had traveled overseas for unknown reasons, possibly to Yemen, and would not return to the United States until June 2002. The FBI suspected that al-Kidd might be "sponsored" by al-Hussayen and another subject [REDACTED].

On December 13, 2001, the FBI's office in Spokane, Washington, opened a preliminary intelligence inquiry on al-Kidd in order to determine if al-Kidd was "involved with, or provid[ed] material support to, terrorists, or terrorist organizations." The opening EC for this inquiry noted that al-Kidd apparently went to Yemen in August 2001 after receiving significant payments from other terrorism subjects, [REDACTED]

On December 19, 2001, the FBI's Salt Lake City Division, which oversaw the Coeur d'Alene office, requested that the U.S. Customs Service place a "silent hit" on al-Kidd to notify the FBI when al-Kidd traveled back to the United States. On April 5, 2002, Customs advised the FBI that al-Kidd had returned to United States.

Immediately upon learning of al-Kidd's return, the FBI converted the Spokane office's preliminary intelligence inquiry to a full field investigation (FFI). [REDACTED]

[REDACTED] The FBI also noted that the FFI was predicated on information that al-Kidd had received more than \$10,000 from other FFI subjects from March 2000 through August 2001, [REDACTED]

On June 10, 2002, an FBI case agent assigned to the Spokane intelligence investigation, conducted a voluntary interview of al-Kidd at his mother's residence in Washington State in order to gather information regarding al-Kidd's trip to Yemen and his associates and other matters. Al-Kidd was living with his mother because he was unemployed. According to the FBI summary of the interview, al-Kidd said he went to Yemen to study Arabic and Islam. Al-Kidd said he considered himself an orthodox Sunni Muslim, or a Salafist. Al-Kidd told the FBI he worked for al-Multaqa, a non-profit business that sold Islamic materials, when he lived in Moscow, Idaho. Al-Multaqa was controlled by a group of wealthy Saudi students at the University of Idaho. However, al-Kidd declined to name any leaders of this group.

The FBI conducted a follow-up interview of al-Kidd in the intelligence investigation on July 3, 2002. According to the summary of this interview, al-Kidd reiterated that he went to Yemen to learn Arabic and study the Koran from true scholars of Islam, but declined to elaborate further. Al-Kidd refused again to identify any individuals associated with al-Multaqa by name. The agent who conducted the interview later stated in al-Kidd's civil litigation that al-Kidd was generally amicable, cooperative, and talkative during the interviews and that he was amenable to additional interviews.

SA Gneckow (the lead agent on the Coeur d'Alene criminal investigation) later testified in al-Kidd's civil litigation that when the FBI determined that the regular monthly payments al-Kidd had received from al-Hussayen and his associates appeared to be salary for working at al-Multaqa, al-Kidd was essentially eliminated as a criminal suspect.

On August 2, 2002, an article appeared in the Seattle Post-Intelligencer about an FBI probe of Muslim charities at the University of Idaho and Washington State University for possible links to international terrorism.<sup>43</sup> The article stated that "among those who have drawn the scrutiny of the FBI" was a

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<sup>43</sup> "Inquiry Targets Muslim Charities in the Palouse," *Seattle Post-Intelligencer*, Aug. 2, 2002.



“former University of Idaho football player, an American who converted to Islam nine years ago,” who lived in the Seattle area. This description matched al-Kidd. The article quoted this unnamed individual regarding the nature of the FBI’s contacts with him. The FBI ceased further contact with al-Kidd after this article appeared because of the concern that al-Kidd had jeopardized the al-Hussayen investigation by contact with the press.

An FBI EC written in September 2002 stated that al-Hussayen and other members of a national Salafist network “appear to aid and abet individuals and organizations with ties to al Qaeda and other terrorist groups” by using the Internet to provide them with communication platforms and financial support. The EC also stated that al-Kidd was a “self avowed Salafist,” who was an associate of al-Hussayen and maintained contact with him. [REDACTED]

On February 26, 2003, al-Hussayen was arrested on a federal grand jury indictment in Idaho and charged with seven counts of visa fraud and four counts of making false statements to the government by submitting forms to the INS, which represented that he sought to enter the United States for the sole purpose of pursuing studies at the University of Idaho. The grand jury indictment alleged that al-Hussayen engaged in significant financial and business activities beyond his student visa. In particular, it alleged that al-Hussayen funneled more than \$300,000 to groups that promote terrorism, such as the Islamic Assembly of North America (IANA), and designed websites for these groups.<sup>44</sup> The arrest of al-Hussayen was highly publicized.

The FBI interviewed several of al-Hussayen’s associates on the day he was arrested, including Saleh al-Kraida. According to the FBI’s written summary, al-Kraida said that al-Hussayen rented an apartment in Moscow, Idaho, and operated a business there known as al-Multaqa, which sold books, tapes, and magazines prior to September 11. Al-Kraida also told the FBI that many of the items sold at al-Multaqa contained Islamic extremist messages that would have invited suspicion by the FBI due to the extreme nature of their content, but sales of these items were discontinued after September 11.

## **B. The Decision to Seek a Material Witness Warrant**

On [REDACTED] the FBI’s Seattle Division interviewed an unidentified source “who was in a position to testify.” This cooperating witness stated that

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<sup>44</sup> In January 2004, the government filed a superseding indictment against al-Hussayen in which it added charges of providing and concealing material support to terrorist groups.

al-Kidd [REDACTED]

[REDACTED] according to the FBI's interview summary.

On March 13, 2003, Customs personnel found al-Kidd's name on a law enforcement bulletin and notified Gneckow that al-Kidd had an imminent, one-way, first class reservation to Saudi Arabia. In testimony later given in al-Kidd's civil suit, Gneckow stated that Customs provided him with the expected departure dates from Dulles International Airport and informed him that the approximate cost of the ticket was \$5,000. We found no evidence that Gneckow was aware that the information that Customs provided to him was inaccurate regarding plane ticket cost, class, and return itinerary. In fact, information made public in al-Kidd's later civil litigation revealed that he had a coach class, round-trip ticket with an open return date that cost approximately \$2,000. Al-Kidd testified in that case that the purpose of his trip was to attend Umm al-Qora University on a scholarship that he said he had received in February 2003.

Gneckow stated that within minutes of being informed of al-Kidd's travel plans he came up with the idea of getting a material witness arrest warrant "to stop [al-Kidd] from leaving the country." After consulting with his supervisor, Gneckow contacted the U.S. Attorney's Office for the District of Idaho. At the request of the Assistant U.S. Attorney (AUSA), Gneckow determined that al-Kidd had left Washington State and confirmed that his name appeared on the manifest for a flight scheduled to depart from Dulles International Airport within 1 or 2 days.

According to Gneckow, the timing of al-Kidd's imminent departure immediately after al-Hussayen's high-profile detention hearing, in conjunction with al-Kidd's declination to identify al-Hussayen during FBI interviews as an individual who ran al-Multaqa, suggested to Gneckow that al-Kidd was fleeing to avoid testifying in the criminal trial of his associate. Gneckow testified that al-Kidd had material information on the charges against al-Hussayen relating to student visa fraud and false statements; namely, information regarding al-Hussayen's numerous business activities, including website work and financial activities on behalf of IANA and al-Multaqa. The Assistant U.S. Attorney gave similar reasons for supporting the material witness arrest warrant.

The affidavit that Gneckow submitted to the U.S. District Court for the District of Idaho on March 14, 2003, contained only three paragraphs describing the evidence as to al-Kidd:

- 6) On February 13, 2003, an Indictment was filed in United States District Court for the District of Idaho alleging violations of 18 U.S.C. §§ 1001(a)(1) and (2), and 3238 - False Statements to the United States; and 18 U.S.C. §§ 1546(a), 3237 and 3238 - Visa

Fraud. During the course of that investigation, information was developed regarding the involvement of Abdullah Al-Kidd with the defendant. That information includes that from March 2000 to November 2001, an individual identified as Abdullah al-Kidd, a/k/a Lavoni T. Kidd, and/or his spouse, Nadine Zegura, received payments from Sami Omar al-Hussayen and his associates in excess of \$20,000.00. Al-Kidd traveled to Sana'a, Yemen in August 2001 and remained there until April 2002, when he returned to the United States. Upon his return to the United States, al-Kidd traveled to Moscow, Idaho, and met with al-Hussayen's associates. While in Moscow, al-Kidd emptied a storage facility which contained personal items belonging to him. Among those personal items were documents al-Kidd left behind, which included a conference program for the second annual IANA conference in Dearborn, Michigan in December 1994; a hotel receipt from Sacramento, California, dated 4/26/2001, in the name of Abdullah al-Kidd, listing his company as 'al-Multaqa'; and telephone numbers for IANA (734-528-0006) and Basem Khafagi (734-481-1930). Khafagi is a former Director of IANA and former University of Idaho student (graduated in 1988) who was recently arrested in New York.

7) Kidd is scheduled to take a one-way, first class flight (costing approximately \$5,000) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

8) Due to Al-Kidd's demonstrated involvement with the defendant, Sami Omar Al-Hussayen, he is believed to be in possession of information germane to this matter which will be crucial to the prosecution. It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

The material witness warrant application for al-Kidd was signed by Magistrate Judge Mikel Williams in Boise, Idaho on March 14, 2003.<sup>45</sup>

On March 16, 2003, al-Kidd was arrested on the material witness warrant at Dulles International Airport and interviewed by FBI agents there. After al-Kidd consented to a search of his belongings, FBI agents found a CD-

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<sup>45</sup> The affidavit was signed and sworn to by the FBI's duty agent stationed in Boise. However, the affidavit stated that it was based on facts acquired by Gneckow and other law enforcement officials. (The use of hearsay in such affidavits is not uncommon or inappropriate.)

ROM, which contained a video entitled, "19 Martyrs." FBI agents viewed this video, which FBI documents later characterized as "a video tribute" to the September 11 hijackers, with al-Kidd on his laptop. According to an FBI interview summary, al-Kidd told the agents that he had the video because he wanted to show it to certain religious sheiks in Saudi Arabia to refute the information therein.

### **C. The Transfer and Detention of al-Kidd**

Al-Kidd was admitted to the Alexandria City Jail the same day as his arrest. The next day, March 17, 2003, al-Kidd had his initial appearance before a magistrate judge in the Eastern District of Virginia. Court records showed that after being advised of his rights, al-Kidd waived representation for purposes of this appearance and agreed to be transferred to Boise, Idaho, for his detention hearing. The magistrate judge therefore issued an order to transfer al-Kidd to Idaho at the end of the initial appearance proceedings.

Al-Kidd remained in detention at the Alexandria City Jail until March 24, 2003. Al-Kidd alleged in his civil complaint that he was detained in a small cell unit with one other inmate for 3 days, and then was transferred to a small cell in the maximum security unit for 5 days. Al-Kidd also alleged that he was strip-searched during his transfer between cells, and thereafter held in solitary confinement for 23 hours per day.

On March 24, 2003, al-Kidd began his transfer to Idaho, when he was sent by USMS airlift to the Federal Transfer Center, a U.S. Bureau of Prisons (BOP) facility, in Oklahoma. Consistent with USMS standard practice, Al-Kidd was shackled during the entire trip. Upon admittance, Federal Transfer Center personnel conducted a strip search of al-Kidd and a visual inspection of his body cavities, in accordance with what the BOP indicated in the civil litigation was its policy to conduct such searches and inspections of each arriving inmate, regardless of whether the inmate is a sentenced prisoner, is awaiting trial, is a material witness, or is being detained for some other purposes. Al-Kidd was assigned a cell in the special housing unit, which was isolated from the general prison population.<sup>46</sup>

The next day, March 25, 2003, the USMS transported al-Kidd by airlift directly from the Federal Transfer Center to Boise because USMS had determined that al-Kidd, as a witness in the al-Hussayen terrorism case, was a "high-security" transport. Prior to departure from the Federal Transfer Center, al-Kidd was subjected to another strip search and visual body cavity search consistent with standard BOP practices, and was handcuffed and shackled

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<sup>46</sup> BOP's Special Housing Unit Cell Form for al-Kidd, 3/24/03, noted "3-man high/max"; "material witness terrorist organization."

consistent with standard USMS practices. In Boise, the USMS took al-Kidd to the Ada County Jail for detention. USMS detention records for al-Kidd noted “Keep From Others For Personal Protection” in the special remarks section. USMS personnel testified in al-Kidd’s civil litigation that their standard practice is to segregate a federal material witness from other prisoners by issuing a keep separate notice, as was done with al-Kidd, for personal safety reasons and to disassociate material witnesses from the larger incarceration setting because they have not been charged with a crime. Upon identification by USMS as a material witness who needed to be kept separate, Ada County jail personnel housed al-Kidd in the preferred cell in the closed custody unit for non-criminal detainees – the “large, private, two-man cell with its own toilet and sink room, a cot, a television, and a private telephone.”<sup>47</sup>

On March 25, 2003, al-Kidd appeared with court-appointed counsel from the Federal Defenders Office before Magistrate Judge Williams, who had issued the material witness warrant. Al-Kidd’s court-appointed counsel advised Judge Williams that he had read the material witness warrant and affidavit for al-Kidd’s arrest. The magistrate judge ordered al-Kidd temporarily detained and continuance of his appearance, after al-Kidd’s court-appointed counsel from the Idaho office of the Federal Defender advised Judge Williams that he needed to clarify al-Kidd’s representation with another Virginia-based lawyer who had visited al-Kidd during detention in Virginia. Subsequent records show that al-Kidd agreed to be represented by the Federal Defender’s Office and then met with the AUSA, SA Gneckow, and the FBI agent from the Spokane intelligence investigation in the presence of counsel at the Ada County Jail. Al-Kidd later testified in his civil suit that his court-appointed lawyer informed him that if he met with the FBI agents and the AUSA there was a possibility that he could be released without a detention hearing.

Following the interview, al-Kidd was not released, and a detention hearing was held on March 31, 2003, before Judge Williams. The parties advised the Court that the issue of representation had been resolved and that they had reached an agreement on conditions for al-Kidd’s release from detention to secure his presence at the al-Hussayen trial.<sup>48</sup> These agreed-upon conditions of release required al-Kidd to be placed in the custody of his then-wife in Nevada; to surrender his passport; to limit his travel to four states; to report to a probation officer in Idaho and Nevada; and to communicate with al-

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<sup>47</sup> See *Al-Kidd v. Gonzales, et al.*, No. 1:05-cv-00093-EJL-MHW, 2008 WL 553777, at \*13 (D. Idaho 2008).

<sup>48</sup> The AUSA testified during al-Kidd’s civil litigation that al-Kidd’s court-appointed counsel raised the issue of a deposition in lieu of testimony, but the AUSA preferred to have live testimony and al-Kidd’s counsel indicated that al-Kidd would be available at trial, if reasonable release conditions were fashioned.

Hussayen only through counsel. The Court accepted these conditions, and ordered al-Kidd released from custody that same day.

Just over 1 year later, in April 2004, the criminal trial against al-Hussayen commenced. Al-Kidd did not testify at the trial. The AUSA subsequently testified in the civil litigation that al-Kidd's testimony was not needed because al-Hussayen did not deny his contacts with certain entities that the government alleged were impermissible business activities connected to material support for terrorist groups.

On June 10, 2004, the jury in the al-Hussayen trial returned a verdict of not guilty on some counts and was unable to reach a verdict on the remaining counts. The court declared a mistrial on the undecided counts and subsequently granted the government's motion to dismiss the remaining counts. Al-Hussayen was then remanded to the custody of the INS and thereafter deported to Saudi Arabia for immigration violations.

On June 16, 2004, the federal district court ordered that al-Kidd be released from all conditions of release as a material witness and ordered that his passport be returned.

#### **D. Al-Kidd's Civil Litigation**

On March 15, 2005, al-Kidd filed a civil lawsuit for monetary damages in federal district court in Idaho for alleged violations of his rights under the Fourth and Fifth Amendments to the Constitution and alleged violations under the material witness statute and other statutory provisions stemming from his arrest, detention, and post-release conditions as a material witness. As amended, al-Kidd's complaint included claims against FBI SA Gneckow, former Attorney General John Ashcroft, and the wardens at the Alexandria City Jail, the Federal Transfer Center, and the Ada County Jail, all in their non-official, personal capacities.

In June 2012, Magistrate Judge Williams ruled that SA Gneckow had violated al-Kidd's Fourth Amendment rights by recklessly drafting an affidavit that contained material omissions and errors and would not have been supported by probable cause had it contained the omitted and corrected information.<sup>49</sup> In particular, Magistrate Judge Williams found that Gneckow's erroneous statements about the details regarding al-Kidd's plane ticket (cost, class, and one-way), coupled with the omissions about al-Kidd's citizenship, family ties to the United States, past cooperation with the FBI, and the FBI's failure to contact him for several months, including to inform him about the

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<sup>49</sup> *Al-Kidd v. Gonzales, et al.*, No. 1:05-cv-00093-EJL-MHW, 2012 WL 4470852 (D. Idaho 2012).

potential need for his testimony or to avoid traveling, “were material to the probable cause determination regarding the impracticability of securing al-Kidd’s presence at trial by subpoena.”<sup>50</sup> Magistrate Judge Williams concluded that taken as a whole, the affidavit as drafted “highly suggest[ed] that al-Kidd was a Saudi national, involved with suspected terrorists, with no ties to the United States, fleeing the country [on a first class ticket] within one month of the al-Hussayen indictment” and the arrest of another associate.<sup>51</sup>

In September 2012, District Court Judge Edward Lodge adopted Magistrate Judge Williams’ ruling that SA Gneckow had violated al-Kidd’s Fourth Amendment rights by drafting an affidavit that failed to include material information that was necessary to the probable cause finding regarding the impracticability of securing al-Kidd’s presence at the al-Hussayen trial.<sup>52</sup> Judge Lodge also found that Gneckow had acted with reckless disregard for the truth.<sup>53</sup> Judge Lodge noted that his finding as to recklessness was based on “the type, nature, and number of misstatements and omissions in the warrant affidavit that were material to the probable cause determination.”<sup>54</sup> In particular, Judge Lodge found that, coupled with the plane ticket errors, it was reckless for Gneckow not to have included that al-Kidd “is a United States citizen with familial and community ties to the United States,” and that he “had previously cooperated with law enforcement.”<sup>55</sup> Judge Lodge found the manner in which the affidavit was drafted “particularly troubling” and “extremely misleading,” and agreed with the Magistrate Judge’s view that the affidavit as drafted made it appear that al-Kidd was a Saudi national, involved with a suspected terrorist (al-Hussayen), fleeing the country after al-Hussayen’s arrest.<sup>56</sup>

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<sup>50</sup> *Al-Kidd*, 2012 WL 4470852, at \*11.

<sup>51</sup> *Id.* at \*12. The agent argued that the omitted information was not relevant because it did not undermine the primary basis for finding that al-Kidd was a flight risk: that al-Kidd was leaving the country for an indefinite period of time, and the al-Hussayen trial was scheduled to begin approximately 30 days later. Magistrate Judge Williams rejected Gneckow’s argument.

<sup>52</sup> *Al-Kidd v. Gonzales, et al.*, No. 1:05-cv-00093-EJL-MHW, 2012 WL 4470776 (D. Idaho 2012).

<sup>53</sup> *Al-Kidd*, 2012 WL 4470776, at \*3, \*6. Magistrate Judge Williams held that the FBI’s duty agent in Boise who signed the affidavit was entitled to qualified immunity because he merely filed the formal warrant application and had no independent knowledge of the factual information included in the affidavit. *Al-Kidd*, 2012 WL 4470852, at \*1, \*15-20. The District Judge adopted this holding as well. *Al-Kidd*, 2012 WL 4470776, at \*8, \*11.

<sup>54</sup> *Al-Kidd*, 2012 WL 4470776, at \*6.

<sup>55</sup> *Id.* at \*3.

<sup>56</sup> *Id.* at \*3, \*6. Given his finding that the omitted information was material to the probable cause determination and evidenced a reckless disregard for the truth, Judge Lodge  
(Cont’d.)

Al-Kidd's claims against former Attorney General Ashcroft alleged that Ashcroft created a practice that authorized federal law enforcement officials and prosecutors to unlawfully use the material witness statute to investigate or preemptively detain him for suspected terrorist activities in violation of the Fourth Amendment.<sup>57</sup> The district court denied Ashcroft's motion to dismiss al-Kidd's claims on grounds of absolute and qualified immunity.<sup>58</sup> In May 2011, the Supreme Court ruled that al-Kidd's Fourth Amendment rights were not violated because his arrest was objectively reasonable under circumstances where a neutral magistrate judge issued the arrest warrant, and the warrant was based upon the FBI's individualized suspicion that al-Kidd was a material witness and would soon disappear, as articulated in the sworn affidavit.<sup>59</sup> Accordingly, the Supreme Court held that Ashcroft was entitled to qualified immunity.<sup>60</sup>

Al-Kidd alleged in his lawsuit against the three prison wardens that his conditions of confinement were excessive, arbitrary, and punitive in violation of his constitutional rights. Al-Kidd ultimately settled his claims against all three prison wardens. Al-Kidd settled his claims against the prison wardens of the Alexandria City Jail and Ada County Jail on appeal after the district courts dismissed his claims in May 2007 and July 2008. Al-Kidd settled his claims against the warden of the Federal Transfer Center after the district court ruled, in August 2007, that the warden violated al-Kidd's Fourth Amendment rights through the Federal Transfer Center's policy that subjected al-Kidd to strip searches and body cavity inspections upon arrival and departure.<sup>61</sup>

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also found that Gneckow was not entitled to qualified immunity. *Id.* at \*6. Gneckow's appeal of Judge Lodge's ruling to the U.S. Court of Appeals for the Ninth Circuit is pending.

<sup>57</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079-80 (2011).

<sup>58</sup> *Ashcroft*, 131 S. Ct. at 2080-83.

<sup>59</sup> *Ashcroft*, 131 S. Ct. at 2079-80. The Supreme Court also noted that al-Kidd conceded that individualized suspicion supported the issuance of the arrest warrant and did not assert that his arrest would have been unconstitutional absent the alleged pretextual use. *Ashcroft*, 131 S. Ct. at 2083.

<sup>60</sup> *Ashcroft*, 131 S. Ct. at 2083-85. Moreover, the Supreme Court also found that at the time of al-Kidd's arrest, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to material witness warrant unconstitutional." *Ashcroft*, 131 S. Ct. at 2083. As such, the Supreme Court found that Ashcroft could not have violated clearly established law, and thus would have been entitled to qualified immunity even if Ashcroft's use of the statute violated the Fourth Amendment. *Ashcroft*, 131 S. Ct. at 2083-85.

<sup>61</sup> See *Al-Kidd v. Sugrue*, No. 5:06-cv-01133-R, 2007 WL 2446750 (W.D. Okla. 2007).



## **IX. Uzair Paracha (Detained March 31, 2003)**

Uzair Paracha is a citizen of Pakistan. Paracha's father operated an import-export textile business based in Pakistan and New York City. Paracha was granted permanent resident alien status in the United States in February 1980, 1 month after his birth. In March 2003, confidential law enforcement sources identified Paracha, then 23 years old, as a participant in an al Qaeda terrorist plot in the United States, which included using Paracha's father's business to implement the plan. On March 31, 2003, the FBI arrested and detained Paracha as a material witness in connection with the al Qaeda plot after it had interviewed him during the previous 3 days. Court materials contain no record of grand jury testimony from Paracha, and he was detained on the material witness warrant for more than 4 months before he was criminally charged and convicted.

### **A. The FBI Learns about Paracha**

In March 2003, a confidential source informed U.S. government personnel of an al Qaeda plan to smuggle explosives into the United States through the Paracha import-export textile business. A confidential source informed U.S. government personnel that Paracha's father, Sayf Paracha, had a relationship with al Qaeda, which included meeting Osama bin Laden in 1999, and offering the use of a Paracha media company in Pakistan. The confidential source also informed U.S. government personnel that the son Paracha worked in several of his father's businesses and regularly traveled to New York City.

The confidential source told U.S. government personnel that another individual specifically discussed with Paracha's father al Qaeda's plan to use Paracha's textile business to smuggle explosives into the United States. The confidential source told U.S. government personnel that this other individual was to rent storage space for the explosives once they were inside the United States.

In March 2003, U.S. government personnel interviewed an individual known as Majid Khan. Khan informed U.S. government personnel that he met Paracha approximately 1 month earlier in Pakistan. Khan said he requested that Paracha take certain actions in Khan's name in the United States to feign Khan's continued presence here to the INS for purposes of obtaining U.S. travel documents.<sup>62</sup> Two days later, the FBI opened an FFI on Paracha to locate his whereabouts in the United States.

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<sup>62</sup> This was reportedly necessary because Khan had been previously granted asylum in the United States and was not permitted to leave and re-enter the United States without first obtaining U.S. travel documents memorializing his refugee status. See *United States v. Paracha*, No. 03-cr-1197, 2006 WL 12768, at \*11 n.1 (S.D.N.Y. 2006). Khan allegedly sought  
(Cont'd.)

On March 28, 2003, FBI agents located Paracha in New York. The FBI interviewed Paracha during the next 3 days, March 28-30, 2003. Paracha stayed at a government-arranged hotel for two nights to resume the interviews after some sleep.

According to FBI interview summaries, Paracha initially told the FBI that he did not know Khan, but subsequently admitted that he met Khan in Pakistan in a meeting arranged by his father approximately 2 weeks before he returned to the United States in February 2003. Paracha admitted that he had several of Khan's personal identification items, including a Maryland driver's license, a Social Security card, and some credit cards. Paracha consented to a search of his residence, and FBI agents located Khan's personal items that Paracha had described. Paracha also stated that his father had met bin Laden and admired him.

Paracha returned to FBI offices on March 29, 2003, at approximately 3:30 p.m. Before the interview resumed, Paracha read and signed an "advice of rights" form, which informed Paracha of, among other things, his right to remain silent. According to FBI testimony provided in the subsequent criminal proceeding against Paracha, the FBI took this action as an extra precaution but Paracha was not being arrested at that time.

During the next 2 days of interviews, Paracha acknowledged that his father told him that Khan was associated with al Qaeda and loyal to bin Laden. Paracha stated that during a second meeting with Khan in Pakistan in February 2003, Khan asked him to perform a "series of tasks" when he arrived in the United States that made it appear as if Khan never left the United States. Specifically, Paracha stated that Khan asked him to use Khan's credit cards, deposit money in Khan's bank account, close Khan's post office box, and make inquiries in Khan's name with the INS regarding the status of Khan's residency papers. Paracha admitted that he contacted the INS, posing as Khan. Paracha admitted that he would be performing these tasks on behalf of al Qaeda given his knowledge that Khan was associated with al Qaeda.

Paracha also told the FBI that his father had multiple interactions with individuals from al Qaeda who visited his father's business premises at night. Paracha recounted that his father had two meetings at his business with a scientist who had been tasked by al Qaeda to develop chemical weapons. FBI records stated that Paracha acknowledged that his meetings with Khan, his father's meetings with the scientist, and Khan's desired entry into the United States were indications that a terrorist plot was being planned, even if Paracha did not know the elements of the plot. Paracha also acknowledged that his

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to enlist Paracha in a plan to pose as Khan for the purpose of preserving his refugee status and securing the requisite travel documents to re-enter the United States. *Id.*

actions on behalf of Khan made him part of the plot. Paracha reportedly stated to the FBI agents that his main motive for helping out with the plot was a \$200,000 investment in his father's business from al Qaeda. However, he also said that he and his father would have helped al Qaeda, as a favor to them, even without the money.<sup>63</sup>

## **B. The Decision to Seek a Material Witness Warrant**

The FBI and the United States Attorney's Office for the Southern District of New York decided to seek a material witness warrant for Paracha before the end of the second day of interviews on March 29, 2003.<sup>64</sup> At approximately 5:15 p.m., during one of the interview breaks, an FBI agent met with an AUSA to complete a material witness warrant application.<sup>65</sup> By 7:00 p.m., on March 29, 2003, a federal district court judge in New York City had signed the material witness arrest warrant for Paracha.<sup>66</sup>

The affidavit submitted in support of the application for a material witness warrant contained several pages describing the materiality of Paracha's potential testimony to a federal grand jury investigation in New York City into past and future terrorist attacks by al Qaeda. Citing confidential sources, the affidavit described Paracha's role in assisting al Qaeda in an alleged terrorist plan to smuggle explosives into the United States through the Paracha import-export textile business. Citing confidential sources, the affidavit also described that Paracha's father had knowledge of this plan. Citing confidential sources, the affidavit further described other details regarding the son Paracha's assistance to al Qaeda, including that he knew that Khan was affiliated with al Qaeda, and that Khan requested that Paracha use his personal identification items in the United States to give the appearance that Khan was physically present in the United States at the time of the transactions.

The affidavit also stated that Paracha, in fact, possessed several items in Khan's name, including personal identification cards and credit cards. These items included a driver's license, a social security card, a credit card, a school identification card, and a work identification card. The affidavit further

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<sup>63</sup> According to FBI records, while waiting in an FBI reception area for his interview to resume on March 30, 2003, Paracha reportedly asked a detective assigned to watch him whether "...God will be happy with [him], that [he] saved human life even though [he] became a traitor to [his] brothers in Islam?" FBI records also stated that Paracha asked this detective how much jail time he would receive for what he told the FBI. FBI records did not reflect any response from the detective to Paracha's statements.

<sup>64</sup> *United States v. Paracha*, No. 03-cr-1197, 2004 WL 1900336, at \*3 (S.D.N.Y. 2004).

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

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

described that the FBI found a written document in Paracha's possession that appeared to provide instructions on how to pose as Khan.

The affidavit described several reasons why it may become impracticable to secure Paracha's testimony by subpoena and detention was warranted. The affidavit noted that although Paracha had not directly refused to answer questions during the FBI interviews, outlined in detail above, his role in a potential terrorism offense and his lack of ties to the United States provided an incentive for him to flee. The affidavit also stated that Paracha may fear revocation of his permanent resident alien ("green card holder") status based on the FBI's investigation, which provided another incentive for him to flee rather than remain and risk imprisonment. The affidavit further stated that Paracha had additional motive to flee because he was on notice from the FBI interviews that he and his father may be subjects of a criminal investigation or prosecution.

### **C. Paracha's Detention as a Material Witness**

On the morning of March 31, 2003, Paracha was served with the material witness arrest warrant and placed under arrest.<sup>67</sup> The same day, Paracha appeared before a federal judge in New York City, and had counsel appointed to him. Paracha consented to an order of detention and was incarcerated in the New York Metropolitan Correctional Center's Special Housing Unit-Administrative Detention.

The next day, the FBI opened a separate criminal investigation on Paracha and his father due to information learned from its investigation that Paracha and his father, among other things, had ties to al Qaeda and utilized their businesses to shelter al Qaeda funds.

It does not appear from available records that Paracha ever had a detention hearing on his status as a material witness. Rather, government records show that on advice of counsel, Paracha consented to multiple two-week continuances of his status as a detained witness from his arrest on March 31, 2003, through the end of May 2003, during which he engaged in several proffer sessions with the government with his counsel in attendance. According to FBI summaries of those sessions, Paracha provided more details regarding meetings between his father and associates of al Qaeda, his interactions with Khan, and the tasks he was supposed to perform in Khan's name to assist Khan in obtaining U.S. travel documents from INS. The sessions resulted in the government proposing a plea deal to Paracha on May 28, 2003.

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<sup>67</sup> *Paracha*, 2004 WL 1900336, at \*3 (S.D.N.Y. 2004).

However, in an FBI EC dated May 29, 2003, the FBI's office in New York expressed concern that a public disclosure of Paracha's situation would adversely affect the FBI's then-pending investigations of the Paracha family's ties to al Qaeda and al Qaeda operations.<sup>68</sup> The EC recommended that Paracha's father be declared an enemy combatant and seized to minimize impact on current investigations as the legal process for Paracha proceeded.

Paracha's father was subsequently declared an enemy combatant and by early July 2003 had been detained overseas.

#### **D. Subsequent Events**

Between the end of May and mid-July 2003, the government and Paracha were unsuccessful in their efforts to reach a plea agreement, while Paracha again consented to multiple continuances on his status as a detained material witness. On August 8, 2003, the government filed a 1-count criminal complaint charging Paracha with conspiring to provide material support and resources to al Qaeda. The complaint alleged that Paracha agreed to help an al Qaeda associate obtain documents from the INS that would allow the associate to re-enter the United States and possibly achieve legitimate immigration status in the United States. On the same day, a federal district court, on application by the government, vacated the material witness warrant for Paracha.

On August 12, 2003, Paracha appeared with counsel at his detention hearing and was ordered detained on the criminal complaint. On September 9, 2003, the court granted a speedy trial continuance until October 8, 2003, while the parties continued to discuss a possible resolution of the criminal complaint. However, the parties once again were unable to reach a resolution by late September 2003.

Accordingly, on October 8, 2003, the government indicted Paracha on five counts after attempts to resolve the case through the plea agreement failed. These charges included conspiracy to provide material support to al Qaeda, and providing or attempting to provide material support or resources to al Qaeda. On November 23, 2005, a jury convicted Paracha on all five counts. On July 26, 2006, a federal district court in New York City sentenced Paracha to a 30-year term of imprisonment. In June 2008, a federal appellate court upheld Paracha's conviction.<sup>69</sup>

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<sup>68</sup> The FBI EC expressly recognized that Paracha could not be detained indefinitely as a material witness, even though Paracha had voluntarily consented for two months to continuances on his status as a detained material witness.

<sup>69</sup> *United States v. Paracha*, No. 06-cr-3599, 2008 WL 2477392 (2d Cir. 2008).

## **X. Witness 12**

Born in Africa, Witness 12 immigrated to a Western country in the 1980s. In the late 1990s, he moved to the United States and married an American citizen. He became a U.S. permanent resident alien shortly thereafter. As detailed below, the U.S. government detained Witness 12 as a material witness following the September 11 attacks in connection with an FBI investigation of al Qaeda's attempts to obtain and deploy biological weapons of mass destruction. Federal prosecutors never called Witness 12 to testify before a grand jury, and after approximately 6 weeks of detention he pled guilty in federal district court to one count of providing material support to a designated foreign terrorist organization.

### **A. The FBI Learns about Witness 12**

Contemporaneous FBI files we reviewed stated that, in the aftermath of the September 11, 2001, attacks, a captured senior al Qaeda member provided the U.S. government with information about named al Qaeda operatives engaged in a biological weapons program. In the course of a government investigation of this program, the FBI learned from multiple sources that Witness 12 had had "operational contacts" with several of these al Qaeda operatives, including individuals who were the subjects of the weapons program investigation. The FBI subsequently opened a full-field international terrorism investigation of Witness 12.

One subject of the weapons program investigation who was captured overseas told investigators that he met Witness 12 years earlier at an al Qaeda training camp and that Witness 12 subsequently engaged in armed combat alongside members of a radical Islamic group. Other evidence we reviewed placed Witness 12 at a suspected overseas biological weapons facility, indicated that he taught English to al Qaeda operatives there, and revealed that al Qaeda paid for his flight home.

Contemporaneous FBI files revealed that "operational correspondence by" Witness 12 with suspected al Qaeda operatives continued well after the September 11 attacks and included relaying messages and contact information, fundraising, and "performing what might be characterized as reconnaissance reports." Files also stated that many of the e-mails to and from Witness 12 demonstrated concern about government surveillance. FBI documents we reviewed showed that the FBI subsequently drafted – but did not present to a court – a material witness warrant as a precaution, "intended for use solely in an emergency situation where [Witness 12] either schedules or otherwise demonstrates his intent to depart the area."

Documents we reviewed reflected the FBI's and CIA's efforts to combat the threat represented by the al Qaeda biological weapons network and

“neutralize any imminent threat [Witness 12] posed,” while simultaneously “harvest[ing] from [Witness 12] the information he possess[ed] on the whereabouts and intentions of” al Qaeda operatives engaged in the biological weapons program. To this end, the local United States Attorney’s Office and the FBI, in consultation with senior Department officials, considered various “neutralization options,” including charging Witness 12 criminally, declaring him an enemy combatant, or arresting him as a material witness. Ultimately, the FBI pursued Witness 12’s voluntary cooperation and approached him at his residence seeking an interview.<sup>70</sup>

FBI notes of the interview stated that Witness 12 initially denied ever travelling to the countries described above. Later in the interview, Witness 12 agreed to accompany the agents to a government facility for further questioning, where he admitted to visiting such countries and provided details about his activities there. FBI records of the interview stated that among other things, Witness 12 described attending terrorist camps overseas, which offered training in explosives, document forgery, suicide bombing, and poisons. He admitted to engaging in armed combat on behalf of a radical Islamic group and stated that he had met Osama bin Laden on multiple occasions.

He also stated that his Western passport appealed to al Qaeda leaders because it enabled the bearer to enter certain countries more easily. He stated that one al Qaeda leader instructed him to seek a replacement for his soon-to-expire Western passport in his home country – rather than in one of the countries he had travelled to – in order to, Witness 12 suspected, avoid “suspicion.”

According to FBI interview notes, Witness 12 initially denied remaining in contact with any fellow trainees or other camp personnel after returning to the United States, but admitted later in the interview that he had been in contact with some al Qaeda operatives and had, at the request of one of these operatives, raised money at his mosque and wired it overseas. He also stated that he had associated while overseas with other named terrorists of interest to the FBI.

After a series of lengthy interviews, Witness 12 stated to the FBI agents that he wished to terminate the questioning. FBI files we reviewed stated that at that point, agents ceased interviewing him and asked that he sign a document attesting that his interview had been voluntary, which Witness 12 did.

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<sup>70</sup> After reviewing a draft of this report, the FBI submitted comments to the OIG, which stated, in part, that “tactical decisions were being made on this case by the Office of the Deputy Attorney General, with significant input from CIA” and that it was the Office of the Deputy Attorney General who directed the FBI to pursue Witness 12’s voluntary cooperation.

## **B. The Decision to Seek a Material Witness Warrant**

On the same day that Witness 12 terminated his voluntary interview, the FBI and federal prosecutors requested a magistrate to issue a material witness warrant for Witness 12's arrest.<sup>71</sup> The FBI affidavit submitted to the court in support of the material witness warrant described the investigation of al Qaeda attacks on U.S. interests at home and abroad as well as its "plans or conspiracies to conduct similar attacks in the future." To establish the materiality of Witness 12's potential grand jury testimony, the affidavit first provided background information on al Qaeda's use of overseas training camps to plan and prepare for attacks on U.S. targets using firearms, explosives, and chemical and biological weapons. The affidavit cited the statements of several confidential sources who had knowledge of Witness 12's activities in al Qaeda training camps as well as his engaging in armed combat on behalf of radical Islamic groups. The confidential sources also described Witness 12's English instruction of al Qaeda operatives and his subsequent al Qaeda-sponsored flight back to the United States.

In order to further demonstrate the materiality of Witness 12's potential grand jury testimony, the affidavit also described al Qaeda detainees' statements as well as those of Witness 12 himself. The affidavit cited al Qaeda detainees' statements regarding al Qaeda's emphasis on indentifying "jihadists who carried American, European, or Canadian passports." The affidavit also described the training of recruits to declare their passports lost after departing overseas training camps in order to obtain "clean" passports, and noted that Witness 12's acquisition of a new passport was "consistent with [such] fieldcraft." The affidavit also described Witness 12's statements to the FBI regarding his activities in training camps and other facilities located overseas and his general contact with al Qaeda associates, including Osama bin Laden.

The affidavit also asserted that securing Witness 12's testimony by subpoena may become impracticable. First, the affidavit stated that Witness 12 was a permanent resident alien – not a U.S. citizen – and that as an unemployed person living in a rented house, he lacked substantial ties to the United States other than three close family members. Second, the affidavit stated that Witness 12's likely "hostility" to the investigation, inferable from his admitted association with numerous al Qaeda operatives, could provide him with an incentive to deprive it of relevant information. Lastly, the affidavit stated that Witness 12 had reason to fear his own prosecution, either for material support of terrorism or for having made false statements to the FBI regarding his overseas travel. The affidavit did not provide any evidence that

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<sup>71</sup> After reviewing a draft of this report, the FBI told the OIG that this decision came at the direction of the Office of the Deputy Attorney General.



Witness 12 had demonstrated an intent either to avoid service of process or to imminently flee the jurisdiction.

The magistrate judge issued the material witness warrant for Witness 12, and authorities arrested him later that day as a material witness “following [his] renewed refusal to answer further questions.”

### **C. Witness 12’s Detention as a Material Witness**

Following Witness 12’s arrest, FBI agents read him his rights and provided him with a public defender. That same day, Witness 12 made his initial appearance in federal court and was detained at a local jail.

Government documents that the OIG reviewed showed that Witness 12’s public defender proposed in a detention hearing that he be deposed and released pursuant to the material witness statute and Rule 15(a)(2) of the Federal Rules of Criminal Procedure. He presented witnesses who testified that Witness 12 had meaningful ties to the community and was not a flight risk. The local federal prosecutor, however, pressed the court to detain Witness 12 and thereby guarantee his appearance before the grand jury. The court rejected the public defender’s request that Witness 12 be deposed and released and instead ordered that Witness 12 be transferred, pursuant to the material witness warrant, from the local jail to a federal detention facility. At a court appearance the following day, Witness 12 consented, with court-appointed counsel present, to his continued detention and agreed to a status hearing scheduled approximately 3 weeks later.

Before that status hearing took place, however, a federal grand jury in another district indicted Witness 12 for conspiracy to provide material support to a designated foreign terrorist organization. The following day, the district court that had issued Witness 12’s material witness warrant vacated it. Court materials contain no record of grand jury testimony from Witness 12. Pursuant to this indictment, Witness 12 was transferred to the other federal district, where he was detained as a criminal defendant.

FBI files we reviewed stated that, after substantial litigation, Witness 12 pled guilty to one count of providing material support to terrorists. The court sentenced him to multiple years in prison, followed by three years’ supervised release.

## **CHAPTER FIVE – ANALYSIS**

In this chapter we present the OIG’s analysis of the Department’s use of the material witness statute in the 10 cases we selected whose facts and circumstances appeared to raise questions about the use of the material witness statute in international terrorism matters. We begin with an overall assessment of the Department’s use of the statute, based on our review of aggregate data and the particular cases for which we conducted an in-depth examination.

We then address several specific issues arising from our review of the 10 selected cases, including: 1) how the government established the materiality of the witnesses’ potential testimony to a criminal investigation; 2) how the government established the impracticability of obtaining the witnesses’ testimony through subpoena (or flight risk); 3) the conduct of the FBI in connection with making alleged misrepresentations to the court in the al-Kidd matter; 4) whether we found evidence that the Department was using the statute as a pretext in order to arrest and detain the subjects of terrorism investigations (because probable cause is lacking or for some other strategic reason) instead of charging and arresting them for criminal offenses; 5) whether we found evidence of any delays or failures to obtain testimony in a reasonable period of time that were an indication of inappropriate use of the statute; 6) how the procedural safeguards provided in the material witness statute and related rules operated to protect the witnesses in these cases; and 7) whether the restrictive conditions under which some of the witnesses were transported and detained were consistent with the statute and related rules and regulations.

### **I. Overall Assessment**

Our review found that the government generally used the material witness statute in post-September 11 terrorism investigations infrequently, and in compliance with the law.<sup>72</sup> To begin with, we found that the use of this statute in international terrorism investigations was concentrated in the 2-year period immediately following the September 11 attacks, in response to specific investigative leads that strongly suggested certain individuals, mostly foreign nationals, were connected to or had information about the September 11

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<sup>72</sup> We recognize that 9 of the 10 cases that we reviewed in detail involved witnesses from a small number of U.S. Attorneys’ Offices from which many antiterrorism investigations in the years before and following September 11 originated. And while some of these cases involved investigative activity or arrests and initial appearances in other districts, we cannot necessarily draw from that limited data broader conclusions about practices in those or other districts.

attacks or other terrorist conspiracies. There has been a dramatic reduction in the use of the material witness statute in international terrorism cases in recent years. Indeed, as noted above, the NSD told us that the last time a material witness was detained in an international terrorism case was in 2004.

Our review uncovered no evidence that the statute was used as part of an arbitrary or overbroad roundup of Muslim men. As detailed in Chapter Four, in each of the cases we reviewed in depth, we found that at the time of the issuance of the warrant, there was ample evidence documenting the basis for the Department's belief that the individuals at issue were involved in or knowledgeable about past or future terrorist acts. For example:

- The FBI obtained a material witness warrant for Witness 1 after learning that he shared a residence with Associates 1 and 2, two illegal aliens who were arrested while travelling across country by common carrier after their September 11 flight was grounded due to the terrorist attacks. The conduct of Associates 1 and 2 paralleled that of some of the hijackers. They were carrying box cutters, large amounts of cash, religious paraphernalia, and an apparent suicide note.
- The FBI obtained a material witness warrant for Witness 4, an illegal alien, after learning that he had attempted to board a flight originally scheduled for September 11, 2001, carrying in his luggage several suspicious items, including flight manuals, a commercial pilot's license, a handwritten note referring to violence and "a coalition of terror," a non-lethal weapon, and other materials relating to the CIA, prior terrorist attacks, and strategies for "beating" a polygraph examination.
- The FBI obtained a material witness warrant for Witnesses 6, 7, and 8 after learning that Witnesses 6 and 7 paid cash to fly to Country 1, carrying little more than fraudulently obtained U.S. passports and a letter from Witness 8 arguably urging a suicide mission in the name of jihad.
- The FBI obtained a material witness warrant for Witness 9 after learning that he had attempted to establish a terrorist training camp in the United States, had served as the "main assistant" of a Country 2-based al Qaeda leader, and had smuggled materials and personnel to terrorist groups in Asia.
- The FBI obtained a material witness warrant for Uzair Paracha after learning of his involvement in an al Qaeda plot to use his father's textile business to smuggle explosives into the United States.

In every case we reviewed in detail, a neutral magistrate authorized the witness's arrest based on a sworn FBI affidavit stating with particularity the facts establishing probable cause to believe that the witness's testimony was material to a criminal proceeding and it might become impracticable to secure the presence of the witness by subpoena.<sup>73</sup> The FBI is responsible for ensuring that statements in such affidavits regarding information known to its agents are factually accurate, logically supportable, and not misleading. In our review of the selected cases, we examined thousands of pages of documents from files provided by the FBI, the Department's National Security and Criminal Divisions, and the relevant U.S. Attorneys' Offices pertaining to the 12 material witnesses in the 10 cases for which we conducted in-depth reviews. In each case, we found that the affidavits stated the underlying information known to the FBI at the time accurately and with particularity.<sup>74</sup>

Four of the witnesses whose cases we examined were released without giving testimony at trial or before a grand jury and without being criminally charged.<sup>75</sup> We did not find this outcome to be a reflection of any misuse of the statute by the Department. First, the circumstances known to the FBI before the warrants were issued were sufficient to justify a conclusion that the witnesses were knowledgeable about relevant facts. Second, our review showed that for such witnesses, the FBI was able to subsequently determine that the witness lacked relevant information, to obtain the information it needed from the witness without formal testimony before the grand jury or at trial, or to obtain the necessary information from another source, thus obviating the need for the witness's testimony. The Department then moved appropriately to resolve the status of the detainees and release them. In these instances:

- Witness 5 was released from custody without testimony and deported after the FBI confirmed that he had no connections to or knowledge about the September 11 attacks or other terrorist activities.
- Witness 3 was released from custody without testimony and deported after the government could not confirm he had

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<sup>73</sup> As the Supreme Court recently stated in *Ashcroft v. al-Kidd*, "The principal evil of [arbitrary searches and seizures] was addressed by the Fourth Amendment's particularity requirement." *Ashcroft*, 131 S. Ct. at 2084.

<sup>74</sup> As discussed below, we found that the affidavit submitted in the *al-Kidd* matter contained some inadvertent errors, omitted some relevant information, and could have been more complete. We address the concerns raised about the affidavit in the *al-Kidd* case in detail below in Section II.C of this Chapter.

<sup>75</sup> As discussed in Section II.E, below, two who did not consent to their detention, Witness 4 and Witness 9, did not testify but were subsequently criminally charged. This scenario raises a potential pretext issue, which is discussed below.

connections to or knowledge about the September 11 attacks or other terrorist activities.

- Al-Kidd was released from his material witness warrant conditions without testifying after the conclusion of the al-Hussayen trial, at which his testimony was not required.
- Witness 2 was released on his own recognizance from his material witness warrant without testifying after it appeared that he did not have relevant evidence.

## **II. Specific Issues Raised by the Case Studies**

### **A. Establishing Materiality of the Witness's Potential Testimony**

Under the material witness statute, a material witness warrant may be issued only if “it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding.” Case law suggests that the standard for establishing materiality is not difficult to satisfy. Indeed, in the seminal decision in *Bacon*, the Court of Appeals for the Ninth Circuit stated that “[i]n the case of a grand jury proceeding, we think that a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy [the materiality prong].”<sup>76</sup>

In each of the 10 cases we examined in depth, the judge or magistrate held that the Department had satisfied the materiality standard, based primarily if not solely on the representations in an FBI affidavit. The OIG did not undertake to review or ratify these judicial conclusions. Rather, given our access to underlying case files not available to the courts, we assessed the FBI's conduct and practices in translating investigative facts pertaining to materiality into affidavits submitted in support of the applications for material witness warrants. Specifically, we assessed the level of detail provided in each affidavit and whether the FBI ensured that its representations relating to materiality were factually accurate, logically supportable, and not misleading. In every case that we reviewed, we found that the FBI made detailed and accurate representations relating to the materiality of the witness's testimony.

#### **1. Level of Detail**

Although an affiant's summary assertion of materiality may satisfy the “mere statement” standard described above, in practice, FBI affiants in terrorism cases exceeded this requirement by a wide margin. Each affidavit we reviewed detailed with some degree of specificity the nature of the relevant

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<sup>76</sup> *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971).

criminal investigation and the factual basis for the FBI's belief that the witness likely possessed information material to that investigation. For example:

- The affidavit submitted in support of the application for a material witness warrant for Witness 2 contained summaries of multiple witness interviews describing in detail his jubilant response to the September 11 attacks, his claims to have specific knowledge regarding the attacks' perpetrators, and his predictions of future assaults on American citizens.
- The affidavit submitted in support of the application for a material witness warrant for Witness 5 likewise devoted some 11 pages to establishing the materiality of Witness 5's testimony to the grand jury investigation, including a detailed description of his suspicious conduct, including: (1) praying in a hotel parking lot with someone who resembled one of the hijackers; (2) discarding an electronic device, wrapped in several sealed bags, in a public trash can and lingering in the vicinity for several hours; and (3) disposing of Arabic documents containing the statement "preparing for the end."
- The affidavit submitted in support of the application for a material witness warrant for Witness 12 contained several specific details establishing the materiality of his testimony, derived from witness interviews and multiple other sources, including descriptions of his activities in al Qaeda training camps; his engagement in armed combat alongside members of a radical Islamic group; his English instruction of al Qaeda operatives; and his al Qaeda-sponsored flight home.

Based on these examples and the other cases we reviewed, we concluded that in each case the FBI gave an ample level of detail to the court to support the government's assertion that the witness was involved in or otherwise had knowledge of information material to a past or potential future terrorism matter being investigated by the grand jury.

## **2. Accuracy and Completeness**

We also considered whether the FBI met its responsibility for reasonably ensuring that its representations relating to materiality were factually accurate, logically supportable, and not misleading. In particular, we analyzed how faithfully each affidavit reflected the facts known to the FBI at the time it sought the material witness warrant. After examining the FBI files and all available contemporaneous written communications provided by the FBI, the U.S. Attorneys' Offices, the National Security and Criminal Divisions, and the courts pertaining to the witnesses whose cases we reviewed, we concluded that the representations in each affidavit supporting the government's assertion of

materiality and flight risk accurately characterized the underlying information known by the FBI at the time.<sup>77</sup> In particular, affidavit statements regarding the materiality of the material witnesses' potential grand jury testimony accurately reflected the underlying witness interviews, surveillance logs, memoranda, and other evidence revealed in related FBI files. For example:

- The affidavit for Witness 1 portrayed his nexus to two terrorism subjects, Associates 1 and 2, as that of a roommate ("Records from a commercial public database reveal that [Witness 1] lives at the subject premises"). The underlying documents we reviewed established the nexus with specific details regarding how Witness 1 had worked for the same company as Associates 1 and 2, had lived with them for some time, knew them well, and likely knew more about them and their intended September 11, 2001, flight across country than he indicated in an initial interview.
- The affidavit pertaining to Witnesses 6, 7, and 8 provided information demonstrating why the FBI suspected the men had knowledge of a terrorism plot. In fact, the FBI files contained additional information not contained in the affidavit that supported this suspicion. For example, FBI files described the specific assessments of foreign intelligence officials, the FBI's discovery of a carving on the headboard of Witness 6's bed memorializing the dates of his abortive trip to Country 1, and the fact that the two men had told FBI agents that they intended to stay at a hotel in Country 1 that did not exist.
- The al-Kidd affidavit recited facts supporting the FBI's belief that al-Kidd had information material to the al-Hussayen prosecution. Again, the underlying FBI documentation provided more detailed information regarding the FBI investigation of al-Hussayen's alleged student visa fraud and other business activities, and made clear that al-Kidd, as al-Hussayen's employee and associate, appeared well-positioned to testify about such matters.

We also searched the FBI files for factual information that would potentially undermine the FBI's arguments about materiality, to determine if any of the affidavits were misleading by reason of the omission of such information. Based on our in-depth review of the files made available to us, the affidavits submitted in the cases we reviewed contained no omissions that appeared either intentional or essential to the issuing judge's materiality

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<sup>77</sup> Many of the affidavits we reviewed plainly stated that they did not purport to capture the universe of information known by the FBI about the witness. Instead, the facts in each affidavit were included "solely for the purpose of establishing [the requisite] probable cause."

finding.<sup>78</sup> In sum, for each affidavit we reviewed, the FBI met its responsibility for ensuring that its representations regarding known information relating to materiality were factually accurate, logically supportable, and not misleading.

## **B. Issues Relating to Establishing Flight Risk**

An application for a material witness warrant under Section 3144 also must establish probable cause to believe that it may become impracticable to secure the presence of the witness by subpoena. As with the materiality prong described above, we compared the affidavits submitted to support the warrants with the underlying FBI records to assess whether the FBI ensured the accuracy and supportability of its representations regarding why each witness's presence could not be reasonably guaranteed through measures short of arrest and detention. After reviewing thousands of pages of FBI documents, including witness interviews, inter-office communications, surveillance logs, reports, and other evidence, we concluded that the statements regarding witness flight risk in all but one of the affidavits we reviewed accurately reflected the information in the underlying FBI documents on which they were based. They typically provided abundant detail and specificity regarding the background of the witness, his foreign connections providing a potential haven from process, and his potential incentives to flee, upon which the magistrate judge could make a reasoned assessment of flight risk.<sup>79</sup>

For example, contemporaneous FBI files we reviewed showed that Witness 9, although an American citizen, had close family members living in Country 2, extensive overseas connections, and sufficient terrorist ties to reasonably suspect him of being both hostile to the investigation and fearful of his own prosecution. Similarly, the affidavit supporting the arrest of Witnesses 6, 7, and 8 offered several specific reasons – each reflected in the underlying FBI documents – to doubt their willingness to honor a subpoena, including the “numerous false and misleading statements” made by Witness 7 as well as, owing to the “serious implications” of their intended trip to Country 1, their “incentive to avoid further contact with law enforcement authorities” and their fear of “possible criminal charges in a plot to commit acts of international terrorism.”

In the cases we reviewed, the FBI's affidavits focused extensively on the witness's ability to flee, a relatively discrete element established in almost every

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<sup>78</sup> In one case, the al-Kidd matter, the magistrate and the district judge ultimately concluded that the affidavit submitted in support of the application for the material witness warrant was misleading with respect to flight risk (and thus did not reach the materiality question). We address the al-Kidd matter in the next section.

<sup>79</sup> Again, the sole exception to this finding was the al-Kidd matter, which we address separately in the next section.



case here because virtually all of the witnesses had foreign contacts offering potential overseas refuges. For example, the Witness 1 affidavit stated that, with family living in Asia, he had “a ready haven to flee to.” Almost every affidavit we reviewed – including those for Witnesses 1, 2, 4, 5, 6, 7, 8, 9, 12, al-Kidd, and Paracha – illustrated the witness’s ability and proclivity to travel overseas, and often described the suspicious contacts he established during such foreign excursions.

In the cases we reviewed, the FBI also emphasized the witness’s motive to flee. In many cases, the FBI established a motive to flee by reference to the witness’s status as a potential defendant facing criminal prosecution or criminal deportation. For example:

- The affidavit submitted in support of the application for a material witness warrant for Witness 12 described evidence of Witness 12’s involvement in an al Qaeda program to produce and deploy biological weapons. In support of the asserted flight risk, the affidavit cited Witness 12’s plausible fear of prosecution for his part in this program.
- The affidavit submitted in support of the application for a material witness warrant for Uzair Paracha described evidence that Paracha had met an al Qaeda operative overseas and attempted to fraudulently obtain U.S. travel documents for him, in furtherance of a plot with Paracha’s father to smuggle explosives into the United States. In support of the asserted flight risk, the affidavit posited that Paracha’s role in a potential terrorism offense created an incentive for him to leave the country rather than risk imprisonment.
- The affidavit submitted in support of the application for a material witness warrant for Witnesses 6, 7, and 8 described evidence of a conspiracy to commit a suicide attack inside Country 1. In support of the asserted flight risk, the affidavit asserted that all three individuals had cause “to be concerned that further investigation may provide a basis for possible criminal charges in a plot to commit acts of international terrorism.”

Another means by which the FBI sought to establish a witness’s motive to flee was to emphasize the witness’s close association with suspected terrorists. From this, the affidavits inferred a general hostility toward the FBI’s investigation as well as a specific incentive to deprive it of relevant information. For example, each of the affidavits submitted in support of the applications for material witness warrants for Witness 12, Paracha, Witness 9, and Witnesses 6, 7, and 8 posited in substance that an individual who associates with terrorists or expresses support for terrorist objectives likely may share some portion of their hostility to the interests of the U.S. government,

rendering them more likely to attempt to avoid giving testimony in support of a U.S. government prosecution.

**C. The Accuracy and Completeness of Representations in the al-Kidd Affidavit**

We selected the al-Kidd case for specific discussion in connection with the issue of establishing flight risk because the government was later severely criticized by a court for omitting information relevant to flight risk from the FBI agent's affidavit in support of the application for a material witness warrant.

As detailed in Chapter Four, al-Kidd was a native-born U.S. citizen who was a converted Muslim and attended the University of Idaho. Al-Kidd had significant connections to a graduate student at the University of Idaho, Sami al-Hussayen, a Saudi national suspected of providing material support to terrorists. Al-Hussayen was arrested in February 2003 for visa fraud and making false statements. In March 2003 the government detained al-Kidd as a material witness in connection with the prosecution of al-Hussayen after receiving information that al-Kidd was preparing to fly to Saudi Arabia. Al-Kidd was detained for 2 weeks and then released on conditions severely restricting his ability to travel. He was never called to testify and the restrictions on his travel were lifted after the completion of al-Hussayen's trial in June 2004.

The FBI affidavit submitted in support of the application for the material witness warrant for al-Kidd provided limited information pertinent to flight risk. It stated that al-Kidd was "scheduled to take a one-way, first class flight (costing approximately \$5,000)" to Saudi Arabia, and that "[i]t is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." The magistrate issued the warrant. There is no evidence that he questioned the prosecutor or the FBI about the affidavit, or specifically the representations regarding this trip, at the detention hearing.

Al-Kidd ultimately brought a civil action for violations of his constitutional rights resulting from his detention. In ruling on al-Kidd's claims in 2012, Magistrate Judge Williams (who was the same magistrate who had issued the warrant in 2003) found that the affidavit contained erroneous statements about al-Kidd's plane ticket and omitted additional facts that the court believed were highly relevant to flight risk.<sup>80</sup> The magistrate held that the warrant would not have been supportable had the affidavit been complete and accurate.<sup>81</sup> District Court Judge Lodge adopted most of Magistrate Williams's

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<sup>80</sup> *Al-Kidd*, 2012 WL 4470852, at \*11.

<sup>81</sup> *Id.* at \* 11.

ruling, holding that the affidavit showed “reckless disregard for the truth and/or was designed to mislead the Magistrate Judge in his probable cause determination.”<sup>82</sup>

Judge Lodge and Magistrate Williams identified the following facts that were not accurately stated in or were material omissions from the affidavit: (1) al-Kidd’s plane ticket was a round trip ticket with an open return, not a one-way ticket; (2) al-Kidd was a U.S. citizen; (3) al-Kidd had previously cooperated with the FBI; and (4) al-Kidd had family and community ties in the United States.<sup>83</sup> Judge Lodge concluded that the affidavit misleadingly suggested that al-Kidd “was a citizen of Saudi Arabia, was involved with money transfers from a suspected terrorist, and was fleeing the country shortly after those he was involved with had been indicted and/or arrested.”<sup>84</sup>

Based on our review of the underlying documents and the chronology of events, it appears that the al-Kidd affidavit was hastily prepared due to the perceived need to act quickly to prevent al-Kidd’s imminent departure from the country. We found that the FBI was not responsible for the errors in the affidavit regarding al-Kidd’s plane ticket. We found that these errors originated with a Customs agent rather than the FBI. As Judge Lodge stated (and we agree), “Gneckow verified certain of the facts concerning the flight – date, time, and destination – thus it seems reasonable for him to have believed all of the information given to him by [Customs] was correct even though he did not verify all of the information about [al-Kidd’s] ticket – price, class, and round trip.”<sup>85</sup> Judge Lodge emphasized that the finding of “reckless disregard for the truth” stemmed from the nature and number of material omissions and misstatements and the manner in which the affidavit was misleadingly drafted, not the failure to conduct further investigation to verify all of the facts received from the Customs agent about the plane ticket.<sup>86</sup>

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<sup>82</sup> *Al-Kidd*, 2012 WL 4470776, at \*4. Judge Lodge clarified that he was not concluding, as Magistrate Williams had, that Gneckow was required to conduct further investigation with respect to the information that he received from Customs or further investigate the purpose of al-Kidd’s travel to Saudi Arabia. *Id.* at \*4, \*6. Rather, Judge Lodge clarified that the conduct found to have violated the Fourth Amendment was the material omissions from the affidavit that the Court believed would have negated the probable cause finding. *Id.* at \*6.

<sup>83</sup> *Al-Kidd*, 2012 WL 4470852, at \*11; *Al-Kidd*, 2012 WL 4470776, at \*2-3. Judge Lodge also noted that Magistrate Williams’s ruling pointed out that the affidavit omitted that al-Kidd had not been contacted by the FBI in eight months, and was not informed by the FBI that he should notify them of any overseas travel or not otherwise travel, or that his testimony may be needed. *Al-Kidd*, 2012 WL 4470776, at \*2.

<sup>84</sup> *Al-Kidd*, 2012 WL 4470776, at \*3.

<sup>85</sup> *Id.* at \*4.

<sup>86</sup> *Id.* at \*4-6.

As Judge Lodge noted, the information in the affidavit regarding al-Kidd's departure date and destination, which the FBI received from Customs and verified, was correct. These representations accurately conveyed al-Kidd's imminent overseas travel plans for an unknown duration within 2 days of the application for the material witness warrant. Moreover, the information that Customs provided to the FBI on al-Kidd's imminent departure [REDACTED]

[REDACTED]<sup>87</sup> Accordingly, we found that the FBI's representations regarding al-Kidd's risk of flight were logically supportable.

However, we agree that the FBI agent who prepared the affidavit should have made a more complete presentation of all the available information relevant to the flight risk determination, including al-Kidd's citizenship and local contacts.<sup>88</sup> We believe that a more complete and accurate affidavit likely would still have been legally sufficient to support the issuance of a material witness warrant for al-Kidd. The affidavit already stated that al-Kidd or his spouse received payments from al-Hussayen and his associates in excess of \$20,000, and that al-Kidd had a connection to a company known as al-Multaqa. The FBI could have added, on the basis of interviews of other individuals, that al-Multaqa was operated by al-Hussayen. In addition, the affidavit could have included the fact that al-Kidd had told the press that he had drawn the scrutiny of the FBI in connection with the FBI's investigation of Muslim charities in Idaho and Washington for links to terrorism. The connections between al-Kidd and al-Hussayen, and al-Kidd's conduct toward the FBI could support an inference that al-Kidd would be reluctant to testify against al-Hussayen and that he was hostile toward the FBI's investigation, which other court decisions have suggested may be indicia of flight risk.<sup>89</sup>

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<sup>87</sup> [REDACTED]

<sup>88</sup> The Department's Office of Professional Responsibility examined the conduct of the AUSA and SA Gneckow and did not find that they committed misconduct or exercised poor judgment in connection with drafting the affidavit in the al-Kidd matter.

<sup>89</sup> The FBI learned other facts in 2002 during its foreign intelligence investigation of al-Kidd that could have supported an inference of hostility to the FBI's criminal investigation of Hussayen, including information that al-Kidd [REDACTED] and the fact that during his FBI interviews al-Kidd had refused to identify the leaders of al-Multaqa or any other individuals associated with it. Under guidelines set forth in a memorandum issued by the Attorney General to the Director of the FBI on March 6, 2002, the FBI could have used evidence collected during a foreign intelligence investigation in a criminal proceeding after consulting with the DOJ Criminal Division and the Office of Intelligence Policy and Review. Under the perceived time-sensitive circumstances of the application for the al-Kidd material witness warrant, obtaining the necessary approval to use this material may have been impractical.

This, plus the fact that he was leaving shortly for Saudi Arabia, with an open return date and plans unknown, would have supported the assertion that it may become impracticable to secure his return and testimony by means of a subpoena.

In other cases we reviewed, the courts issued the material witness warrant despite the presence of facts in the affidavit regarding local contacts of the type that were omitted from the al-Kidd affidavit. For example, the affidavit in the case pertaining to Witnesses 6, 7, and 8, discussed in Chapter Four, provided information regarding the witnesses' U.S. citizenship and prior cooperation with the FBI. Unlike the thinly sketched al-Kidd affidavit, it placed this information within the context of specific facts about a highly suspicious trip to Country 1, a deeply troubling letter referencing jihad, and "numerous false and misleading statements" made by the trip's apparent ringleader. In that case, the affidavit reasonably reflected the context and detail contained in FBI files, and the requested warrant was issued despite the existence of local contacts.

Unlike many of the other witnesses we reviewed in this investigation, al-Kidd had actual, confirmed, and imminent plans to leave the country shortly before the proceeding at which his testimony might be required, for a destination from which it could be impractical to secure his presence at trial by subpoena. From our review of the larger set of data, we are aware of very few instances in which applications for material witness warrants have been denied, and no instance in which that occurred even though the intent to travel outside the country had been so concretely established.<sup>90</sup>

The al-Kidd case illustrates the need for great care by agents and prosecutors when preparing material witness warrant applications. Applications for such warrants may be prepared under severe time pressure, and of necessity are initially granted on an *ex parte* basis. We believe that the FBI and prosecutors should reiterate to affiants the importance of reasonably ensuring the accuracy and completeness of information attributed to them in affidavits. Information tending to undercut a motive to flee, such as U.S. citizenship, family and community ties, and prior cooperation with investigators, should be acknowledged together with the particular facts suggesting that a witness might attempt to avoid giving testimony anyway. The al-Kidd matter also demonstrates why the government should ensure that it presents a complete record as to factors relevant to flight risk, particularly with regard to an affidavit that is sparse or vaguely phrased as to factors such as

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<sup>90</sup> However, we are not aware of any statistics on this issue.

the citizenship of the witness or whether he has family or other contacts in the United States.<sup>91</sup>

#### **D. Pretext**

We attempted to determine whether the Department used the broad powers of the material witness statute to detain the subjects of criminal investigations prematurely and pretextually. Evidence, if any, of such a strategy would likely appear in cases where probable cause to charge and arrest the individual for a criminal offense was lacking or in cases where, although probable cause to criminally charge the individual existed, law enforcement opted to detain him as a material witness in order, for example, to avoid triggering disclosure requirements associated with a criminal arrest or to allow an investigation to continue secure in the knowledge that the criminal subject was behind bars. We examined the 10 material witness cases described in this report for indications of such pretextual use.

When courts have been asked to examine allegedly pretextual uses of the material witness statute in the context of Fourth Amendment challenges to the detention of material witnesses, they have generally sought to avoid probing the subjective intent of law enforcement officials. See *Ashcroft v. al-Kidd*, 131 S. Ct. at 2080-81; *Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000); *Whren v. United States*, 517 U.S. 806, 814 (1996); *Scott v. United States*, 436 U.S. 128, 138 (1978). Under the Court's Fourth Amendment analysis, if detention can be objectively justified by the need to secure the witness's testimony, it does not matter if the subjective intent of the relevant officials was something else, such as to detain the individual pending the development of probable cause to arrest him. See *Ashcroft v. al-Kidd*, 131 S. Ct. at 2080-81. The OIG is not similarly limited in the scope of its inquiry, however, and we have access to a broad range of materials, such as internal government communications, that could make it practical to assess whether officials were using the need for testimony as a pretext for preventive detention.

However, our assessment was complicated by the fact that many of the individuals whose cases we reviewed were simultaneously subjects in a terrorism investigation and potential witnesses to an investigation that involved other subjects or potential subjects as well. In that scenario any individual who is a named or potential subject of the investigation will by definition

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<sup>91</sup> As Justice Ginsburg noted in *Ashcroft v. al-Kidd*, "The affidavit used to secure al-Kidd's detention was spare . . . . Had the Magistrate Judge insisted on more concrete showings of materiality and impracticability, al-Kidd might have been spared the entire ordeal." 131 S. Ct. at 2088, n.2. (Ginsburg concurring in the judgment, but objecting to the disposition of al-Kidd's Fourth Amendment claim on the merits).

potentially possess information that is material to the investigation.<sup>92</sup> Law enforcement officials could offer legitimate justifications for the detention of such an individual under the statute on the basis of his status as a witness while serving an ulterior purpose of detaining him preemptively with or without the requisite probable cause to charge him for a crime. As a result, a pretextual misuse of the statute may be difficult to detect. Further complicating the matter is the question of whether having dual purposes for using the statute to detain an individual, only one of which is to secure his testimony, would constitute misuse of the statute at all. If a subject is detained under a material witness warrant, it may be possible to attempt to obtain his testimony relevant to activities under investigation by a grand jury or in issue at trial, while simultaneously developing other evidence necessary to later charge him criminally, secure in the knowledge that he is not at large while the investigation continues.

Despite these evidentiary and conceptual challenges, we looked for signs of pretextual use of the statute. We found no direct evidence, such as e-mails or internal memoranda, sufficient to support a conclusion that any witness was detained under the statute solely in order to hold him preemptively while the investigation continued. Although our review of contemporaneous government files sometimes revealed that officials had mixed motives for detaining a witness, we found no evidence that a genuine and legitimate interest in securing his testimony was not also present. Therefore, we could find no evidence of clear pretextual usage. At most, the purpose of obtaining testimony coexisted with other law enforcement objectives, such as continuing an otherwise valid terrorism investigation. Even in such “mixed-motive” cases, the development of additional evidence and the subsequent filing of criminal charges against a material witness appeared to be used as a leverage-enhancing tactic consistent with the government’s professed strategy of pressuring a reluctant witness to testify against co-conspirators who were considered more important subjects of the investigation.

The Witness 12 case described in Section X of Chapter Four is an example of potentially mixed motives. Witness 12 was suspected of involvement in a plot to develop and deploy biological weapons of mass destruction in the United States. Although the files we reviewed showed officials debating ways to “neutralize any imminent threat [he] posed,” the overriding strategy remained “harvest[ing] from [Witness 12] the information he possess[ed] on the whereabouts and intentions of the [al Qaeda weapons

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<sup>92</sup> A former U.S. Attorney for the Southern District of New York told us, “You have witnesses who are really just observing and have no complicity. And then there are people who not only have information, but they have information because they are complicit.” With respect to the latter category of individuals, he later stated, “If you’re going to know anything about what goes on in the sewer, you have to swim with the other rats.”

program] operatives.” Put another way, even though the facts of the Witness 12 case inevitably led authorities to view him as a subject as well as a witness, and even though a federal court subsequently convicted him of providing material support to terrorists, all available evidence showed that his detention resulted from the government’s “overall strategy” of learning what he knew and not solely from a desire to build a case against him while he was in custody. Indeed, the FBI pursued Witness 12’s voluntary cooperation before seeking a warrant. This tends to show that law enforcement’s principal interest in Witness 12 lay not in detention as an end in itself, but in learning what he knew.

Other cases we reviewed similarly featured a choice not to detain a detainable witness – a fact, we believe, that tended to demonstrate the government’s good faith interest in obtaining information and undermine notions of preemptive or pretextual detention. For example, the government’s handling of the case pertaining to Witnesses 6, 7, and 8, involving the suspicious trip to Country 1, raised questions regarding whether the individuals’ detention as material witnesses was a pretext for holding them in custody while probable cause was established to arrest them as criminal subjects. The facts of that case, however, tended to show that the FBI used detention not pretextually but to ensure the availability of demonstrably unreliable witnesses. As described above, the FBI arrested Witness 7 – who had demonstrated his unreliability by making false statements to the FBI – immediately upon obtaining the arrest warrant. In contrast, the FBI delayed the arrests of Witnesses 6 and 8 in an effort to obtain their voluntary cooperation until specific facts such as Witness 6’s failing a polygraph test sufficiently eroded the FBI’s faith in their sincerity and reliability. As a senior prosecutor told the OIG, “[I]f somebody is cooperating . . . and there is nothing to make you believe that the person is going to suddenly be a flight risk . . . then you wouldn’t need to arrest them as a material witness.”<sup>93</sup>

We also examined these cases for indirect indicia that the statute was being misused as a substitute for probable cause to arrest these individuals for criminal offenses. For example, we would have considered it suspicious if

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<sup>93</sup> We considered whether such cases – where a detainable witness’s pre-arrest cooperation with law enforcement causes authorities to postpone executing a signed material witness warrant – call into question the accuracy of the FBI affiant’s prior representations to the court regarding the individual’s flight risk. We do not believe that law enforcement’s decision to delay arresting a detainable but seemingly cooperative witness necessarily vitiates an affiant’s earlier flight-risk representations to the court. As described above, the material witness statute requires only that the affiant show that it *may become* impracticable to secure a person’s presence by subpoena – not that it currently is or will be impracticable. That said, we believe that facts regarding an individual’s good faith pre-arrest cooperation may be relevant to the magistrate judge’s flight risk determination and that the better practice generally would be to include that information in a warrant affidavit.



prosecutors had obtained a material witness warrant and then unreasonably resisted or delayed obtaining the witness's testimony through deposition, in the grand jury, or at trial. Although we observed some instances in which there were troubling delays in obtaining the witness's testimony, and others in which the witness ultimately was not called upon to testify at all, upon closer examination we did not find such facts sufficient to support a conclusion that the statute had been misused in those instances, or that they evidenced a pattern of pretextual use by the government. We address in depth the issue of delays in obtaining testimony following arrest in the next section.

The cumulative data about the use of the material witness statute in connection with terrorism investigations also does not support an inference that the statute has been the subject of widespread pretextual misuse. As previously noted, the statute has been infrequently, and decreasingly, employed in non-immigration cases. If the FBI were inclined to misuse this statute as a substitute for charging subjects, we would have expected to see it used more frequently in that manner.

In sum, we did not find sufficient evidence in the cases we reviewed to conclude that law enforcement officials used the material witness statute pretextually.

#### **E. Delays or Failures in Securing Testimony**

As discussed in Chapter Two, the focus of the material witness statute is simply to ensure that a witness's testimony is obtained. As such, although the statute contains no limits on the length of detention, the rationale for detention expires once the testimony (or its equivalent) is obtained from the witness. The justification for detention also expires if the government subsequently determines that the witness does not have relevant testimony to provide or otherwise decides not to seek that testimony.

We believe that a failure within a reasonable time to either obtain the witness's testimony or determine that the witness has no relevant testimony could be an indication that the statute is being used as a pretext to detain a suspect without charging him criminally. We did not find sufficient evidence in the cases we reviewed to conclude that the statute had been used in that manner.

In nine of the cases that we reviewed, no testimony was taken from the witness within one month after arrest, including one case where no testimony was taken within 4 months after arrest. In each case, however, we found that there was a reasonable explanation for these delays as highlighted below. We also found no indication that such explanations were a pretext for extending the detention period for improper purposes. We discuss these explanations next.

First, witnesses often consent to detention. A former high-level manager in one U.S. Attorney's Office told us that the parties often consented to the specific duration of detention with court approval. Indeed, in the Paracha case where detention exceeded 120 days, the documents we reviewed showed that the witness voluntarily agreed, on advice of counsel, to delay court review of his status as a detained witness for several months.<sup>94</sup> Likewise, Witness 12 consented to continued detention that resulted in a total detention period of more than 30 days. The former high-level manager in one U.S. Attorney's office told us that detained material witnesses often consented to continued detention, on advice of counsel, in order for the FBI to obtain additional information that showed the witness's lack of involvement or obviated the need for the witness to testify, and thus the witness could avoid testifying and be fully released from the compulsory criminal proceedings.

Second, the documents we reviewed showed post-detention circumstances that impeded obtaining prompt testimony from some of the witnesses. For example, in four of the cases we reviewed, involving Witnesses 1, 4, 7, and 9, the witnesses refused to testify unless granted immunity or declared their intention to assert their Fifth Amendment right against self-incrimination. This forced prosecutors to consider immunizing them to obtain their testimony. The information we reviewed showed that prosecutors took time to evaluate immunity decisions carefully. Prosecutors also told us that information from the witness had to be verified and the impact on potential criminal cases had to be evaluated before the immunity decisions could be made. Nonetheless, these four witnesses all had their material witness warrants vacated approximately 4 to 12 weeks after arrest.<sup>95</sup> Witness 4 and Witness 9 were charged criminally and did not testify as material witnesses because their immunity requests could not be fulfilled.<sup>96</sup> Witnesses 1 and 7 received immunity, but only Witness 7 testified before the grand jury. The government obtained pertinent information sought from Witness 1 without the need for formal testimony before the grand jury.

Witnesses 3 and 5 did not make immunity requests, and did not testify or obtain release within 30 days. However, the documents we reviewed showed

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<sup>94</sup> In the three other cases where detention exceeded 45 days, involving Witnesses 3, 4, and 5, the motivation of the witnesses to challenge their detention on the material witness warrant may well have been undercut by the fact that all three were illegal aliens subject to INS detention once the material witness warrants were vacated.

<sup>95</sup> Witnesses 1, 7, and 9, all had their material witness warrants vacated approximately 4 weeks after arrest. Witness 4's material witness warrant was vacated 12 weeks after arrest. However, as discussed above, Witness 4 was already in detention as an illegal alien as of mid-September 2001, and thus even if his material witness warrant had been vacated earlier, Witness 4 would have remained in custody.

<sup>96</sup> Witness 9 did, however, later testify before a grand jury in another matter, well after the dismissal of his material witness warrant.

that in Witness 5's case law enforcement agents and prosecutors evaluated exculpatory information provided after arrest that the witness had no knowledge about terrorist attacks. This process took time. Approximately 2 months after arrest, Witness 5 was released from custody as a material witness without having testified and returned to the custody of INS for deportation, after the FBI determined that Witness 5's activities were not connected to the September 11 attacks or to persons involved in the attacks. In Witness 3's case, the government similarly determined that Witness 3 was not connected to the September 11 attacks approximately 3½ months after his arrest, and he was likewise returned to the custody of INS for deportation without having testified.

Al-Kidd was never called to testify at trial. Nevertheless, we found that al-Kidd clearly had information relevant to the prosecution of al-Hussayen, and that it was not unreasonable to expect that such testimony would be needed at trial. Al-Kidd offered to give a deposition, but instead the government negotiated conditions on his release that it deemed adequate to secure his testimony at trial 9 months later. As a result, al-Kidd was released from incarceration after 14 days. Further, the documents we reviewed showed similar brief detention periods, including in the period immediately following the September 11 attacks. For example, in one case that we reviewed, Witness 2, a foreign national who had entered the United States a few months before the September 11 attacks, was detained as a material witness for 11 days in 2001 before being released on his own recognizance.

We recognize that the fact that someone was detained as a material witness, then not called to testify and charged instead potentially raises an inference that the individual was not really being detained in order to obtain his testimony. However, after reviewing the individual cases more closely we found sufficient explanations for the delay in obtaining testimony or the subsequent decision not to seek it to overcome such an inference. Given the foregoing, we did not find that the delays or failures to obtain testimony were an indication of inappropriate use of the statute.

#### **F. Procedural Safeguards**

Although material witness arrest warrants are granted by judges in *ex parte* settings, material witnesses are protected by several procedural safeguards, including access to counsel and a detention hearing at which the witness can challenge the basis for his detention. In addition, the court is required by the general bail statute to issue a written detention order containing findings of fact and a statement justifying the detention. The statute and the Federal Rules of Criminal Procedure provide for the release of a material witness if his testimony can adequately be secured by deposition. Lastly, the Federal Rules require that the government file bi-weekly reports with the court explaining why the witness should not be deposed or released.

We attempted to assess how these procedural safeguards worked in connection with the material witnesses that we selected for detailed examination.<sup>97</sup>

## **1. Access to Counsel**

All material witnesses have the right to have counsel represent them in court proceedings. Those witnesses who lack financial means are provided with court-appointed counsel.<sup>98</sup> We found that the material witnesses in our selected cases all had counsel, retained or court-appointed, in court proceedings to address their status as material witnesses.<sup>99</sup> Available documents provided to the OIG revealed that at least some counsel played an active role in resolving the status of detained witnesses who were ultimately determined not to have information material to the pending terrorism investigations for which they were originally detained. For example, Witness 5 and his counsel met with law enforcement personnel twice after his arrest to demonstrate that Witness 5 had no connection to the September 11 attacks or any other criminal activities. After the FBI corroborated the information from Witness 5, he was subsequently released from the material witness arrest warrant and deported. Similarly, Witness 2 and his counsel met with the government three times in 1 week to answer questions and secure Witness 2's release.

## **2. Detention Hearings and Access to the Affidavit**

The material witness statute provides witnesses a means to contest their detention by expressly referencing the bail, release, and detention provisions in 18 U.S.C. § 3142, which primarily apply to criminal defendants pending trial. Section 3142 affords a detained material witness with a detention hearing after which the court determines whether the witness shall be released, released on conditions, or remain detained pending testimony before a grand jury or at

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<sup>97</sup> We were told there were also procedural safeguards within the Department immediately after the September 11 attacks. A former senior manager at the Department who co-led the September 11 investigation told us that all material witness warrants related to the September 11 attacks had to be reviewed and approved by him or his co-lead with assistance from other Department attorneys who worked together at the FBI's Strategic Information Operations Center (SIOC) and manned a 24/7 call center to field calls on matters regarding the September 11 investigation. The documents we reviewed also showed review and approval, or denial, of material witness warrants by those overseeing the September 11 investigation at the FBI SIOC.

<sup>98</sup> Indigent material witnesses held in custody are entitled to court-appointed counsel pursuant to 18 U.S.C. § 3006A(a)(1)(G).

<sup>99</sup> As discussed above, court records showed that al-Kidd agreed to waive representation for purposes of his initial appearance in the Eastern District of Virginia, and agreed to be transferred to Boise, Idaho, which was the location of the court that issued his material witness arrest warrant.

trial. In general, we found that the witnesses were offered or granted a detention hearing within a few days after their initial appearance in the district of arrest and before the respective courts that issued the material witness warrant for their arrest.<sup>100</sup>

In the cases we reviewed, the government provided material witnesses and their counsel with access to the affidavits, which set forth the basis for the claims of flight risk and materiality.<sup>101</sup> We concluded that the witnesses were able to challenge the government's allegations through written motion or during the detention hearing. For example, Witness 9's counsel asserted in a motion that Witness 9 was not a flight risk because he was on a no-fly list and cooperated with authorities during the arrest process. Witness 12's counsel presented witnesses during the detention hearing who testified that Witness 12 had meaningful community ties through study at a community college and involvement with the local community. Neither Witness 9 nor Witness 12 was successful in his challenge. Nonetheless, these instances showed that the detention hearing process provided a meaningful opportunity to contest the government's flight risk claims.<sup>102</sup>

Even if a witness is unable to fully rebut the government's claims of flight risk, the detention hearing also provides a witness the opportunity to persuade a court to craft conditions of release that are considerably less harsh than continued detention. Section 3142(g) identifies factors that a court shall consider in determining whether there are conditions of release that will reasonably ensure the appearance of the person in court for testimony, short of continued detention.<sup>103</sup> For example, al-Kidd's counsel obtained al-Kidd's

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<sup>100</sup> However, in two instances right after September 11, the detention hearings for Witness 1 and Witness 2 took approximately 2 weeks. Also, Witness 12 waited approximately 8 days for a detention hearing before a federal district court.

<sup>101</sup> Although the documents that we reviewed did not reveal any allegations that counsel for material witnesses were denied access to the affidavits, one complained that he was only allowed to look at the documents and take notes, but was later allowed to copy the document completely.

<sup>102</sup> The materials we reviewed showed that even after the detention hearing, witnesses had additional opportunities to contest their continued detention. For example, Witness 2's counsel helped secure Witness 2's release within 1 week after his detention hearing by demonstrating to the government that Witness 2, in fact, had substantial and meaningful ties to the United States and would not flee. Additionally, 1 month after Witness 7's detention hearing at which the court ordered his continued detention, his counsel filed a motion for reconsideration based on Witness 7's strong local ties, his lack of significant foreign ties, and the lack of evidentiary support for the government's charges of involvement in a terrorist plot. The government called Witness 7 to testify under a grant of immunity one day after his counsel filed this motion, and he was ordered released the next day.

<sup>103</sup> For example, Section 3142(g)(3)(A) provides that the court shall consider the history and characteristics of a person, including a person's character, family, employment, and community ties, among other attributes, in assessing whether to release or detain the witness.

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release from jail in Idaho through court-ordered conditions of release, which required al-Kidd to be placed in the custody of his then-wife in Nevada; to surrender his passport; to limit his travel to four states; to report to a probation officer in Idaho and Nevada; and to communicate with al-Hussayen only through counsel. These conditions of release were deemed appropriate to secure al-Kidd's presence at trial 9 months later and were far less severe than typical conditions of confinement for a material witness, as discussed later in this Chapter.

We did not observe challenges by witnesses to the government's allegations of materiality in the cases we reviewed. That absence may be because the standard to establish materiality is relatively low and therefore challenges might been considered pointless, or because defense counsel concluded that the evidence of materiality was very strong. That absence may also be because the evidence presented in the FBI affidavit is often presented in summary form, and in a manner designed to protect confidential or classified sources of information. A detainee may have limited ability to respond to information of this type (which need not be admissible evidence to support a warrant). For example:

- The affidavit for Witness 2 based materiality primarily on statements that he allegedly made to five unnamed confidential sources.
- The affidavit for Witness 3 based materiality, in part, on two unidentified individuals whose names and phone numbers appeared in Witness 3's calendar book and who were purportedly connected to unidentified associates of Osama bin Laden.

Because of the absence of witnesses contesting the government's allegations on materiality of testimony, we were unable to draw firm conclusions on a witness's ability to fully challenge the government's allegations of materiality.

Most of the material witness warrants in the cases we reviewed were issued under seal as part of grand jury investigations, and the proceedings relating to most of them were closed to the public. We saw no evidence in the cases we reviewed, however, that this secrecy operated to the detriment of the witnesses. Rules ensuring grand jury secrecy exist to preserve the integrity of ongoing criminal investigations and serve to protect the privacy interests of

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18 U.S.C. § 3142(g)(3)(A). In the cases of Witnesses 2 and 4, the courts noted the factor of danger to the community, but did not appear to rely on this inappropriate considering in determining whether to detain these witnesses. See *Awadallah*, 349 F.3d at 63 n.15; accord S. Rep. No. 98-225, at 26 n.90 (1983), 1984 U.S.C.C.A.N. at 3209 (expressing that dangerousness is not an appropriate consideration in the material witness context).

witnesses and subjects alike, at least until formal criminal charges are filed.<sup>104</sup> We found no cases in which the court denied the witness and his attorney access to the affidavit justifying his detention; the material witness warrant application, including the FBI affidavit, was typically sealed to the general public but never kept “secret” from the party detained.<sup>105</sup>

### 3. Depositions

The material witness statute and Federal Rule of Criminal Procedure 15(a) expressly provide for the release of a detained material witness if his testimony can adequately be secured by deposition. The Department has stated in court that “Congress intended depositions to be available as a less restrictive alternative to detaining a grand jury witness,” and several courts have agreed.<sup>106</sup> In a similar vein, it has been said that “Rule 15 depositions are the keys to the jailhouse door” for detained material witnesses.<sup>107</sup>

Although all but one of the witnesses whose cases we examined in depth were detained in order to obtain testimony for grand jury (as opposed to trial), the deposition option was not utilized in any of these cases. We identified only three instances in the cases we reviewed in which the witness sought to have his deposition taken. In Witness 12’s case, FBI documents state that the court denied the request summarily, and documents made available to us do not reveal the reasons. In Witness 5’s case, the court denied the request as inappropriate at the time given that the government was in the process of verifying the witness’s claims that he had no connections to persons or activities related to the September 11 attacks. Approximately 3 weeks later, after completing their assessment of Witness 5’s claim of non-involvement, prosecutors agreed to release him from the material witness warrant into the

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<sup>104</sup> The Supreme Court has consistently recognized that the proper functioning of the grand jury system depends upon the secrecy of grand jury proceedings and has identified five specific reasons for grand jury secrecy: “(1) To prevent the escape of those whose indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; [and] (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979) (internal quotations omitted).

<sup>105</sup> The grand jury secrecy rule does not apply to the witnesses themselves, who may identify themselves publicly at any time.

<sup>106</sup> *Awadallah*, 349 F.3d at 42, 59-60; *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413-414 (5th Cir. 1992); *United States v. Matus-Zayas*, 655 F.3d 1092, 1100 (9th Cir. 2011).

<sup>107</sup> *United States v. Lai Fa Chen*, 214 F.R.D. 578, 581 (N.D. Cal. 2003).

custody of INS for deportation without taking his testimony. In the third case, involving Witness 7, the witness was brought before the grand jury the day after he requested that his deposition be taken.

Prosecutors we interviewed identified several reasons that the deposition option is not commonly utilized for material witnesses in grand jury investigations or cases related to terrorist attacks. A senior manager in one U.S. Attorney's Office told us that the deposition option was a disfavored practice in criminal cases in part because it was preferable and more efficient to bring the witness before the grand jury where grand jurors' questions could be answered. A former senior prosecutor in another U.S. Attorney's Office told us that depositions were an unnecessary tool because the grand jury in that district was empanelled every day.<sup>108</sup> In addition, some prosecutors may have reasonably doubted, prior to a decision by the Second Circuit Court of Appeals in 2003, whether Rule 15 depositions applied in the grand jury context.<sup>109</sup>

We were not able to determine the reason that most of the witnesses in the cases we reviewed – all of whom were represented by counsel – did not request to be deposed pursuant to Rule 15(a) to the extent they viewed their detention as unduly prolonged. Because most witnesses declined to seek this outlet, we did not have an adequate basis to draw conclusions about the effectiveness of depositions as a means of obtaining a material witness's testimony so as to accelerate his release from custody.<sup>110</sup>

#### **4. Periodic Reports**

Federal Rule of Criminal Procedure 46(h)(2) requires that the government make bi-weekly reports with the court that justify continued detention of material witnesses without release or deposition. This requirement has existed as part of Rule 46 since 1966 as the means to assist the court to fulfill its responsibility for supervising detention of witnesses and eliminating all

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<sup>108</sup> However, grand juries did not necessarily convene with such frequency in every district. In addition, documents show that a decision on Witness 5's potential testimony had to await the formation of a "special panel" of the grand jury to investigate the September 11 attacks, and we believe that a decision on Witness 3's potential testimony may have been delayed for the same reason.

<sup>109</sup> *Awadallah*, 349 F.3d at 59-61.

<sup>110</sup> We determined that the deposition option is commonly employed in cases involving immigration-related crimes, such as alien smuggling cases. Some courts handling large volumes of such cases have used standing orders that require the prosecutor to take a material witness's deposition within a limited number of days after the witness is detained, absent a showing that further detention is necessary to prevent a failure of justice. See, e.g., *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413-414 (5th Cir. 1992); *United States v. Allie*, 978 F.2d 1401, 1403 (5th Cir. 1992).



unnecessary detention.<sup>111</sup> The Federal Court of Appeals for the Second Circuit identified such bi-weekly reporting as “[p]erhaps [the] most important” rule to regulate the duration of detentions.<sup>112</sup> Additionally, the Federal Court of Appeals for the District of Columbia noted that the failure to make such reports “represents an unwarranted rejection of a mechanism designed to insure that the cases of incarcerated [persons] are not ignored or forgotten in the administration of criminal justice.”<sup>113</sup>

In the eight cases where Rule 46(h)(2) reports would have been required, the two respective U.S. Attorney’s Offices had no records of any written periodic reports that were made to the courts. However, we found that one U.S. Attorney’s Office generally fulfilled the bi-weekly reporting requirement to the court under Rule 46 through oral in-person conferences. In instances in the same district where such in-person conferences were not held, we found that the witnesses consented to their continued detention for periods that arguably obviated the need for bi-weekly reports during those interim periods.

In particular, records from this Office in the relevant cases showed instances where the prosecutors requested in-person court conferences between the government and the detained witnesses and their respective counsel on a witness’s detention status less than 14 days after detention was ordered. We note that such conferences provided a forum for the court to probe the government on the basis for continuing a witness’s detention status. Other materials from this Office showed instances of both the government and the court pressing to end a witness’s detention status during these in-person conferences. Additionally, contemporaneous court orders showed that these detained witnesses frequently consented to adjournments of previously scheduled court conferences on their detention status, and often did so in increments equal to or beyond the bi-weekly reporting requirements in Rule 46(h)(2). Based on the foregoing, we found that the functions of Rule 46(h)(2) were essentially fulfilled in the relevant cases in one Office, even though written reports were not filed.<sup>114</sup>

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<sup>111</sup> Fed. R. Crim. P. 46(h) advisory committee’s note (1966).

<sup>112</sup> *Awadallah*, 349 F.3d at 62.

<sup>113</sup> *United States v. West*, 504 F.2d 253, 257 (D.C. Cir. 1974) (although this case involved a defendant subject to excessive detention, the same principle would apply with at least equal force to a witness subject to excessive detention).

<sup>114</sup> In comments submitted in response to a draft of this report, this U.S. Attorney’s Office stated that the reporting requirement of Rule 46(h) (and its predecessor) “may not by its terms apply to material witnesses held for the grand jury” and that to the extent it does, “the personal appearance of witnesses, represented by counsel, before the court on the short time frames ordered by the court, would seem to satisfy the concerns and purpose of those Rules.” We recognize that, at least prior to the Second Circuit’s ruling in *Awadallah*, the wording of the rules left room for debate about their applicability to grand jury witnesses. However, we see no  
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We did not find the same to be true for the relevant cases in the other U.S. Attorney's Office. In this Office, we did not see records where the prosecutors requested conferences with the court within two weeks, or less, after detention was ordered at the detention hearings. We saw virtually no records of court filings by prosecutors, or subsequent court orders, in which the witnesses consented to their continued detention beyond the bi-weekly period reporting requirement.<sup>115</sup> Accordingly, we did not find that this Office affirmatively met Rule 46(h)(2)'s bi-weekly reporting requirement.

In making this finding, we are not suggesting that the failure to make bi-weekly reports led to any of the witnesses being detained longer than if the reports had been made. In several of the cases the issue of the witness's detention status was brought to the court's attention through other court filings despite the absence of bi-weekly reports by the government, such as by the witness's counsel seeking to challenge the witness's continued detention or requesting his deposition be taken in lieu of continued detention. In addition, the court mandated detention well beyond two weeks, until at least the next status conference, in virtually all of the relevant cases.<sup>116</sup> Nonetheless, we do not believe that the foregoing circumstances permit the government to disregard the rule, which, as the Second Circuit has emphasized, provides perhaps the most important safeguard in limiting the duration of detention. Accordingly, we cannot find that the one U.S. Attorney's Office sufficiently met Rule 46(h)(2)'s reporting requirement to the court.

## **5. Conditions of Confinement**

In the selected cases discussed here, we reviewed whether the general conditions under which the witnesses were transported or confined were consistent with applicable laws and policies. As discussed in Chapter Four, Abdullah al-Kidd complained that he was subjected to harsh conditions during transport or confinement, including shackling, strip searches, and administrative detention in special housing units. Following his release, al-

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principled basis for affording material witnesses being held for grand jury testimony less protection from unnecessarily long detentions than that afforded to witnesses held for trial, and we believe that U.S. Attorney's Offices should be diligent in making the reports required under Rule 46(h) for *all* material witnesses.

<sup>115</sup> After being in detention for 4 weeks, we saw one instance, regarding Witness 4, where he consented to a 2-week continuance of a status hearing with the court at the end of the second bi-weekly reporting period, but did not see similar consent to detention in the prior bi-weekly reporting period that had passed.

<sup>116</sup> In one instance regarding Witness 3, available records did not describe a court-mandated detention timeframe beyond the bi-weekly reporting period. However, we believe the detention period likely would have been more than 1 month for the reasons discussed earlier regarding the delay in the formation of a specially designated panel of the grand jury relating to the September 11 attacks.

Kidd sued the wardens of the three facilities where he was detained. All three cases were settled, including one after the warden was found personally liable with respect to a strip search policy that was applied to all inmates upon entrance and upon transfer to a different facility, even material witnesses who were segregated during their entire stay.

The relevant statutes do not treat material witnesses any differently than criminal defendants with respect to conditions of confinement, even though the former have not been charged with any criminal offense. Instead, the material witness statute merely provides that a court treat an arrested material witness “in accordance with the provisions of section 3142.” 18 U.S.C. § 3144. As discussed above, section 3142 is directed to whether, pending trial, an indicted criminal defendant should be released, released with conditions, or detained. 18 U.S.C. § 3142.

Section 3142 also does not set forth any standards governing the conditions of confinement applicable to criminal defendants or material witnesses, with one exception. Operating together, sections 3144 and 3142(i)(2) require that if detention is ordered, material witnesses must be confined in a corrections facility and be kept “separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.” 18 U.S.C. § 3142(i)(2).

Under its general statutory duties, BOP has a primary obligation “to provide suitable quarters” for all persons held as witnesses, as well as those charged with or convicted of crimes. 18 U.S.C. § 4042(a)(2). BOP regulations set forth general “segregation” requirements for criminal defendants and material witnesses that are consistent with 18 U.S.C. § 3142. They provide that “pretrial inmates” will be separated, including in housing, from convicted inmates to the extent practicable. 28 C.F.R. §§ 551.100, 551.104. “Pretrial inmates” are defined to include material witnesses. 28 C.F.R. § 551.101(a)(1).

The segregation requirement is intended to protect criminal defendants and material witnesses, but it sometimes results in the imposition of highly restrictive conditions of confinement. At some federal facilities, the only option for segregation from the general prison population with convicted inmates is to house the individual in a restrictive setting called a special housing unit. Special housing units are cells at BOP facilities where inmates are securely separated from the general prison population to help ensure the safety, security, and orderly operation of facilities. 28 C.F.R. § 541.21. One type of special housing unit is administrative detention, which BOP regulations state is non-punitive and can occur for a variety of reasons. 28 C.F.R. § 541.22(a). For example, BOP regulations state that an inmate may be placed in administrative detention where an inmate’s presence in the general population poses a threat to the inmate or to the security or orderly operation of the institution. 28 C.F.R. § 541.23(c). Although this form of detention may satisfy

the segregation requirement of section 3142, it is in some respects even more restrictive than housing in the general population. For example, under BOP regulations, criminal defendants generally receive, at a minimum, 1 hour per day of outside recreation, weather permitting, and 2 hours per day of indoor recreation. 28 C.F.R. § 551.115(b)(1) and (2). In contrast, persons in administrative detention units receive outside exercise for as little as 5 hours per week. The regulations do not provide for any minimum amount of indoor recreation. 28 C.F.R. § 541.31(g).

Our review of selected cases did not reveal any violations of the above statutory provisions or regulations. Three of the material witnesses we reviewed, Witness 1, al-Kidd, and Paracha were housed alone in administrative detention units. Although these housing units can be more restrictive than housing in the general prison population, such conditions comply with the general statutory and regulatory goal to keep material witness detainees separate from convicted criminals. Such conditions generally would also comport with BOP regulations for placement in administrative detention, which expressly provide that a material witness can be placed in administrative detention for the witness's own safety or security of the institution. 28 C.F.R. § 541.23(c). Indeed, if the only housing choices for a material witness were general population or administrative detention or similar restricted housing, we agree with two courts that found it was prudent to avoid placing al-Kidd, as a material witness, in the general population at the Federal Detention Center in Oklahoma or Ada County Jail in Idaho where the witness could be harmed by convicted criminals, even if it resulted in less freedom of movement generally.<sup>117</sup> Housing a material witness in an administrative detention unit, where necessary for segregation from convicted criminals, would help ensure the safety of the material witness, help ensure the overall security of the facility by reducing the risk of any violence by or against the witness, and help ensure the presence of the witness at trial.

We found in several cases that material witnesses were fully restrained during transportation to and from detention facilities. These restraints included leg irons, waist chains, and handcuffs, which appeared to be in accordance with standard USMS practices for all persons in custody, whether a material witness or a convicted prisoner. Specifically, USMS Directive 9.1 explicitly states that all persons, including material witnesses, "in the operational custody of the USMS will be fully restrained during transportation." The Directive further provides that "fully restrained" means "secured in a

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<sup>117</sup> See *Al-Kidd v. Sugrue*, 5:06-cv-01133-R, Dkt. No. 42, at 12-14 (W.D. Okla. 2007); *Al-Kidd*, 2008 WL 553777, at \*13-15. Additionally, al-Kidd's cell at the Ada County Jail, which had, among other attributes, a private telephone, bathroom, and television, provided features that were consistent with his status as a non-criminal detainee, even though it was located in a restricted area.

minimum of handcuffs, waist chain, and leg irons.” Therefore, such treatment of material witnesses in national security cases was consistent with the normal practices of the USMS. We did not find evidence that the USMS engaged in practices inconsistent with standard procedures.

In short, the statutory scheme generally empowers prosecutors, courts, and physical custodians to treat material witnesses exactly the same as criminal defendants with respect to the conditions of their confinement and transportation. There may be constitutional limitations on the treatment of material witnesses in custody (as seen in the partial summary judgment for al-Kidd relating to the strip searches), but these limitations have not yet been clearly identified through litigation and are, in any event, beyond the scope of our review.

### **III. Conclusions**

This review examined the Department’s use of the material witness statute in international terrorism investigations during the years 2000-2012. Among approximately 112 material witnesses we identified 12 whose arrests appeared to raise questions regarding whether the Department was misusing the material witness statute in such investigations. The OIG concluded that the Department used the material witness statute in post-September 11 international terrorism investigations relatively rarely and in a manner that comported with applicable laws. In addition to responsible conduct on the part of law enforcement personnel, we found that the procedural safeguards in the Federal Rules of Criminal Procedure and the material witness statute largely worked as intended to limit a material witness’s time in detention. However, we were unable to assess whether provisions in the Federal Rules allowing for the use of a deposition option provided a means to accelerate release from custody due to the dearth of use, and we found instances where bi-weekly reporting to the court was not sufficiently observed. We also found that the general conditions of confinement and transportation for the material witnesses in our selected cases were consistent with applicable laws and policies.

After reviewing in depth the cases of the 12 material witnesses, we found no evidence of abuse of the statute. The evidence we examined showed that the government used the statute in a responsible and targeted manner. First, we confirmed that, for each of the cases that we reviewed in detail, a neutral magistrate authorized the witness’s arrest based on a sworn FBI affidavit articulating with particularity the facts establishing probable cause to believe that the witness’s testimony was material to a criminal proceeding and it might become impracticable to secure the presence of the witness by subpoena.

Next, we examined the validity of the affidavits’ statements themselves. Put another way, we sought to determine whether the FBI met its responsibility

for ensuring that the affidavits' statements regarding information pertaining to each of the 12 material witnesses were factually accurate, logically supportable, and not misleading. To determine this, we examined thousands of pages of documents from files provided by the FBI, the Department's National Security and Criminal Divisions, and the relevant U.S. Attorneys' Offices pertaining to the 12 material witnesses of whom we conducted in-depth reviews. We concluded that, at the time of each warrant's issuance, the government files pertaining to that witness contained abundant evidence documenting the basis for the Department's belief that the witness was involved in or knowledgeable about past or future terrorist conspiracies. In addition, with the possible exception of the al-Kidd matter, we found that the affidavits accurately reflected the underlying evidence revealed in related FBI files. We found that the affidavit in the al-Kidd matter contained some inadvertent errors and should have set forth a more complete presentation of all available information relevant to the flight risk determination, whether or not such information undercut a motive to flee.

We also attempted to determine whether the Department used the material witness statute to detain the subjects of criminal investigations pretextually. Although four of the witnesses whose cases we examined in detail were released without giving testimony at trial or before a grand jury and without being criminally charged, we did not find this outcome to be a reflection of any misuse of the statute by the Department. Rather, our review of these cases showed that after detention of each of these witnesses, the FBI either determined that the witness lacked relevant information, or obtained the necessary information from another source or from the witness without formal testimony before the grand jury or at trial. In any event, the Department then moved appropriately to resolve the detainees' statuses and release them.

In short, after an extensive review, we found no evidence that the Department's use of the statute in post-September 11 international terrorism investigations resulted in the arbitrary or indiscriminate detention of Muslim men; we confirmed that the Department's allegations of witnesses' terrorist links and flight risks were credible and responsibly made; and we determined that the statute was used for its intended purpose – to secure a witness's testimony for a criminal proceeding – rather than to preemptively detain and pretextually investigate individuals suspected of criminal offenses.

## **APPENDIX A**



Office of the Deputy Attorney General

Washington, D.C. 20530

August 27, 2014

Mr. Michael Horowitz  
Inspector General  
U.S. Department of Justice  
Washington, DC 20530

Dear Mr. Horowitz:

Thank you for your report entitled "A Review of the Department's Use of the Material Witness Statute with a Focus on Select National Security Matters." I appreciate the work by you and your team in drafting this report and the opportunity to provide comments here.

Your review examined the Department of Justice's (Department) use of the federal material witness statute in international terrorism investigations and reached many notable conclusions. Specifically, the report includes an in-depth review of 12 investigations and found that in each case, substantial evidence existed to seek a material witness warrant, and that the "Department's allegations of witnesses' terrorist links and flight risks were credible and responsibly made." Additionally, you found that Department officials used the statute "for its intended purpose – to secure a witnesses' testimony for trial – and not to preemptively detain or pretextually investigate individuals suspected of criminal offenses." Significantly, your report "found no evidence that the Department's use of the statute in post-September 11 international terrorism investigations resulted in the arbitrary or indiscriminate detention of Muslim men."

The report also discussed some of the challenges the Department faces in sharing with the Office of the Inspector General (OIG) grand jury material protected by Federal Rule of Criminal Procedure 6(e) and wiretap material protected by Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510–2522 (Title III). The Department is committed to ensuring that OIG has access to the information it needs to perform effectively its oversight mission. On every occasion where OIG has sought access to Title III or Rule 6(e) material from the Attorney General or me, we have ensured OIG obtained access to such material. When these issues arose during your review of the Department's use of the federal material witness statute, for example, the Department identified specific provisions in Rule 6(e) and Title III that would permit disclosure of the requested materials to OIG, and subsequently did so.

To assist the Department in resolving the complex legal issues implicated by the interaction of Section 6(a)(1) of the Inspector General Act and other statutes limiting the disclosure and dissemination of particular categories of sensitive information, the Department



Mr. Michael Horowitz  
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has requested a formal opinion from the Office of Legal Counsel (OLC). As we have discussed, if the outcome of OLC's legal review does not assure the OIG of the access it needs to do its job, we are willing to work with you to develop legislative remedies. In the meantime, the Attorney General and I are committed to working with you to provide your office with access to all materials necessary to complete your reviews, consistent with existing law.

Sincerely,

A handwritten signature in black ink, appearing to read 'James M. Cole', with a stylized flourish at the end.

James M. Cole  
Deputy Attorney General

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